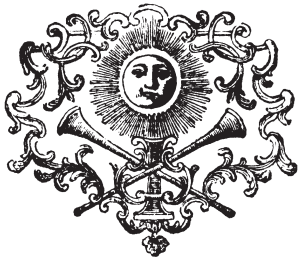
THE FEDERALIST

a political review

To look for a continuation of harmony between a number of independent unconnected sovereignties situated in the same neighbourhood, would be to disregard the uniform course of human events and to set at defiance the accumulated experience of ages.

Hamilton, The Federalist



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THE FEDERALIST

a political review

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The Federalist was founded in 1959 by Mario Albertini together with a group of members of the Movimento Federalista Europeo and is now published in English and Italian. The review is based on the principles of federalism, on the rejection of any exclusive concept of the nation and on the hypothesis that the supranational era of the history of mankind has begun. The primary value *The Federalist* aims to serve is peace.

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The Greek Crisis: a Chance for Political Union of the Eurozone?*

The Greek crisis cannot yet be considered over. The Greek parliament has been asked to approve, in record time, a series of reforms that the country has been waiting for in vain for many years, but it remains to be seen exactly what impact these reforms will have on the country's internal political balance. Furthermore, there is no doubt that Greece's road to recovery will be an uphill one all the way, and that the negotiation of its actual bailout is going to be a long and complex process.

And yet, if one is able to step back from the clash of ideologies that has accompanied this difficult crisis, and avoid being swayed by the heightened emotions stirred up by the manner of the latest negotiations, and by the irresponsible, even injurious, behaviour of the Greek government up until Tsipras's about-turn in the early hours of Friday July 10, one gets the feeling that these recent developments could actually prove to be a turning point for the monetary union. Indeed, this chapter of events, which somehow encapsulates all the contradictions thrown up by the existence of a single currency managed through the intergovernmental method, has brought many unanswered issues to the fore. And even though, to date, only one of these questions (that of whether economic sovereignty can be left exclusively in the hands of the member states) has been answered (in the negative), and moreover in a manner that was painful and is certainly unsustainable (through a show of force, and without shifting the axis of power from the intergovernmental to the European supranational level), it can nevertheless be suggested that recent events have clearly shown that completion of the monetary union through the creation of a political union is necessary and possible, and that the agreement reached, far from showing that "Greece's brutal creditors have demolished the eurozone project"

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* This editorial went to press in late July 2015.

(Wolfgang Münchau, *Financial Times*, July 13, 2015), could actually be the basis for its revival.

As Münchau's comment suggests, at present few observers share this assessment of the situation. Although all have been quick to welcome the avoidance of Grexit and the devastating effects it would have had on Europe, the majority have, at the same time, been keen to point out that following this close shave — the possibility of Greece leaving the single currency was even raised in Eurogroup documents, albeit never approved — the euro can no longer be claimed to be irreversible; they have also underlined the harshness of the attitude of Germany and the other creditor countries towards Greece and the differences between the French and German governments, and condemned the conditions imposed on the Greek government by the Eurosummit, arguing that they are unrealistic and hardly likely to help kick start a country burdened by unsustainable debt that should, instead, be restructured. The representatives of the European institutions and governments who actually took part in the negotiations seem to be the only ones who really want to highlight the deeper meaning of the agreement, and reveal its crucial nature. For example, Piercarlo Padoan (*Sole24Ore*, July 24, 2015), in reply to a journalist who asked him "Following this initial compromise, isn't it now time to tackle the broader issues of a reform of the eurozone governance rules and a strengthening of the concept of political union?", replied "Yes, I already said and wrote as much in less critical times; we are in midstream and certainly cannot stay where we are. We must press on or turn back. We are working on this."

In order to understand how Europe, having narrowly avoided the tragedy of a negative outcome to the Greek crisis, can get started again, the first thing to establish is who have been the winners and losers in this bitter struggle; second, it is necessary to analyse the origin of the contradictory behaviour of the current intergovernmental system, in order to try and clarify the unresolved problems that need to be addressed in order to finally start the process of creating political union in Europe.

* * *

Controversial as this affirmation may seem, the strongest impression one gets from the agreement reached between the Greek government and its eighteen eurozone partners is that there have been no winners and no losers in this affair. One need only look back at the alternatives that were on the table. Would it have been better, for Greece, to have been "rescued" without being subject to a strict conditionality that, by putting

pressure on the country's government and parliament, actually constitutes support for the weak, but decisive pro-European forces? Greece needs the structural reforms that have been decided upon in negotiations with the Eurosummit, and these reforms constitute the country's only real opportunity to modernise and find its way out of the tunnel. Would an agreement that allowed Greece to retain its "sovereignty" as it implemented the agreed measures have made the task of the political forces wanting to reform the system easier or more difficult? Will the tight deadlines that have been set help Tsipras to exploit the dramatic nature of the moment and, on this basis, win the consensus needed to push the reforms through the Greek parliament? Many have spoken out against the brutality of Greece's creditors, Germany in particular, whose "pedagogic and punitive" approach is claimed to have humiliated Greece, and also criticised the failure to take into account the will of the Greek people who had voted against the so-called austerity measures. But neither of these criticisms takes into account what Europe effectively is.

As clearly pointed out by Sabino Cassese, writing in *Corriere delle Sera* (July 15, 2015), the transfer of sovereignty that accompanied the creation of the single currency (and not just that) effectively created, even in today's still imperfect intergovernmental EU, conditions of legitimacy and accountability that put Europe's ruling class under an obligation not only to the people they govern directly, but also to the other members of the Union: "The national governments are no longer answerable only to their own people, but also to the governments (and, indirectly, the peoples) in the other European states. If the Union is an association of joined hands, it is entitled to dictate rules of conduct for all its members, and expect these to be respected. For this reason, it is wrong to talk of a wounding of sovereignty or a humiliation of democracy, to complain that this is not an agreement between equals, to allude to protectorates, and appeal to national pride. Basically, this dual responsibility is precisely what Europe's founding fathers had in mind: they believed that popular legitimacy was not enough, that democracy needed to be enriched; this is precisely what happens when one enters into an association with others and common rules are established that everyone must respect."

Clearly, over time this balance in Europe, elegantly described by Cassese, is destined to become untenable, because it creates a conflict between the formation of consensus, which remains at the national level, and the political dynamic that has a European dimension but lacks a common platform for shared exchanges. This is precisely the aspect

that warrants criticism and correction, and that shows the need to overcome the existing system. As long as we fail to call into question the intergovernmental method, we are effectively accepting the existence of a situation governed by power relations, also within the Eurogroup. And this applies to everyone. It applies in particular to Greece which throughout the negotiations of recent months never hesitated to play, with breathtaking ruthlessness, all the cards it held. The real weapon it used was blackmail, threatening to bring down the single currency if its demands were not met, and its behaviour and the stances it adopted, including its launching of a bitter ideological attack on the German government in particular, were a consequence of this approach. Greece was attempting to reject the entire European system created over decades, not in the name of a credible European alternative (in reality, the Syriza slogan "another Europe is possible" has never been backed up by a single concrete proposal), but rather in its pursuit of purely national interests. The Greek government has never really criticised the intergovernmental system, nor supported the numerous initiatives geared at overcoming it that, in the final weeks of the negotiations themselves, coincided with the preparation and publication of the Five Presidents' Report. All Tsipras did was press for his country's sovereignty on the one hand, while demanding supranational solidarity on the other. It is this impossible combination, together with the manner in which he played his game, undermining the foundations of mutual trust and bringing the European system to the brink of a devastating crisis, that explain the harshness of the negotiations in the days that followed his post-referendum turnaround, when his awareness of the abyss towards which was leading his country finally prevailed.

Having said all this, the fact that Tsipras was able to reverse the course of events and return to the negotiating table with other governments, on an entirely new basis, shows that neither he nor Greece can be said to have come out of the agreement as losers. On the contrary, in this new framework, Tsipras has the possibility of becoming the statesman who can lead Greece towards a stronger future, and is finally in a position to fight the battles to improve the conditions of the Greek people that, at the time of his election, he promised to fight.

Similarly, the European project, having passed this tough test, is in a position to get under way again with renewed strength and determination. Although the aftermath of all these recent tensions will undoubtedly remain with us for some considerable time to come, it is already possible, in the midst of the dust of controversy, to discern two key facts

that, if cultivated and exploited in the right way, could revive attempts to complete the monetary union through the realisation of political union. The first, already mentioned, is the recent affirmation of the principle of the dual accountability of governments (to their own people, and to the peoples of their partner countries) and, by extension, of the principle that it is necessary to accept the conditionality that accompanies solidarity. The second key fact is the need, which emerged strongly, to improve the governance of the eurozone by formalising the transfer of sovereignty, replacing the present "system of rules" with stronger European institutions, and initiating the transformation of the current system, still predominantly confederal, into a federal one.

It is likely that these latest intergovernmental negotiations will turn out to have been the very last occasion on which it proved possible to obtain, through this method, a positive outcome with progressive value. Since the start of the economic and financial crisis, this system of rules has served as a means of re-starting the European machinery each time it has found itself jammed by the serious errors of the previous decade. The list of advances "jump started" in this way is a long one. It was the governments themselves that, in 2011, affirmed the political principle that a member state could be bailed out (something expressly prohibited by the Treaties); that outlined an institutional system of controls on member states' national budgets, similar to the kind used in federal states (overcoming the system enshrined in the Maastricht Treaty, purely confederal in nature and essentially based on control by the markets); that defined the eurozone as the framework in which to pursue, within the broader EU, a deepening of economic and political integration; that paved the way for the first, albeit partial, forms of debt pooling; that started up the banking union, agreeing to make provision for the necessary risk sharing; that created a setting in which the European institutions have been able start acting as a driving force once again: this applies to the ECB (from July 2012 and Draghi's "whatever it takes" through to the quantitative easing of recent months), to the Commission (we may cite its November 2012 Blueprint, the politicisation of the election of its president in 2014, the Juncker plan for investments, the Analytical Note, and the Five Presidents' Report, the latter disappointing in terms of the results it produced but remarkable in its ability to reignite and encourage development of the debate), and also to the European Parliament itself, which is waking up to its role as an institution responsible for supporting and developing control mechanisms and the workings of supranational democracy in the European setting. The intergovernmen-

tal system has also succeeded in bringing into line those countries whose systems, and above all debts, are incompatible with membership of the monetary union. We saw this in particular with Italy, where the change of government in 2011 and the start of a process of internal reforms were greatly helped by the country's membership of the European system, a circumstance that strengthened those in the country who, despite initially being in the minority, were determined to change the national system and to ensure its progressive convergence with the rules agreed within the monetary union. And the same thing has now happened with Greece. In this latter case, because of the difficulties encountered in initiating the process of convergence with the rest of the euro area, the agreement has amounted to direct intervention, by the Eurogroup, in Greek politics. As we have already tried to explain, this does not represent an assault on national democracy, but merely the affirmation of a principle that must now be rendered universal in the eurozone and democratised, by transferring to the Commission and the European Parliament the necessary powers (currently in the hands of the Eurogroup) and ensuring that the institutional framework of the monetary union evolves in a federal direction. The principle of partial transfer of sovereignty to the European level is essential in order to achieve economic union (which must inevitably be political too), and the fact that this has now been affirmed, albeit in a controversial manner, is helping Europe to continue down this route. From here, it would be unthinkable to turn back; equally unthinkable is the idea of again having to experience the painful events that have just unfolded. The problem is that there is a very high risk of a similar situation occurring again. Even though the U-turn by Tsipras represents a huge blow to the anti-systemic movements and the euroskeptics, who saw him as a flagbearer of their ideas and are disoriented by his new political line, the present system continues to be one in which the governments of countries needing to undergo a process of modernisation — with all the resistance that this will encounter — must implement reforms that, even though they will produce enormous benefits over time, in the immediate term will impact on vested interests, and thus generate confusion in society and, in many cases, high social costs. If these reforms are not reinforced "from the outside", *i.e.* lent support at European level, then there is a very high risk that the winners at the ballot box will be the populist forces whose support stems from a mixture of different elements: fear, opportunism and resistance to change. Should this indeed come about, as many surveys unfortunately seem to suggest, Europe would once again find itself having to reckon with countries in disarray

– a paradoxical situation given the continued desire, on the part of the majority of public opinion, for stronger European unity.

Therefore, the eurozone, if it is to be saved from implosion, must unavoidably set out to overcome the intergovernmental method, and this means assuming a federal structure.

We feel it is important to use the term "federal" clearly and unambiguously. Ever since the European institutions started to be seen once again as institutions in the making, which need to acquire supranational political power (as was envisaged in the original plan of the founding fathers, Monnet included), the Community method, has, in many ways, overlapped with the federal one. However, the Community method is weakened by the fact that it retains a cultural flaw: namely, its continued understanding of the transfer of power as a series of gradual steps, *i.e.* as a progressive and uninterrupted evolution. But this is not what it is at all. As Spinelli always declared, the creation of a European power implies a definite leap forward that, despite entailing a seemingly small shift of prerogatives from the national to the European setting, is a transition that changes the "character" of the power relations between the national and the supranational levels. It is the step of creating an autonomous European power that, equipped with the means and resources necessary to exercise its competences directly, is a coordinated system in which the supranational level is no longer subordinate to that of the member states. And this is the point at which the dynamic changes radically: sovereignty is no longer merely something that the states, as equals, agree to pool; rather, it is "transferred" with the precise objective of creating a new sovereign entity alongside the national one; in this way, power no longer remains exclusively in the hands of the states, but is shared with Europe. And while the national peoples certainly continue to be central to the citizens' sense of identity, they are joined by a brand new European people, united by shared interests and common values, and capable of fostering the development of an additional strong collective sense of belonging. At the same time there emerges a powerful political dynamic that helps to strengthen the European power. This is the scenario often painted by the Federal Constitutional Court of Germany, which has at least provided the model. Given the way things are taking shape, the reality will undoubtedly be more subtle. The transition will occur through the advancement of the four unions and through the launch of an autonomous budget for the eurozone, even in an embryonic form to begin with; this will put the own resources issue on the table, together with that of the need for a democratic political system in which

a key role is played by the European Parliament, and the Commission is granted autonomy from the member states but at the same time rendered more accountable to the European Parliament. But however gradual these steps may seem to be, and however seemingly imperceptible the formation of a European power, they in fact amount to what Draghi has called a "quantum leap". This fact is patently clear to the governments called upon to give up their "power to decide in the last resort", and it is therefore no coincidence that they waver and draw back whenever they are called upon to make a choice, as also shown in the case of the so-called Five Presidents' Report. This was a report prepared by the president of the European Commission Juncker, together with the other four European presidents (Draghi — ECB, Dijsselbloem — Eurogroup, Tusk — European Council, and Schulz — European Parliament) and published ahead of the European Council of June 25-26. Its publication was preceded by an in-depth debate and it raised considerable expectations, given that it was meant to tackle the issue of the completion of the monetary union. As stated in the first, introductory chapter of the document, this objective implies the need "to shift from a system of rules and guidelines for national economic policy-making to a system of further sovereignty sharing within common institutions". It also implies that: "Progress must happen on four fronts: first, towards a genuine Economic Union that ensures each economy has the structural features to prosper within the Monetary Union. Second, towards a Financial Union that guarantees the integrity of our currency across the Monetary Union and increases risk-sharing with the private sector. This means completing the Banking Union and accelerating the Capital Markets Union. Third, towards a Fiscal Union that delivers both fiscal sustainability and fiscal stabilisation. And finally, towards a Political Union that provides the foundation for all of the above through genuine democratic accountability, legitimacy and institutional strengthening. All four Unions depend on each other. Therefore, they must develop in parallel and all euro area Member States must participate in all Unions." However, after these premises, which confirm the value of the positions expressed in particular by the ECB and by Juncker himself in various interventions and preparatory notes, but also by the European Parliament Committee on Constitutional Affairs and by some governments, including the Italian one, the subsequent chapters of the report failed to go any further than offer remarks on the need not to abandon the process of reform of euro area governance, and on the need to continue to aim at completing the monetary union together with the four unions — but deferring until

2017 efforts to start moving in this direction.

If one considers that the four unions project has been on the table since 2012, in other words since the publication of the European Commission's Blueprint for a deep and genuine Economic and Monetary Union, followed by the Four Presidents' Report whose main author was Van Rompuy, then President of the European Council (on that occasion the President of the European Parliament did not participate), then one can appreciate what a crushing defeat it was to have to postpone, yet again, the realisation of these objectives. In the two aforementioned documents of 2012, completion of the monetary union by transferring to European level true powers of government in the economic and fiscal field, including fiscal capacity and responsibility for employment policies, together with the creation of an adequate and autonomous budget for the eurozone, was seen as the development that needed to be brought about in the medium to long term (within five years for certain objectives, longer for those demanding profound reforms of the Treaties), having first achieved, as a short-term objective, the creation of the banking union. Three years on, re-reading these two documents and analysing the extent to which the objectives they identified have been achieved, delayed and at times even deliberately ignored, the thing that emerges most strikingly is the fact that it is the further transfer of sovereignty, in the literal sense of the power to decide in the last resort, more than the transfer of competences and instruments of control and coordination, that represents the line at which the institutional advances of the Economic and Monetary Union have repeatedly ground to a halt. And it is precisely for this reason — the tendency of the governments to pull back — that this report too remained stuck on the brink of the "quantum leap".

However, as already indicated, it is clear that the Greek crisis has effectively reshuffled the cards. It has shown that, contrary to what the Five Presidents' Report suggests, we certainly do not have two years of calm ahead of us in which to prepare the conditions for a subsequent resumption of efforts to reform the governance of the euro. The problem has to be addressed immediately, resolving the issues that, ever since the birth of the monetary union, have prevented its further development.

* * *

The monetary union, when it came into being, rested on very weak foundations. When France first proposed it in 1988, Mitterrand saw it as a way of getting Germany to give up the Deutschmark and thus of reducing the weight of German influence within the Community equi-

librium. For Kohl, who chose to take up the challenge, the single currency was, rather, the basis for creating political union, which he envisaged as based on the assignment of real political powers, particularly the power of legislative codecision, to the European Parliament. Delors, entrusted with drawing up a preliminary plan (completed in August 1989), deliberately chose not to consider budgetary union together with monetary union; he wanted to avoid provoking negative reactions on the part of the governments, which would have been alarmed by the idea of losing control of their national budgets. The thinking was that, once the currency had been created, it would be possible in the very next treaties to take steps to complete its structure. But, as we all know, this is not how things turned out. The Economic and Montetary Union came into being with a weak structure, as a result of the mutual fears of France and Germany.

In the clash between the two opposing concepts embodied by France and Germany (on the one hand, a statist neo-Keynesian kind of vision, in which monetary policy is shaped by the government's economic strategies, and on the other an ordoliberal view, based on sustainability of public finances and control of inflation and revolving around the complete independence of the central bank), the least common denominator on which it proved possible to reach an agreement was the model of the social market economy, founded on the doctrine (ordoliberal) of independence of the central bank and the control of public finances, offset, however, by renunciation of all explicit transfers of sovereignty in the economic and budgetary field and suspension of the start of political union. Indeed, in the Maastricht Treaty, the European Parliament saw its powers increased, but not in the key area of monetary union, a result obtained through the ploy of creating the three-pillar structure of the EU. In this way, the ideas of social union, fiscal union and budgetary union, all fundamental parts of a monetary union, were shelved. Instead, criteria were established to govern the public finance behaviour of the single governments and fix the inflation rate for the euro area, but no real mechanisms of control and supervision were created. Basically, in a system that, despite being set in the framework of a single monetary area, had features typical of a confederation, the markets were left to play the role of guardians and enforcers of the rules, in the misguided belief that they, through the spread mechanism, would effectively sanction divergent trends between different economies. There was no anticipation of the profound transformation that the financial markets were about to undergo as a re-

sult of the incipient globalisation phenomenon, or of how easy it would be, in this context of global growth and low interest rates, for the single states to formally meet the parameters without endeavouring to initiate a real convergence of the national economies; similarly, there was no anticipation of the protective effect that the euro would have on the weaker economies, cradling them in their inefficiencies instead of stimulating the necessary reforms (this was true in the case of Greece, and perhaps even more so in that of Italy). Also, there was no instrument designed for governing a suboptimal currency area in which the differences between the national economic systems were destined to get even worse in the absence of the necessary political tools of guidance and compensation: a supranational budget for absorbing, at least partially, asymmetric shocks and for implementing a measure of redistribution, a banking system and a capital market, both genuinely unified, and effective powers for the European institutions in the economic field.

The story of the following years shows how, from the mid-1990s onwards, every attempt to consolidate the monetary union was abandoned. In particular, France's rejection of the German attempt (through the Schäuble-Lamers document) to set up an initial monetary union embracing five countries — Europe's founding member states minus Italy — and to accompany this with deeper political integration, so as to create a magnet to attract the other EU countries and create the basis for putting a definitive end to confrontation between sovereign nations in Europe, ended up having the opposite effect, *i.e.* causing a race to participate among countries that, lacking the basic economic requisites, were not really ready to join the single currency; and once the consequences of the phenomena of German unification and EU enlargement to the East had become apparent, together with the effects of American neoliberal globalisation, the prevalent thinking in the European Union was that a stable equilibrium had been reached through the enlargement of the single market, and that there was no need for additional steps towards political integration. By using terms ambiguously, in a way that struck at the heart of the federalist culture from which the European project itself had sprung, the governments and even the European institutions of those years wiped out the chances of starting a true political union, as the whole story of the Convention and of the birth of the so-called Constitutional Treaty — post Lisbon — clearly shows. These were the years that, in the presence of mounting difficulties in France, saw Germany, under Schroeder, playing a major role in the Union, and effectively exercising hegemony, yet without accepting

a "political leadership" role (this is reflected, for example, in Germany's lack of attention to and lack of efforts to correct the growing imbalances within the euro area, caused both by the high public debt in some countries and by the excessively fragile growth models adopted by countries like Spain and Ireland). Its actions in this period amounted to exploitation of its position of strength for purely national ends, as the matter of its own 2002 violation of the Maastricht criteria illustrates.

The outbreak of the financial and economic crisis and, above all, the emergency of the speculative attacks against the euro, came as a rude awakening for the national governments. Germany, with regard to its European policy, had to make to a full 180° turn. The true extent of the weakness of the foundations of the single currency was exposed, and Germany, primarily, was forced to acknowledge that many of the premises on which the euro had been built were untenable: the no bailout clause, to begin with, but also the exclusion of any form of debt pooling, risk pooling and transfer union. The challenge became, once again, that of completing the monetary union with economic and political union, and what this meant for Germany was, effectively, the start of a new era of political leadership within the setting of the euro area, which this time, however, it found itself having to learn to exercise in the interests of Europe as a whole, and in a climate characterised by growing mistrust on the part of public opinion in the other countries, and by lukewarm support for this new role among public opinion at home. A very difficult challenge for Merkel and Schäuble.

The obstacles were, and still are, enormous. First of all, even though many strides have been taken, politics, having striven for over a decade to destroy the federalist perspective, has struggled and still struggles to rediscover the concepts that will allow it to think and act, once again, along federalist lines. Furthermore, it has not been easy for post-war Germany, facing various historical and political difficulties, to take on a leadership role in Europe, especially when its opponents slyly use its past against it. But what really complicates Germany's exercising of this role is actually the democratic nature of its attempt to do so; indeed, we are not talking about the hegemonic approach of a country that cloaks its actions in rhetoric and ideological mystification in an attempt to mask the real balance of power, but rather an approach that amounts to a genuine assumption of responsibility. It is a leadership role that Germany feels called upon to take on, simply because it recognises that it has the necessary solidity and that, despite the protests, there is actual-

ly no alternative, in Europe, to the social market economy model that it advocates. The problem is that this type of leadership is workable only to the extent that other states accept it: indeed, at critical junctures, a country assuming this role, not being in a position to impose change without first having gained the consent of its partners, can only seek to advance by small steps that can be shared and supported by all.

As indicated several times, there are currently two open fronts, and they are actually related: one is the economic convergence of the entire euro area towards the social market economy model that the Northern European countries have shown to be the only sustainable system for Europe, insofar as it is designed to protect the welfare system and to combine competitiveness and social justice (one does not have to be an expert to see that the neo-Keynesian solutions based on debt-financed increases in public spending by national governments, which are vociferously advocated by many politicians and also supported by leading Anglo-Saxon economists, cannot work without the leadership and monetary policy resources of great powers like the US, which attract capital flows in any case — even though the possibility of a sustainable debt incurred to finance investments by a federal Europe would be a different story of course; or, conversely, to see that models based on tax cuts are incompatible with the preservation of the welfare state). The other front is the transfer, by the eurozone states, of part of their sovereignty in order to create a genuine economic and political union, which entails them giving up their ultimate decision-making power over their budgets and economic policy strategies. As we recalled at the start, from the outbreak of the crisis up to the present time, much progress has been made on both these fronts, thanks to the patient work of the Council led by Germany and the other European institutions, primarily the ECB. With regard to the first front, we can cite the process of reforms begun in Greece, in the wake of the one started in Italy, as well as the emergence from the crisis of Spain, Portugal, Ireland and Cyprus (all developments that are moving in the direction of an economically sustainable system), and with regard to the second, all the changes and new institutions put in place and all the proposals fielded between 2011 and today. Nevertheless, the enemies of this direction are still numerous and also very strong, and can be identified by their resistance to the financially and economically sustainable model that underpins monetary union, and to the transfer of sovereignty to supranational level. Those resistant to these ideas, *i.e.* the euroskeptics and populist movements, are indeed the ones who, hiding behind false economic or political alternatives (the former disastrous, as we

have seen, and the latter able to lead only to dead ends), are building the myth of a Germany that wants to crush the rest of Europe.

Moreover, and there is no point denying this, many of them see France as their stronghold. It is no coincidence that, in the context of the different political proposals for a quantum leap in the governance of the euro area, the French government, repeatedly proposing a eurozone institutional model created around a new parliament (a second-level parliament, understood as an expression of the governments or national parliaments), has clung to its vision of creating a union "of sovereign states"; whereas the alternative proposed by the federalists is to have the European Parliament meet in specific composition on issues relating to the euro, so as to create a genuinely supranational model. The French position is a formidable obstacle to Germany, which will never consider moving towards political union without the support of France.

If, then, the conflict between the two visions embodied by France and Germany is the source of the impasse that has prevented the monetary union from developing into a political union, the crucial thing to understand now, in the midst of today's confused debate on European issues, is that Germany is neither an enemy nor a hegemonic power striving to impose its vision of Europe. It is Europe itself, strengthened by a history that has demonstrated the superiority, for our continent, of the so-called German model, that has made the choice between the two alternatives. This affirmation certainly does not imply that all dialectic between right and left and between different political and social sensibilities has come to an end; it merely establishes the framework in which such exchanges can be productive. In the same way, it is post-WWII European history, together with the actual unfolding of political events, that has gradually assigned Germany a particular weight of responsibility in the European process.

In short, to contribute to the success of the European project, the national governments and political forces (Italy's first and foremost) must prove able to create the conditions that will allow France to accept the European federalist model, and encourage it to play its crucial political role alongside Germany. This is important primarily in order to prevent the reactionary forces within Germany, fuelled by the poisonous debate that is raging at the level of public opinion in the other countries, from becoming so resistant to change that the monetary union loses any chance of making its political quantum leap.

The Federalist

The Historical Significance of the Process of European Unification

"We are not living in an era of change, but a change of era. The situations we are experiencing today are presenting new challenges that we sometimes find difficult to understand. The problems of our times need to be treated as challenges, not obstacles." This reflection by Pope Francis, addressing representatives of the V National Congress of the Italian Church, meeting in Florence on 10 November, 2015, certainly captures the meaning of our times, and helps to clarify the role of politics today. It explains, among other things, why the old ideological clash between left and right no longer corresponds to reality and why, instead, the new demarcation line separating the various political forces is, rather, the one that separates, on the one hand, the ability to understand the current transformations linked to globalisation and the technological revolution, and the desire try to govern them, and, on the other, the refusal to recognise them and to acknowledge the changes they entail. These ideas were clearly encapsulated by Pietro Ichino in an article published on December 9, 2015, in *Il Foglio*, in which he highlighted the clash between "policies shaped by the desire to defend national sovereignties, return to the closed borders of the past, defend national identities, protect native businesses and workers against competition from outsiders, and favour a strictly local economy", and "policies shaped by the desire to build a supranational continental system, introducing the internal reforms necessary to make European integration possible, but also by the desire to encourage the inflow of foreign investment (as a vehicle of technological innovation) and promote cultural exchange and the mobility of persons, goods and services". Ichino remarked that "the construction of the new European Union is nothing other than the first stage in the policy of those who wish to embrace the challenge of globalisation and feel able to overcome it. Conversely, rejection of this perspective is the first stage in the policy of those who shun this challenge, seeing primarily its risks and costs."

These were precisely the challenges that Altiero Spinelli and Mario

Albertini, engaged in the lengthy process of laying the political and theoretical foundations of federalism, had in mind when they referred to post-WWII Europe as the laboratory of new world politics that was preparing solutions for the new era of global interdependence. The affirmation of an institutional model that allows sovereignty to be shared is, indeed, the Gordian knot that the new era must find a way of unravelling. The current level of interdependence between countries, together with the global dimension of today's problems and opportunities, shows that it is necessary to extend the orbit of the democratic state, in such a way that the sphere of democratic government matches the scale of the various processes taking place. All this explains the need to give rise to a new supranational institutional model (federal) built on the sharing of sovereignty between the different levels of power of government — a system that establishes a new concept of people that embraces unity in diversity and allows all citizens to have multiple loyalties and identities. "Normal" politics, on the other hand, which reasons and acts within the existing (national) power framework, lacks the capacity to treat today's problems "as challenges, not obstacles" and perceives them only as threats; this is precisely because it remains a prisoner of the myth of the nation-state as the ultimate holder of sovereignty, and of the view that a people is necessarily defined by a closed and exclusive identity shaped by the concept of nation, and that the nation-state is therefore the natural framework of politics and solidarity. By refusing to let go of this view, politics remains, quite simply, helpless in the face of reality.

The challenge of overcoming the national dimension is precisely what, in the gut instinct of Europe's founding fathers (even before their theoretical analysis), the building of Europe was felt to embody. For this reason, as we have repeated many times in this review, what is at stake in Europe is not just the future of our continent, but the future of the whole of mankind. It is through the process of European integration that the struggle to establish a new model, in place of the national one, will be won or lost. No other part of the world is ready to embark on an experiment of this kind, and until Europe succeeds in constructing a new, supranational, democratic, political order, the nation-state will continue to prevail. After all, it is still supported by the weight of its long history, the early part of which brought successes, and by a consensus crystallised in the power relations that still govern the world; it can also count on the lack of cultural alternatives, given that political thought remains tied to the old national categories and is unwilling, or unable, to embrace the federalist ones and use them as the starting point to build something new. Nation-

alism also thrives on inertia, which, as Machiavelli pointed out, ensures that "there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things. Because the innovator has for enemies all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new. This coolness arises partly from fear of the opponents, who have the laws on their side, and partly from the incredulity of men, who do not readily believe in new things until they have had a long experience of them."

All this explains why the European project has a universal character. Understanding this fact makes it possible to appreciate the narrowness of the framework within which almost everyone would see it confined. What is more, because those wanting to defend the process of European integration are not able to see clearly the effect, in terms of profound change, that federal unification would have on the European countries themselves and throughout the world, they almost always find themselves struggling for arguments, especially in the present turbulent phase. Even more than the wellbeing it would generate and the fact that it would allow the Europeans to assume the critical mass needed to play an active role on the international stage, European federation is, first and foremost, a vision of civilisation.

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Analysing the process of European integration from the perspective of the challenge to achieve shared sovereignty also makes it possible to understand clearly the dynamics of its events. After the collapse of the EDC Treaty, which amounted to a refusal by the European countries (France primarily) to "sacrifice" their national sovereignty, the strategy adopted to carry the process forward hinged on the pursuit of greater economic integration, as it was felt that this, by making the Europeans interdependent on a material level, would somehow pave the way for a subsequent political transition. In any case, the political project remained, until the mid-1990s, a crucial point of cultural reference for the Europeans; without it, the internal market (the common market and subsequently the single market), the institutional strengthening of the Community (particularly through the direct election of the European Parliament), and the introduction of the single currency would have been impossible. The Community has never been simply "a free trade area", and it is only thanks to the political nature of the European process that certain, otherwise inconceivable, developments have been possible (in-

stances of openness, legislative harmonisation, convergence and shared policies, not to mention forms of solidarity). In short, European economic integration was successful precisely because it was supported by the prospect of political integration. In this respect, a comparison with the European Free Trade Area, founded in 1959 by many of the countries that had not joined the European Community, is helpful.

Despite this state of affairs, the constituent nature of the pursuit of political unity that underlies economic integration — it implies a transfer, by the states, not only of competences but also of sovereignty and direct powers over the citizens — has never been clearly defined by politicians, who preferred to pretend that political unity meant pursuing "soft" solutions, *i.e.* transfers of competences that the national governments agreed to coordinate jointly. In this context, only the federalists continued to present the pursuit of political unity unambiguously.

Over the years, therefore, awareness of what building a European federation really means, in institutional terms, has become blurred. In part, this fact can be attributed to the role played by Great Britain: indeed, since the time of the UK's entry in 1973, Europe has included an influential, albeit minority, group of member states that has never had any intention of participating in a political project, being interested only in economic integration. Accordingly, these countries have always opposed any choice liable to deprive the nation-states of prerogatives and direct control capabilities. To an extent, however, this blurring of awareness can also be attributed to complacency on the part of the founding member countries, which, strengthened by the success of European integration in the economic sphere and reassured by the situation of relative international stability created by the Cold War, ceased to think, in concrete terms, of the need for a European federation.

In this regard, the creation of the euro, as we have often reiterated, represented a turning point, as it entailed an irreversible advance in political terms. In particular, it backed the British into a corner, forcing them accept that other member states had chosen to advance along the path towards deeper integration. Even though the contradictions and paradoxes of a currency existing in the absence of the necessary political institutions did not properly emerge for almost a decade, the financial, economic and political crisis of recent years has certainly laid them bare. As a result, the EU is once again confronted with the need, in order to save the entire European edifice from collapsing, to complete the monetary union with the construction of a European federation.

However, the crucial question of sovereignty remains a taboo that

is proving difficult to overcome. In spite of all the talk of political union, powers of government and fiscal capacity for the European institutions, the transfer of sovereignty is the aspect that states have still not accepted and it is therefore hardly surprising that words have still not been translated into deeds, and the decisions on the crucial political advances continue to be postponed. But this situation is only exacerbating the mutual lack of trust between the countries and their nationalistic reactions in the face of problems. This is a vicious cycle that is making it increasingly difficult to reach the agreements necessary to start building political unity.

There was a phase — 2012 in particular — in which specific steps with the potential (despite relating to partial advances such as an embryonic own budget for the eurozone) to shift the axis of power from the states to Europe seemed within reach, perhaps through recourse to the forms of flexibility provided for in the Treaties. The fact that they have never been achieved, despite being deemed necessary and their importance never being in question, is a demonstration of the fact that until the states accept the need to resolve the sovereignty sharing issue, the quantum leap of creating a European federal government, even in an embryonic form, will not be taken. A further demonstration is provided by the continued postponement of completion of the banking union — a step that is now being called into question because it, too, touches on the issue of sovereignty.

What is more, the current contradictory situation in which the states are struggling yet denying the need to create a new European power risks becoming explosive in the face of the security problem created by the recent migratory flows and terrorist attacks. The need for commonly managed external border controls — these should be entrusted to the European Commission, which should therefore be equipped with the necessary powers of government and resources — and a European intelligence service, again coordinated by the Commission, with all the implications that this would have in the field of defence and foreign policy, are issues that should be forcing the states to acknowledge that creating a supranational government is the only possible choice. The alternative is to take refuge in a dangerous and futile attempt to ensure security through a strengthening of national controls. This, however, would only result in the dismantling some of Europe's essential achievements, such as the Schengen System, in a fuelling of nationalistic and xenophobic tendencies, and in an increasingly bitter confrontation between the member countries that would make it even more

difficult for them to agree on the decisions that need to be taken.

This alarming scenario, which is associated with a very real risk of Europe disintegrating, should not be allowed to distract us from the fact that the European alternative to a catastrophic return to nationalism remains on the table, and continues to be supported by the European institutions themselves and by the more responsible representatives of politics and culture within the member states. In this regard, the difficulty inherent in making the transition to a European federation — the federalists have always anticipated this difficulty — should, for those convinced of its necessity, serve as an incentive to step up the battle. Taking care to avoid concealing the radical nature of this choice, they should present it as a choice of civilisation, highlighting its revolutionary significance and the effects it would have, in terms of progress and change, on European society.

It is not yet possible to say by what route the decision to transfer power may eventually be reached: whether it will ultimately be made possible (without the need for Treaty change) by recourse to solutions like the ones highlighted by the European Parliament, which is seeking to establish whether there are still any ways of exploiting the terms of the Lisbon Treaty, or by Andrew Duff in his important proposal for an *ad hoc* protocol to complete the monetary union with an agreement among the eurozone countries (*The Frankfurt Protocol*[1]); or whether, instead, the conditions will become ripe for a reform of the entire European edifice, on the basis of indications that the European Parliament could develop starting from the ongoing work in its Constitutional Affairs Committee under the guidance of Guy Verhofstad. All these are mutually reinforcing hypotheses: they all recognise how the European Union needs to change and they are all helping to fight the same battle.

Given that, as pointed out by Mario Draghi, addressing the European Parliament on 1 February, 2016, "we are undoubtedly at a point in time when the cohesion of Europe is being tested", the important thing is not to ignore reality: the fate of the European Union depends on the creation, within the eurozone, of a federal core by a group of countries that, strengthened by a 65-year history of integration and common endeavour, are ready to accept responsibility for creating a new supranational state, the European federation.

The Federalist

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[1] A. Duff, *The Protocol of Frankfurt: a new treaty for the eurozone*, Bruxelles, European Policy Centre, 2016, http://www.epc.eu/documents/uploads/pub_6229_protocol_of_frankfurt.pdf.

Enhanced Cooperation and Economic and Monetary Union: a Comparison of Models of Flexibility*

GIULIA ROSSOLILLO

1. *Introduction*.

The emergence of forms of flexibility in European Union law is a phenomenon that, in some respects, has been present since the dawn of the process of European integration. The Treaty establishing the European Economic Community provided the member states with the possibility of retaining (conditionally, temporarily and subject to the authorisation of the Commission) national measures that the achievement of the Customs Union and freedoms of movement would otherwise have made it obligatory to abolish,[1] or of adopting safeguard measures. Even though this was a temporary form of differentiation, recourse to it meant that Community law was not being applied uniformly throughout the territory of the European Community.

Nevertheless, it was from the time of the Maastricht[2] and Amster-

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* This article has already been published in the review Rivista di diritto internazionale, n. 97 (2014), p. 325 ff..

[1] See, for example, *ex*. Art. 17(4) TEEC, which reads "Where the Commission finds that in any Member State the substitution of such duty meets with serious difficulties, it shall authorise such State to retain the said duty provided that the State concerned shall abolish it not later than six years after the date of the entry into force of this Treaty. Such authorisation shall be requested before the end of the first year after the date of the entry into force of this Treaty". On this point, see C. Guillard, *L'intégration différenciée dans l'Union européenne*, Paris, Bruylant, 2006, p. 34 ff..

[2] According to C. Guillard, *L'intégration*..., *op. cit*., p. 38, the Maastricht Treaty constituted a real turning point in the history of differentiation, as it impacted on decision-making mechanisms (given the exclusion of member states with a derogation from voting in the Council) and introduced a form of differentiation, regarding the United Kingdom and Denmark, that turned out to be permanent. Other forms of differentiated integration had actually developed in the years before the Maastricht Treaty. In particular, the Schen-

dam Treaties that the significance of this phenomenon really became apparent. The first, by establishing that only states meeting certain economic and legal requirements could join the single currency and, at the same, granting the United Kingdom and Denmark the possibility of opting out of the third stage of economic and monetary union (EMU), introduced a distinction between participating member states, states with a derogation,[3] and states with special status.[4] The second, in addition to providing a series of opt-outs in favour of the United Kingdom, Ireland and Denmark in relation to the area of freedom, security and justice,[5] the Schengen *acquis*,[6] external border controls[7] and defence

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gen Treaty between France, Germany, Belgium, the Netherlands and Luxembourg, which referred to the gradual abolition of checks at their common borders, dated back to 1985 and was completed by the Convention Implementing the Schengen Agreement signed by the same states in 1990. This was a form of differentiated integration that, having initially evolved outside the institutional framework of the founding Treaties, was subsequently inserted into it by the Treaty of Amsterdam. On the Schengen agreements and their incorporation into the Treaties, see, for all, D. Curtin, *The Schengen Protocol: Attractive Model or Poisoned Chalice?*, in *Der rechtliche Rahmen eines Europas in mehreren Geschwindigkeiten und unterschiedlichen Gruppierungen* (edited by C.D. Ehlermann), Cologne, Bundesanzeiger, 1999, p. 73 ff.; S. Mazzi-Zissis, *Les accords de Schengen et la libre circulation des personnes dans l'Union européenne: exemple à suivre ou dangereux précédent?*, *ibid*., p. 47 ff.; M. Den Boer, *The Incorporation of Schengen into the TEU: A Bridge Too Far?*, in *The European Union after the Treaty of Amsterdam* (edited by J. Monar and W. Wessels), London-New York, Bloomsbury Publishing, 2001, p. 296 ff..

[3] The expression "Member States with a derogation", which appears in Art. 139 TFEU, can be explained by the fact that progression to the third stage of EMU is automatic. In other words, states not fulfilling the necessary conditions also enter the third stage, but "with a derogation", meaning that certain provisions applicable from the third stage of EMU do not apply to these countries. Therefore, the UK and Denmark were the only member states that did not enter the third stage of EMU. On this point, see C. Zilioli, M. Selmayr, *La Banca Centrale Europea*, Milan, Giuffré, 2007, p. 251 ff..

[4] Even though the position of Denmark and the United Kingdom (now defined in Protocols N. 15 and N. 16) is peculiar — they are states that do not participate in the single currency out of choice —, from the perspective of their treatment by the Treaties, it is to be noted that member states with a derogation and member states with special status are on a par. There exists a further form of differentiation, relating to social policy, that can be traced back to the Maastricht Treaty. Once it became clear that it would be impossible to reach an agreement with the United Kingdom on this subject, a protocol on social policy was annexed to the Maastricht Treaty that authorised the other member states to implement, through the institutions, procedures and mechanisms laid down in the Treaties, the agreement on social policy attached to the same protocol.

[5] Protocol No. 4 on the position of the United Kingdom and Ireland and Protocol No. 5 on the position of Denmark, now Protocols No. 21 and No. 22.

[6] Protocol No. 2 integrating the Schengen *acquis* into the framework of the European Union and Protocol No. 5 on the position of Denmark, now Protocols No. 19 and No. 22.

[7] Protocol No. 3 on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland, now Protocol N. 20.

policy,[8] introduced a differentiation mechanism — enhanced cooperation — which lent itself to use by groups of states (meeting certain requirements established in the Treaty) wanting to advance more rapidly towards integration in particular fields.

It is precisely this latter mechanism that, today, seems to warrant particular attention. Indeed, after many years that saw no concrete application of provisions on enhanced cooperation, 2010 saw the adoption of the regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation;[9] this was followed, in 2012, by the regulations implementing enhanced cooperation in the area of the creation of unitary patent protection[10] and applicable translation arrangements.[11] These developments were followed by the Council decision of 22 January, 2013 authorising enhanced cooperation in the area of the financial transaction tax.[12] Furthermore, many have

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[8] Protocol No. 5 on the position of Denmark, now Protocol No. 22.

[9] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in OJ L 343, 29.10. 2010, p. 10. The expression "enhanced cooperation" also appears in the Protocol on integrating the Schengen *acquis* into the framework of the European Union (now Protocol No. 19), which states that, taking into account the position of Denmark, the United Kingdom and Ireland, "it is necessary to make use of the provisions of the Treaties concerning closer cooperation between some Member States". However, as underlined elsewhere (D. Curtin, *The Schengen Protocol...*, *op. cit*., p. 76), the flexibility, in this case, would be a predetermined flexibility, since it is the Treaties themselves that define the extent and scope of application of the said form of cooperation.

[10] Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, in OJ L 361, 31.12.2012, p. 1.

[11] Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, in OJ L 361, 31.12.2012, p. 89.

[12] Council decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of the financial transaction tax, in OJ L 22, 25.1.2013, p. 11.[13] The idea of enhanced cooperation as an instrument for completing EMU is referred to in Art. 10 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2 March 2012, which reads "In accordance with the requirements of the Treaties on which the European Union is founded, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market". On this point, see also C.D. Ehlermann, *Différenciation accrue ou uniformité renforcée?*, Revue du Marché unique européen, 5 (1995), p. 191 ff., esp. p. 207; J.-V. Louis, *Differentiation and the EMU*, in *The Many Faces of Differentiation in EU Law* (edited by B. De Witte, Hanf and

proposed[13] that enhanced cooperation might be a useful instrument to use with a view to completing the Economic and Monetary Union, and in particular for taking the first steps towards the creation of a fiscal, banking, budgetary and economic union. This prospect presents some problematic aspects, on account of the difficulty of reconciling an instrument like enhanced cooperation, designed to give rise to closer forms of integration, each time between a different group of states, with a form of differentiation — EMU — that is increasingly tending to constitute a veritable subsystem within the European Union.

2. *Enhanced cooperation in the Treaty of Amsterdam*.

Since their introduction into EU law by the Treaty of Amsterdam,[14] the provisions on the establishment of enhanced cooperation have been amended by subsequent treaties, which have made the conditions for their application less strict in some respects.

Vos), Antwerp-Oxford-New York, Intersentia, 2001, p. 43 ff.; and Y. Bertoncini, *Eurozone and Democracy(ies): a Misleading Debate*, Notre Europe Policy Paper, n. 94, July 2013, esp. p. 28, who nevertheless feels that it would be more appropriate for enhanced cooperation to concern a "comprehensive package" of initiatives.

[13] The idea of enhanced cooperation as an instrument for completing EMU is referred to in Art. 10 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2 March 2012, which reads "In accordance with the requirements of the Treaties on which the European Union is founded, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market". On this point, see also C.D. Ehlermann, *Différenciation accrue ou uniformité renforcée?*, Revue du Marché unique européen, 5 (1995), p. 191 ff., esp. p. 207; J.-V. Louis, *Differentiation and the EMU*, in *The Many Faces of Differentiation in EU Law* (edited by B. De Witte, Hanf and Vos), Antwerp-Oxford-New York, Intersentia, 2001, p. 43 ff.; and Y. Bertoncini, *Eurozone and Democracy(ies): a Misleading Debate*, Notre Europe Policy Paper, n. 94, July 2013, esp. p. 28, who nevertheless feels that it would be more appropriate for enhanced cooperation to concern a "comprehensive package" of initiatives.

[14] On the provisions relating to enhanced cooperation contained in the Amsterdam Treaty, see, for all, V. Constantinesco, *Les clauses de « coopération renforcée ». Le Protocole sur l'application des principes de subsidiarité et de proportionnalité*, Revue trimestrielle de droit européen, 33 (1997), p. 752 ff.; G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?*, Common Market Law Review, 35 (1998), p. 855 ff.; H. Kortenberg, *Closer Cooperation in the Treaty of Amsterdam*, Common Market Law Review, 35 (1998), p. 833 ff.; J. Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, European Law Journal, 35 (1998), p. 63 ff.; C.D. Ehlermann, *Differenzierung, Flexibilität und engere Zusammenarbeit. Die neuen Vorschriften des Amsterdamer Ver-*

Indeed, the terms of the Treaty of Amsterdam, both as regards the conditions that enhanced cooperation must respect and the procedure that must be followed for instating it, were extremely restrictive.

Looking at the first of these aspects, *ex* Art. 43 TEU contained a very extensive and detailed list of conditions to be fulfilled in order to be able to establish an enhanced cooperation.[15] To these must be added the further conditions laid down in *ex* Art. 11 TEC relating to cooperations established in the Community pillar[16] and in *ex* Art. 40 TEU relating to those established in the area of police and judicial cooperation in criminal matters.[17] On the other hand, the possibility of establishing enhanced cooperation in the area of common foreign and security matters (second pillar) was excluded.[18]

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trags, in *Der rechtliche Rahmen...*, *op. cit.*, p. 15 ff.; G. Gaja, *La cooperazione rafforzata*, in *Il Trattato di Amsterdam*, Milan, Giuffré, 1999, p. 61 ff.; E. Philippart, G. Edwards, *The Provisions on Closer Co-operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union*, Journal of Common Market Studies, 37 (1999), p. 87 ff..

[15] In particular, under the terms of this article, member states wanting to cooperate more closely with each other could make use of institutions, procedures and mechanisms laid down by the founding Treaties, on condition that the cooperation in question: i) was aimed at furthering the objectives of the Union and at protecting and serving its interests; ii) respected the principles enshrined in the Treaties and in the Union's single institutional framework; iii) was used only as a last resort, it having proved impossible to reach the objectives of the Treaties under the procedures provided for therein; iv) concerned at least a majority of the member states; v) would not adversely affect the *acquis communautaire* and the measures adopted under the terms of the other provisions of the Treaties; vi) would not adversely affect the competences, rights, obligations and interests of the member states not participating in it; vii) would be open to all member states, allowing them to join it at any time.

[16] In the first pillar, enhanced cooperation was not permitted to concern areas that were the responsibility of the Community alone, to affect Community policies, actions or programmes, or to affect citizenship of the Union or discriminate between nationals of different member states. Furthermore, it had to remain within the limits of the competences conferred on the Community by the Treaty, and could not constitute a source of discrimination in or a barrier to trade between member states, or lead to unequal conditions of competition between them.

[17] The further conditions established by *ex* Art. 40 TEU were of a much more general and flexible nature, basically amounting to the need for the enhanced cooperation in question to respect the competences of the European Community and the objectives laid down in Title VI (police and judicial cooperation in criminal matters). The explanation for the greater number of conditions required for the establishment of enhanced cooperation in the Community pillar compared with the area of police and judicial cooperation in criminal matters lies in the greater degree of integration and supranationality that characterised the first compared with the third pillar. In other words, it was felt that differentiation in the Community pillar posed greater risks of violation of the principles of non-discrimination and solidarity. On this point, see C. Guillard, *L'intégration...*, *op. cit.*, p. 390 ff..

[18] As pointed out by E. Philippart, G. Edwards, *The Provisions...*, *op. cit.*, p. 99, the exclusion of the common foreign and security policy from the scope of enhanced coop-

As regards the procedure for implementing enhanced cooperation, Council authorisation was envisaged in both pillars. However, whereas in the first pillar the request had to come from the states and be addressed to the Commission, which could submit a proposal on which the Council would then decide by a qualified majority after consulting the European Parliament, in the area of the area of police and judicial cooperation in criminal matters, the states had to put the request directly to the Council, which, after it had consulted the Commission and also forwarded the request to the European Parliament, would then decide by a qualified majority. In keeping with the intergovernmental nature of the third pillar, the Commission and European Parliament had, in this latter case, a less important role.

The possibility that an enhanced cooperation could be authorised by a qualified majority, in other words, the fact that its implementation did not require the unanimous agreement of the member states, certainly constituted an incentive for making use of this instrument. However, in relation to both of the above-mentioned pillars, the Treaty of Amsterdam made provision for recourse to a sort of emergency brake mechanism, which essentially gave any state wanting to block the procedure of establishing a cooperation the possibility of doing so. Indeed, according to *ex* Art. 11 TEC, if a member of the Council declared that it intended to oppose the granting of an authorisation by qualified majority for important and specific domestic policy reasons, the vote would not take place and the Council, acting by a qualified majority, could ask that the matter be referred to the Council, meeting in the composition of the heads of state or government, for a decision by unanimity. A very similar provision was contained in *ex* Art. 40 TEU in relation to the third pillar, the only difference being that, in this case, the matter was to be referred not to the Council, meeting in the composition of the heads of state or government, but to the European Council.

Because of this emergency brake, and the multiple conditions on which the possibility of establishing closer cooperation depended, this mechanism actually stood little chance of constituting an effective tool for flexibility.[19] Indeed, it seems that, at the negotiating table, the con-

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eration was difficult to explain, given that it might be considered a "natural" field for application of enhanced cooperation.

[19] As noted by C. Guillard, *L'intégration*..., *op. cit.*, p. 388 ff., the threat of recourse to the emergency brake has, over the years, led to the failure of various attempts to establish closer cooperation. Furthermore, as regards participation in an enhanced cooperation that has already been established, *ex* Art. 11 CEE, in relation to the first pillar, stip-

cerns of states reluctant to allow space for forms of differentiation prevailed over those of states keen to find effective solutions to the different needs of the member states of an enlarged Europe.[20]

This also emerges clearly if we analyse how enhanced cooperation stood to impact on voting mechanisms within the political institutions. Indeed, under the Treaty of Amsterdam, all Council members could take part in the deliberations prior to the adoption of the acts and decisions necessary in order to implement an enhanced cooperation, but only those representing member states involved in the closer cooperation could take part in the actual decision making. This meant that the states outside the enhanced cooperation, given that they could nevertheless take part in the discussion in the Council, had some scope for trying to influence its deliberations; moreover, the differentiation between states participating in and those outside the cooperation was not reflected at the level of the Commission and the European Parliament; in short, it was envisaged that these institutions would participate in the adoption of the legislation necessary to implement the enhanced cooperation in their full composition, which would thus include members from states not participating in the enhanced cooperation in question.

3. *The changes introduced by the Treaty of Nice*.

The rigidity of the mechanism as configured by the Treaty of Amsterdam was remedied only in part by the Treaty of Nice.[21] Indeed, the

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ulated that the decision should be taken by the Commission, after consulting the Council; as for the third pillar, under *ex* Art. 40 TEU, it fell to the Council to decide, after consulting the Commission. On the incongruous nature of the rules envisaged for the first pillar, in particular as regards the advice provided by the Commission to the Council in a situation in which it is not the Council that is called upon to decide, see G. Gaja, *La cooperazione...*, *op. cit.*, p. 65.

[20] On this point, see E. Philippart, M. Sie Dhian Ho, *Flexibility after Amsterdam: Comparative Analysis and Prospective Impact*, in *The European Union...*, *op. cit.*, p. 184 ff., who point out that "generally speaking, the defensive character of the enabling conditions has been deliberately reinforced at various stages of the ICG negotiations, choices being systematically made in favour of more conditions and more restrictive wording". On the debate on flexibility in the IGC setting, see A. Stubb, *Negotiating Flexibility in the European Union*, New York, Palgrave, 2002, p. 84 ff..

[21] On the changes to enhanced cooperation introduced by the Treaty of Nice, see H. Bribosia, *Les coopérations renforcées au lendemain du Traité de Nice*, Revue du droit de l'Union européenne, 11 (2001), p. 111 ff., who notes that the possibility of amending the provisions on enhanced cooperation was at first excluded on the grounds of the difficulty of finding a compromise, and that it was the Benelux countries that suggested that this aspect could also be addressed by the intergovernmental conference; C. Guillard, *L'intégration...*, *op. cit.*, esp. p. 388 ff..

changes introduced by the latter turned out to be, in some respects, more cosmetic than substantive.[22]

There is no doubt that the Treaty of Nice extended the scope of application of enhanced cooperation, allowing its establishment also in relation to common foreign and security policy, a field previously excluded from the operating sphere of this mechanism of differentiation. In particular, enhanced cooperations in this field had to be "aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene"; they also had to "respect the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy; the powers of the European Community and consistency between all the Union's policies and its external activity" (*ex* Art. 27 A TEU). Furthermore, they could not "relate to matters having military or defence implications" (*ex* Art. 27 B TEU).

As regards the method for implementing closer cooperation (*ex* Art. 27 C TEU), member states intending to establish an enhanced cooperation between themselves in the second pillar were required to address a request to the Council, which would then be forwarded to the Commission, so that the Commission might give its opinion on the consistency of the proposed cooperation with Union policies, and to the European Parliament, for information. Authorisation to establish the cooperation would then be granted by the Council deciding by qualified majority. However, the references that were made in *ex* Art. 27 C TEU to *ex* Art. 23(2) TEU (2nd and 3rd paragraphs) meant that, in this area too (exactly as envisaged by the Treaty of Amsterdam for enhanced cooperation in the first and third pillars), it was possible to apply the emergency brake. Indeed, this last provision established that should a member of the Council declare that it intended for important reasons of national policy to oppose the adoption of a decision to be taken by a qualified majority, the Council could "acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity."

While the existence of this possibility was justifiable in the area of common foreign and security policy (in which decision-making proce-

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[22] In this sense, see H. Bribosia, *Les coopérations*..., *op. cit.*, p. 116, who maintains that the main contribution of the Treaty of Nice was perhaps to make the provisions on enhanced cooperation clearer and more legible.

dures are of an essentially intergovernmental character, and there exists a sort of *reverse* flexibility in the form of the constructive abstention mechanism[23]), the maintenance of an emergency brake mechanism in the Community pillar and the pillar relating to police and judicial cooperation in criminal matters was less readily justifiable, especially in the light of the fact that this same brake had been one of the reasons for the failure, up to that point, to actually use the enhanced cooperation instrument.

Therefore, in these areas, the Treaty of Nice effectively eliminated the possibility of using an emergency brake mechanism proper. Nevertheless, there still remained, for states opposed to an enhanced cooperation, one possible way of making its establishment less straightforward. Indeed, according to the new wording of the provisions on enhanced cooperation in the Treaty of Nice, a member state could, when the Council was deciding on the enhanced cooperation, request that the matter be referred to the European Council; once the matter had been raised before the European Council, the Council would decide by a qualified majority.

As others have pointed out, this provision, despite seeming to constitute a weakened form of emergency brake mechanism,[24] nevertheless had the capacity to make establishment of a cooperation more difficult. First of all, the Council, following the raising of the matter before the European Council, might decide not to act. Furthermore, from a political point of view, it was very unlikely that the opposition of a member state would be overcome within the European Council, and also that the Council, following the adoption of a negative stance by the European Council, would fail to respect its position.[25]

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[23] The constructive abstention mechanism is currently provided for by Art. 31 TEU, which states that any member of the Council, when abstaining in a vote, may qualify its abstention by making a formal declaration; as a result, it will not be obliged to apply the decision, but will nevertheless accept that the decision commits the Union. However, the decision shall not be adopted if the members of the Council abstaining in this way represent at least one third of the member states comprising at least one third of the population of the Union.

[24] D. Negrescu, G. Truica, *Can EU's Enhanced Cooperation Mechanism Provide Solutions to the "Single Undertaking" Problems of the WTO?*, Romanian Journal of European Affairs, 6 (2006), p. 5 ff., esp. p. 12, have defined this new mechanism a "ralentisseur".

[25] In this sense, see C. Guillard, *L'intégration*..., *op. cit*., p. 388, who points out that the optional nature of the vote in the Council following raising of the matter before the European Council emerges clearly from the fact that, during the negotiating stage, the phrase "After that matter has been raised before the European Council, the Council *acts*" was replaced by the phase "After that matter has been raised before the European Coun-

4. *Enhanced cooperation after the Treaty of Lisbon: the relaxing of the authorisation procedure in areas other than that of foreign and security policy.*

In fact, it was not until the Treaty of Lisbon that the main obstacle to the establishment of an enhanced cooperation, namely, the possibility for a single state to obstruct or hinder the procedure for implementing the mechanism, was eliminated; and it is no coincidence that the first concrete applications of this instrument followed the entry into force of this Treaty.

In line with the abandonment — formal at least — of the division of the EU into pillars, the Treaty of Lisbon lists a series of conditions, common to all areas, that must be fulfilled prior to the establishment of an enhanced cooperation.

The peculiarities of the common foreign and security policy area, which, despite the abandonment of the pillars, remains firmly in the intergovernmental mould, continue to be reflected in the procedure to be followed in order to bring about cooperation in this area. Indeed, Art. 329(2) TFEU states that the request from member states wishing to establish, between themselves, an enhanced cooperation in the framework of common foreign and security policy must be addressed to the Council and forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, the Commission and the European Parliament. The authorisation is then granted by the Council deciding by unanimity. The elimination of the emergency brake, envisaged by the Treaty of Nice, is thus offset by the need for unanimous support in the Council in order to authorise the cooperation.

Conversely, in relation to enhanced cooperation in all the remaining areas, the Treaty of Lisbon does much to facilitate the use of this form of differentiation. Indeed, Art. 329(1) TFEU, denying the member

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cil, the Council *may act*" (italics added). As for the other conditions required for the implementation of enhanced cooperation in the first or the third pillar, the Treaty of Nice no longer mentions the fact that enhanced cooperation must not influence Community policies, actions or joint programmes, nor affect the citizenship of, or discriminate between, nationals of the member states. These conditions are replaced by a new one, according to which the cooperation must aim to strengthen the integration process and must not undermine the internal market or economic, social and territorial cohesion. Finally, eight is established as the minimum number of states needed in order to set up an enhanced cooperation and it is made clear that the cooperation "may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties".

states any possibility of preventing or hindering the implementation of an enhanced cooperation, establishes that, once a request to institute an enhanced cooperation has been submitted and the Commission has presented a proposal to the Council, the latter, acting by a qualified majority, should proceed with its authorisation. The difference, in the method of voting within the Council, between the area of common foreign and security policy and the other areas also exists in relation to requests, from member states, to join an existing enhanced cooperation.[26]

5. *The conditions for establishing enhanced cooperation: the necessary character of the cooperation.*

Even after the Treaty of Lisbon, the conditions governing the implementation of an enhanced cooperation nevertheless remain numerous. For the sake of an easier analysis of them, it is worth trying to split them into broad categories, namely those designed to restrict the use of enhanced cooperation to situations in which it is deemed absolutely necessary; those relating to the need to comply with EU law as a whole; and those relating more specifically to relations with states outside the enhanced cooperation. It has to be acknowledged that these last two categories actually overlap to a large extent; they differ mainly in the greater emphasis placed by the former on the need to respect the unitary nature of EU law and the fundamental principles that govern its

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[26] Under the provisions of Art. 331 TFEU, any member state intending to participate in an existing enhanced cooperation in an area other than that of common foreign and security policy must inform the Commission and the Council of this intention. The Commission, within a maximum of four months from the date of notification, confirms the state's participation in the enhanced cooperation, if necessary adopting the measures necessary for the implementation of the acts already adopted within the framework of the cooperation. If, on the other hand, the Commission deems that the state does not meet the conditions to participate, it sets a deadline for a review of the request. If, once this period has expired and the request has been re-examined, the conditions for participation are still not deemed to be met, the Commission may refer the matter to the Council which shall act by a qualified majority (*i.e.* with the votes only of the states already participating in the enhanced cooperation). As for the area of foreign and security policy, on the other hand, any member state intending to participate in an existing enhanced cooperation must inform the Council, the High Representative of the Union for Foreign Affairs and Security Policy, and the Commission of this intention. The Council confirms the state's participation, after consulting the High Representative, and, on the latter's proposal, may adopt the transitional measures necessary for the implementation of the acts already adopted within the framework of the enhanced cooperation. If, on the other hand, it deems that the conditions for participation are not met, the Council indicates the measures that need to be taken in order to meet them and fixes a date for a review of the application. In all the possible scenarios relating to the entry of a new state into an enhanced cooperation in the field of foreign and security policy, the Council decides by unanimity.

functioning, and by the latter on the rights enjoyed by the states remaining outside the enhanced cooperation vis-à-vis those that have instead decided to be part of it.

The conditions applied in order to ensure that recourse is had to enhanced cooperation only when this is necessary are, essentially, the requirement that the cooperation include at least nine member states and the condition that it be adopted only as a "last resort", which is to say that recourse can be had to this form of flexibility only if the Council "has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" (Art. 20(2) TEU). They are conditions whose aim is to prevent unsuccessful negotiations from leading, each time, to one or more enhanced cooperations at the expense of efforts to reach a compromise, a circumstance that, as highlighted by the Court of Justice, would be detrimental to the interests of the Union and the integration process.[27]

Over the years, with the successive enlargements that have seen the number of member states increasing to the current 28, the minimum number of states participating in an enhanced cooperation (a threshold designed to ensure that the group of states wanting to advance towards integration is sufficiently sizeable) has become proportionally lower and lower; today it does not even amount to a third of the EU member states.[28] Moreover, the fact that the states can give rise to different forms of enhanced cooperation in different areas is, as we shall see, one of the distinctive features of this form of differentiation that makes it dissimilar to pre-defined forms of differentiation such as the Economic and Monetary Union.

The last resort criterion is one of the conditions that the Treaty of Lisbon helped to relax (compared with what was stipulated in the Amsterdam and Nice Treaties), thereby paving the way for easier recourse to the enhanced cooperation mechanism. Whereas the Treaty of Amsterdam stated that enhanced cooperation should be used only should it

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[27] Court of Justice, judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic* v *Council of the European Union*, not yet published, par. 49.

[28] The Treaty of Amsterdam demanded that enhanced cooperation concern at least a majority of the member states, *i.e.* at least eight of the fifteen. The Treaty of Nice replaced this expression with the indication of the precise number — eight — of states needed in order to set up an enhanced cooperation. Since the 2004 enlargement, this number, even after the Lisbon Treaty increased it to nine, has no longer represented the majority of the member states.

prove impossible to attain the objectives of the Treaties "by applying the relevant procedures laid down therein" and the Treaty of Nice underlined the need to establish "within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties", Art. 20(2) TEU today states that "the decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".

As highlighted by the Advocate General Bot[29] in his opinion on the case relating to enhanced cooperation for a unitary European patent, whereas the Amsterdam and Nice Treaties were formulated in a way that implied that the Council should "follow the legislative process to its conclusion and that it was only where the proposed measure was rejected that enhanced cooperation could be envisaged", the wording of Art. 20(2) TEU seems to indicate that rather than having to arrive at a rejection, by a vote, of a legislative proposal, it is enough for the Council to ascertain, at any level of the legislative process, the presence of a deadlock clearly showing that a compromise is impossible.[30] On this basis, the Court, in relation to the unitary patent question, deemed the last resort condition to be fully met, given that "the legislative process aiming to establish a unitary patent on the EU level began in 2000 and was carried out in several stages; a considerable number of language arrangements for the unitary patent were discussed among all Member States within the Council; and none of those arrangements found support capable of leading to the adoption at EU level of a full 'legislative package' relating to that patent".[31]

On the one hand, then, the Council has a degree of discretion[32] in ascertaining the impossibility of reaching a compromise, given that it is "best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put for-

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[29] Opinion of Advocate General Bot delivered on 11 December 2012, Joined Cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic* v *Council of the European Union*; *Italian Republic* v *Council of the European Union*.

[30] In this sense, see J.-V. Louis, *La pratique de la coopération renforcée*, Revue trimestrielle de droit européen, 49 (2013), p. 277 ff., esp. p. 284.

[31] ECJ, Judgment of 16 April 2013, *op. cit.*, paragraphs 55 and 56. For a criticism of this position, see O. Feraci, *L'attuazione della cooperazione rafforzata nell'Unione Europea: un primo bilancio critico*, Rivista di diritto internazionale, 96 (2013), p. 955 ff., esp. p. 963.

[32] Opinion of Advocate General Bot, *op. cit.*, par. 115.

ward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future";[33] on the other, as the Court itself underlined,[34] the factors preventing the achievement of the compromise in question seem to play no role.

6. *The conditions for establishing enhanced cooperation: respect for EU law and for the single institutional framework.*

The second category of necessary conditions for the establishment of enhanced cooperation (those concerning the need to comply with EU law as a whole) in turn includes conditions of different types, some of a more general nature, others linked to the principle of non-discrimination.

The more general conditions are set out in Art. 326 TFEU and Art. 20(1) TEU (second sentence), which state that enhanced cooperation must comply with the Treaties, and EU law must "aim to further the achievement of the EU, protect its interests and reinforce its integration process",[35] and that it may not concern matters within the framework of the Union's exclusive competences.

This latter requirement was set out differently in the Treaty of Amsterdam. Indeed, *ex* Art. 40 TEU, referring to enhanced cooperation in the area of police and judicial cooperation in criminal matters, demanded that this should respect "the powers of the European Community and the objectives laid down in this Title", whereas in relation to the Community pillar, *ex* Art. 43 TEU merely stipulated that it must not violate the "principles" of the Treaties. The absence of any reference to the powers of the Community in the latter provision had led to the doubt being raised, in the literature, that enhanced cooperation could be used to move the process of integration forward also in new areas, in which the Community had no powers to act. This interpretation was ac-

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[33] ECJ, Judgment of 16 April 2013, *op. cit.*, par. 53.

[34] ECJ, Judgment of 16 April 2013, *op. cit.*, par. 36. According to the Court, the impossibility of reaching a unitary solution as referred to by Art. 20(2)TEU "may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement". On this point, see T. Balagovic, *Enhanced Cooperation: is there Hope for the Unitary Patent?*, Croatian Yearbook of European Law and Policy, 8 (2012), p. 299 ff., esp. p. 310 ff.; J.-V. Louis, *La pratique...*, *op. cit.*, p. 284.

[35] The ECJ, in its judgment of 16 April 2013, *op. cit.*, par. 62, dwelt on this latter condition, underlining that the unitary patent, by conferring uniform protection in the territory of all the member states taking part in the enhanced cooperation, would favour the process of integration compared with a system in which the extent of the protection guaranteed by the patent were defined by national law.

tually contradicted by subsequent provisions in the same Treaty, where it was specified that enhanced cooperation should be used only when the objectives of the Treaties could not be attained by applying the relevant procedures laid down therein: an enhanced cooperation — then as now — could be used only as a last resort, having first established that no Community measure involving all the member states could be adopted, and therefore had to concern areas in which the adoption of a uniform act throughout the Community was possible.[36]

Moreover, this principle was reiterated by the Court in an *obiter dictum* in the *Pringle* case;[37] examining the opportuneness of creating the European stability mechanism through an enhanced cooperation, rather than through a treaty based on Art. 136 TFEU, the Court underlined that "It is clear from Art 20(1) TEU that enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation. However [...] the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM". As highlighted by the Court itself in its judgement on the unitary patent,[38] the fact that the legal basis on which an act of the Union might have been established should refer the Union as a whole, yet also be the legal basis for the creation, by an enhanced cooperation, of acts binding only on the states taking part in the coopera-

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[36] In this sense, see G. Gaja, *How Flexible...*, *op. cit.*, p. 863; H. Bribosia, *Différenciation et avant-gardes au sein de l'Union européenne*, Cahiers de droit européen, 36 (2000), p. 57 ff., esp. p. 66.; B. De Witte, *Old-Fashioned Flexibility: International Agreements between Member States of the European Union*, in *Constitutional Change in the EU. From Uniformity to Flexibility* (edited by G. De Búrca and J. Scott), Oxford, Hart Publishing, 2000, p. 31 ff., esp. p. 55; E. Philippart, M. Sie Dhian Ho, *Flexibility...*, *op. cit.*, pp. 185 and 193.

[37] Judgment of the Court, 27 November 2012, Case C-370/12, *Pringle*, not yet published; reproduced in *Rivista di diritto internazionale*, 96 (2013), p. 580 ff.. For a comment, see for all B. De Witte, T. Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order*, Common Market Law Review, 50 (2013), p. 805 ff.; F. Martucci, *La Cour de justice face à la politique économique et monétaire: du droit avant toute chose, du droit pour une seule chose. Commentaire de l'arrêt CJUE 27 November 2012, Pringle*, Revue trimestrielle de droit européen, 49 (2013), p. 239 ff.. According to L.S. Rossi, *L'Unione europea e il paradosso di Zenone. Riflessioni sulla necessità di una revisione del Trattato di Lisbona*, Il diritto dell'Unione europea, 18 (2013), p. 749 ff., esp. p. 762, the Union's lack of the competences necessary to adopt the European stability mechanism should, as a logical consequence, mean that this mechanism could be adopted by the member states through an international treaty, without the need to carry out a simplified revision of Art. 136 TFEU.

[38] Judgment, 16 April 2013, *op. cit.*, par. 68.

tion itself, far from amounting to a violation of the Treaties, constituted the very *raison d'être* of this form of differentiated integration.

Nevertheless, the establishment of an enhanced cooperation demands more than just the existence, in EU law, of a legal basis allowing an action by the Union as a whole; it is also necessary that the area in which the enhanced cooperation is to be implemented does not fall within the within the category of the Union's exclusive competences. In relation to this condition, the Lisbon Treaty does not modify what was already established in the Treaty of Nice; however, it helps to clarify which sectors fall into this category, providing, in Art. 3(1) TEU, an exhaustive list of them.[39]

With regard to the conditions more closely related to the principle of non-discrimination,[40] under the terms of Art. 326(2) TFEU, enhanced cooperation "shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them."

In reality, however, any form of flexibility, precisely because it involves only some member states, inevitably involves a degree of discrimination. Clearly then, the provisions just mentioned, if taken literally, constitute a major barrier to the establishment of enhanced cooperation,[41] and for this reason must be interpreted with common sense. Respect for the principle of non-discrimination, in particular, should

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[39] This is a point also addressed by Advocate General Bot in his Opinion in the European patent case (delivered on 11 December 2012, *op. cit.*). Indeed, responding to Spain and Italy's argument that the list of exclusive competences in the aforementioned Art. 3(1) TEU was purely illustrative, and that in any case the creation of a unitary patent would fall not within the framework of the Union's shared competences, but within that of its exclusive ones, given that it would fall within the framework of the competition rules necessary for the functioning of the internal market, the Advocate General underlined that the use, in Art. 3(1) TEU, of the expression "The Union shall have exclusive competence in the following areas" was a clear indication that this was indeed an exhaustive list; he also pointed out that the fact that the unitary patent might impact on competition was not a sufficient reason for it to be considered within the framework of the competition rules.

[40] According to J. Wouters, *Constitutional Limits of Differentiation: the Principle of Equality*, in *The Many Faces*..., *op. cit.*, p. 338, all the conditions that, under the Treaties, must be met in order for an enhanced cooperation to be established are essentially related to the principles of equality and non-discrimination.

[41] In this sense, see G. De Búrca, *Differentiation within the Core: the Case of the Common Market*, in *Constitutional Change*..., *op. cit.*, p. 133 ff., esp. p. 144. It should also be noted that, contrary to the terms of the Treaty of Amsterdam (Art. 5A), it is no longer stipulated that enhanced cooperation must not affect citizenship of the Union or discriminate between nationals of member states.

not be assessed by comparing the effects of an enhanced cooperation with the effects that would have been produced had the measure in question been adopted by all the member states, but rather by comparing the situation created following its establishment with that which existed before it came into being.[42] Accordingly trade discrimination or a distortion of competition between the member states can be said to have occurred if an enhanced cooperation leaves the member states outside it at a disadvantage compared with the position they enjoyed before it was established; it is clear, given the reference to trade between member states and to competition, that the more closely a cooperation is related to the key objectives of a common market and freedoms of movement, the greater the concrete risk of violating the non-discrimination principle will be.[43]

As regards the principles that must be respected before an enhanced cooperation can be implemented, the Treaty of Lisbon, unlike the Amsterdam and Nice Treaties, makes no mention of the principle of institutional unity. However, this omission seems to have been merely a question of form, given that the need to respect this principle nevertheless emerges from other provisions of the Treaty. The first clue that this is, indeed, the case is provided by Art. 20 TEU, according to which member states wishing "to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties", expressions which seem to indicate that the enhanced cooperation cannot extend outside the institutional framework established by the TEU and TFEU.[44]

This impression is confirmed by the provisions on the functioning of the Council and other political institutions, which today are almost the same as they were in the Treaty of Amsterdam. Indeed, under Art. 20(3) TEU and Art. 330 TFEU, all members of the Council may participate in its deliberations, but only those representing the member states participating in an enhanced cooperation may take part in the relative vote.[45] The fact that enhanced cooperation affects voting in the

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[42] In this sense, see T. Balagovic, *Enhanced Cooperation...*, *op. cit.*, p. 320.

[43] On this point, see F. De La Serre, H. Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?*, Notre Europe Research and Policy Paper, n. 2, September 1997, p. 12; G. De Búrca, *Differentiation...*, *op. cit.*, p. 148.

[44] In this sense, see J.-V. Louis, *EMU and Enhanced Cooperation*, in *Europe Reloaded, Differentiation or Fusion?*, Baden-Baden, Nomos, 2011, p. 303 ff., esp. p. 316.

[45] This provision does not imply violation of the principle of equality as it is based

Council, but not its composition, illustrates the will, still evident in the Treaties today, to ensure that this form of flexibility is not allowed to affect the composition of the institutions, and to avoid the creation of restricted organs, a circumstance that would, to an extent, give enhanced cooperation a certain autonomy from the institutional structure of the Union.

Also indicative of this is the fact that other political institutions (the Commission and the European Parliament) vote on enhanced cooperations in their ordinary composition. Whereas, in the literature, this circumstance is generally readily accepted in relation to the Commission — a body whose members, representing the interests of the Union as a whole, are required to pledge their independence from their state of origin — some doubts have been raised with regard to the European Parliament, which may even be called upon to intervene in the implementation of a cooperation.[46] Indeed, as has already been pointed out,[47] while it is true that MEPs do not represent their country of origin, it is also true that they represent the entire Union, and not just a part of it, and that allowing MEPs from countries not participating in an enhanced cooperation to take part in the vote on the adoption of measures implementing it might be deemed to be incompatible with democratic principles.[48] Even though this issue had been discussed during the Intergovernmental Conference negotiating the Treaty of Amsterdam, opposition from the European Parliament, together with the fear that the

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on an objective difference between the participating and the non-participating states and, in any case, the states' freedom to join an enhanced cooperation at any time is guaranteed by the Treaties. For more on this aspect, see J.-V. Louis, *Quelques réflexions sur la différenciation dans l'Union européenne*, in *Vers une Europe différenciée? Possibilité et limites* (edited by P. Manin and J.-V. Louis), Paris, Pedone, 1996, p. 33 ff., esp. p. 40; C. Guillard, *L'intégration...*, *op. cit.*, p. 149.

[46] As noted by E. Philippart, G. Edwards, *The Provisions...*, *op. cit.*, p. 94, the European Parliament, having had little involvement in the setting up of an enhanced cooperation, could instead play an important role in its implementation, in situations in which, for example, it is decided that the costs of the cooperation are to be covered by the EU budget, or if it is necessary to adopt acts through a procedure that involves the participation of the Parliament itself.

[47] In this sense, see H. Bribosia, *Les coopérations renforcées...*, *op. cit.*, p. 157, who argues that the lack of provision for interventions by the European Parliament in variable composition is even more incomprehensible in the light of the fact that, today, enhanced cooperation can involve just nine of the 28 member states, and therefore most of the MEPs may have been elected in countries outside the enhanced cooperation in question.

[48] In this sense, see D. Negrescu, G. Truica, *Can EU's Enhanced Cooperation...*, *op. cit.*, p. 13; *Editorial Comment*, *What do we want? "Flexibility! Sort of ...", When do we want it? "Now! Maybe ..."*, Common Market Law Review, 50 (2013), p. 673 ff., esp. p. 680.

emergence of closer cooperation in relation to a variety of matters might lead to undue fragmentation of the work of the European Parliament and confusion at institutional level, ultimately resulted in the exclusion of a solution allowing the European Parliament to intervene in variable composition.[49]

Therefore, institutional unity, even though it is no longer mentioned in the Treaties, continues to be a principle from which enhanced cooperations cannot deviate.

7. *The conditions for establishing enhanced cooperation: relations with states not participating in the enhanced cooperation.*

However, it is the provisions falling within the last of the aforementioned categories of conditions, *i.e.* the one referring to relations between states participating and those not participating in a cooperation, that, above all, give the states remaining outside an enhanced cooperation a chance of blocking its implementation or interfering with its functioning.

Indeed, even though Art. 327 TFEU sets out a sort of *sui generis* principle of fair cooperation, namely the principle that the member states outside a cooperation must not impede its implementation by the states participating in it, the Treaty offers the former a number of instruments potentially able to become a kind of sword of Damocles hanging over the enhanced cooperation itself.[50]

The first of these is provided by Art. 327 TFEU, which states that "Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it".[51] Indeed, given the extremely general nature of the terms used, this provision makes it relatively easy for states outside the cooperation to contest its legitimacy.

The same may be said of the subsequent article (Art. 328 TFEU), which sets out the principle that an enhanced cooperation must be open

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[49] On this point, see H. Kortenberg, *Closer Cooperation...*, *op. cit.*, p. 847.

[50] In this sense, see E. Philippart, M. Sie Dhian Ho, *Flexibility...*, *op. cit.*, p. 185.

[51] A consequence of this principle is that, as stipulated in Art. 332 TFEU, "Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise". As regards relations with states joining the European Union subsequently, Art. 20(4) TEU specifies that "Acts adopted in the framework of enhanced cooperation [...] shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union."

to all the states wishing to participate in it; this is a provision susceptible to being used as a weapon by states wanting to hinder the functioning of the cooperation. Indeed, particularly in areas in which decisions must be taken unanimously,[52] a state joining an enhanced cooperation in order to impede its functioning would have the faculty to veto the adoption of any act within the cooperation and thus be able to force the states participating in it to accept a compromise that would fall short of what had been intended. In a sense, as already underlined, the complete openness, from their inception, of enhanced cooperations is a condition that risks undermining the rule that enhanced cooperation in any area other than that of foreign and security policy must be authorised by the Council voting by qualified majority.[53] Indeed, the impossibility for a single state of vetoing the authorisation of a cooperation must be set against the possibilities that are instead open to it: that of contesting an enhanced cooperation simply by demonstrating that it would impinge on its competences, rights and obligations, and that of participating in the creation of a cooperation with the precise objective of preventing it from working.

It should be noted that the principle of enhanced cooperations open to all member states is actually fully respected only during the phase of creating a cooperation, given that the participation of a member state in an existing enhanced cooperation is subject to certain limitations. Indeed, according to Art. 331 TFEU, the participation of a member state in an enhanced cooperation that is already in progress is subject to a procedure that, in matters not relating to foreign and security policy, involves a preliminary intervention by the Commission, which checks that the conditions of participation are met and, if it eventually deems that they are not, a decision by the Council; instead, within the area of foreign and security policy it is subject to a decision by the Council. Thus, participation is dependent on an evaluation by these institutions.

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[52] According to Art. 333(1) TFEU, "Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously [...] may adopt a decision stipulating that it will act by a qualified majority". Therefore, a switch from unanimity to majority voting is possible, but in any case it requires unanimous agreement in the Council.

[53] On this point, see G. Gaja, *How Flexible...*, *op. cit.*, p. 860, who points out that the principle of openness could actually have a dissuasive effect on a group of states intending to create an enhanced cooperation, should these states be faced with the possibility of being joined by another state that may not have the characteristics that would make it a suitable participant in the enhanced cooperation in question; Id., *La cooperazione...*, *op. cit.*, p. 64; H. Bribosia, *Les coopérations...*, *op. cit.*, pp. 141 and 143; C. Guillard, *L'intégration...*, *op. cit.*, p. 129.

8. *Enhanced cooperation and fiscal harmonisation: the proposal for a Council directive implementing enhanced cooperation in the area of the financial transaction tax*.

The proposal for closer cooperation in the field of the financial transaction tax provides an illustration of how the many restrictions imposed by the Treaties on the establishment of enhanced cooperation can make this form of differentiation difficult to apply.[54] This particular cooperation, authorised by a decision of the Council on 22 January 2013,[55] which was followed by a proposal for a Council directive whose approval procedure is still ongoing, involves eleven EU member states,[56] all belonging to the eurozone.

As already mentioned in the previous sections, the practical application of the mechanism of enhanced cooperation dates back to only 2010 and the adoption of regulation 1259/2010 in the area of the law applicable to divorce and legal separation. This milestone was followed, in 2012, by the regulations 1257/2012 and 1260/2012 implementing enhanced cooperation in the areas of the creation of unitary patent protection and applicable translation arrangements.

While the implementation of enhanced cooperation in the area of divorce and legal separation did not give rise to particular problems, the decision authorising enhanced cooperation in the field of unitary patent protection was opposed by the governments of both Spain and Italy, whose actions for annulment of the relative regulations were dismissed by the European Court of Justice in its judgment of 16 April 2013; furthermore, on 22 March 2013 Spain lodged two actions for annulment of regulations 1257/2012 and 1260/2012, which were also dismissed by the Court.[57] With regard to enhanced cooperation in the field of the financial transaction tax, the above-mentioned proposal for a Council directive was the subject of an opinion of the Council Legal Service,[58] which highlighted several criticalities it presents, while the

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[54] Proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 fin., 14.2.2013.

[55] Council decision 2013/52/EU, *op. cit.*.

[56] Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.

[57] Judgment of 5 May 2015, Case C-146/13, *Kingdom of Spain v European Parliament and Council of the European Union*, not yet published; judgment of 5 May 2015, Case C-147/13, *Kingdom of Spain v Council of the European Union*, not yet published.

[58] Council of the European Union, opinion of the legal service on the proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax (FTT), 6 September 2013.

decision authorising this cooperation was challenged through an action for annulment by the United Kingdom, dismissed by the Court in its judgment of 30 April 2014.[59]

Therefore, whereas, in principle, the application of the enhanced cooperation mechanism to non-economic issues has presented no real problems, when sectors more closely linked to the functioning of the internal market are involved, things have proved less straightforward.[60]

As stated in the explanatory memorandum to the proposed directive on the financial transaction tax, the aims of this directive, whose legal basis lies in Art. 113 TFEU, are to harmonise legislation on indirect financial taxation, ensure that financial institutions make a fair contribution to covering the costs of the recent economic crisis, ensure a level playing field with other sectors from a financial point of view, and create appropriate disincentives for transactions that do not enhance the efficiency of financial markets, in order to avoid future crises.

In seeking to identify the category of activities subject to taxation, the proposal combines the principle of establishment with elements of the principle of issue, thus making it is less advantageous to relocate activities and residence outside the territory of the member states participating in an enhanced cooperation. Therefore, the tax is payable in the presence of any one of the following circumstances: a financial institution has been authorised by the authorities of, or is established in the territory of, a state participating in the enhanced cooperation; a financial institution is established outside the territory of the states participating in the enhanced cooperation, but the other party in the transaction is established in the territory of a participating member state; neither of the parties in the transaction is established in the territory of a member state participating in the enhanced cooperation, but the transaction concerns financial instruments issued in the territory of a participating member state. These criteria will not apply if the subject liable to pay tax demonstrates that there is no link between the economic substance of the transaction and the territory of the member states participating in the enhanced cooperation.[61]

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[59] Judgment of 30 April 2014, Case C-209/13, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, not yet published.

[60] On this point, see *Editorial Comment*, *What do we want?...*, *op. cit.*, p. 676.

[61] The proposal also sets the taxable base and minimum rates for types of financial transactions. As stated in the proposal's explanatory memorandum, "preliminary estimates indicate that the revenues of the tax could be in the order of magnitude of EUR 31 billion annually" and it is envisaged that in the future, for the countries participating in

These criteria for determining the subjects liable to pay the tax are the very aspect criticised in the aforementioned opinion of the Council Legal Service. The main problem is the fact that, under the proposal, the tax would also be payable by financial institutions that are established in EU member states that are not part of the enhanced cooperation, but negotiate financial instruments with subjects that are established in a participating member state. In this circumstance, the Legal Service opines, the genuine link between the financial institution and the participating state that receives the tax, *i.e*. the necessary condition for exercising the power of taxation, would not exist.[62] In other words, the participating state would be exercising its fiscal powers beyond the territory of the states bound by the closer cooperation.[63]

The application of the above criterion, according to the Legal Service, would also result in a violation of the principle of non-discrimination. Indeed, every state taking part in the enhanced cooperation in the area of the financial transaction tax would be required to tax: the financial institutions authorised or established within its own boundaries, but also financial institutions established in non-participating states (which may or may not be EU member states) in relation to financial transactions entered into with parties established within its boundaries. However, it would not tax financial institutions established in participating member states entering into financial transactions with parties established within its own territory. In short, transactions entered into by non-resident financial institutions would be treated differently depending on whether these institutions were established in a state participating or in one not participating in the enhanced cooperation.[64]

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enhanced cooperation, this revenue will replace, in the Union budget, the resource based on gross national income. On this point, allow me to refer to G. Rossolillo, *Autonomia finanziaria e integrazione differenziata*, Il diritto dell'Unione europea, 18 (2013), p. 793 ff., esp. p. 805 ff..

[62] According to the opinion (p. 7), a provision of this kind would also contravene customary international law, and in particular the principle that requires the existence of a relevant link between the state that exercises jurisdiction and the person or situation over which jurisdiction, including fiscal, is exercised.

[63] This extension of its powers, according to the legal service, would not be justifiable even in relation to the objectives of the proposal, namely to increase tax revenues, to transfer some of the costs of the crisis to the financial sector and to discourage excessively risky activities. Indeed, many of the institutions subject to the tax on financial transactions would not have played any part in the origin of the crisis and, as regards the concern over the need to avoid risky activities, many operations subject to the transaction tax would be perfectly safe transactions with real economic substance.

[64] In the event of a transaction between an institution established in a participating member state and one established in a non-participating state, the participating member

Finally, even Art. 327 TFEU, which requires enhanced cooperations to respect the competences, rights and obligations of the member states that are not part of it, highlights the problematic aspects of the proposal under examination. The impact of enhanced cooperation on the rights and obligations of non-participating states seems, indeed, to derive from the fact, highlighted above, that those liable to pay the tax would also include financial institutions that are established in these external states but involved in financial transactions with subjects based in participating states. In other words, the states outside the cooperation, despite having decided not to participate in it and therefore not to tax financial transactions involving institutions established in their territory, would nevertheless see the effects of enhanced cooperation spreading to their financial markets.

The opinion just examined also confirms an aspect already highlighted by some of the literature, namely the difficulty of applying the enhanced cooperation mechanism to the field of tax harmonisation. Indeed, while it is true that this sector was identified by some as a possible area for application of the enhanced cooperation mechanism,[65] it should not be forgotten that countries actually have little inducement to enter into enhanced cooperations in the field of taxation, given the risk that the economies of the participating states might become less competitive as a result.[66] Furthermore, since this whole area is closely bound up with the functioning of the internal market, problems of compatibility with the principle of non-discrimination and with the provisions relating to competition are likely to arise.

In fact, the problems of compatibility with the Treaties raised by the opinion of the Council Legal Service seem to be quite serious: taking the country where a financial institution is based as the only criterion for identifying taxable transactions clearly creates a risk that such institutions will opt to relocate to territories of member states that are not

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state would receive the tax twice, as opposed to only once in the event of a transaction between an institution established in that same participating member state and one established in another participating state.

[65] In this sense, see H. Bribosia, *Différenciation...*, *op. cit.*, p. 67, who points out that the Dutch presidency, in 1997, drew up a list of areas that could, in theory, be the subject of enhanced cooperation and that indirect taxation and, in general, accompanying measures related to EMU featured prominently in it; J.-V. Louis, *Differentiation...*, *op. cit.*, p. 61.

[66] In this sense, see A. Stubb, *The Amsterdam Treaty and Flexible Integration: A Preliminary Assessment*, Paper presented to the International Political Science Association Conference, Brussels, 1997; F. Milner, A. Kölliker, *How to Make Use of Closer Cooperation? The Amsterdam Clause and the Dynamic of European Integration*, European Commission Working Paper, 2000; C. Guillard, *L'intégration...*, *op. cit.*, p. 482.

part of the cooperation; on the contrary, the taxing of institutions that are established in the territory of a non-participating state (but involved in financial transactions with partners established in a participating state) would undoubtedly affect rights and obligations of states that have opted not to be part of the enhanced cooperation.

There thus appear to be only two possible alternatives: i) enhanced cooperations that are relatively ineffective, given that the relocation of financial institutions outside the territory of the participating member states would mean less revenue for the states that have decided to participate in them, or ii) enhanced cooperations that risk being incompatible with the Treaties on the grounds of the effects they would have on the non-participating member states.

9. *Enhanced cooperation as an instrument for* à la carte *integration*.

Ever since the 1990s, in particular, when the Maastricht Treaty extended the concept of flexibility to monetary matters, the differentiation debate within the European Union, despite running into complex attempts at classifying the different forms of flexibility,[67] has focused essentially on two different models, which reflect two different visions of the integration process. The first, which finds its fullest expression in the Schäuble-Lamers report presented to the Bundestag by the CDU/CSU parliamentary group in 1994,[68] sees flexibility as an appropriate instrument for ensuring that a homogeneous group of states, determined to take concrete steps towards greater integration, is able to create a kind of core within the EU, and therefore potentially to act as a vanguard (open to all states wanting to be part of it) spearheading the integration process. The second model, illustrated in the same year by the then British Prime Minister John Major,[69] among others, envisages a kind of *à la carte* European Union, given that it interprets flexibility as an instrument allowing each member state to choose, in each field, whether to cooperate more closely with the other states or avoid more advanced forms of integration.

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[67] See for all, A. Stubb, *A Categorization of Differentiated Integration*, Journal of Common Market Studies, 34 (1996), p. 283 ff.; Id., *Negotiating*..., *op. cit*., p. 123 ff..

[68] *Reflections on European Foreign Policy*, a document presented to the Bundestag by the CDU/CSU parliamentary group on 1 September 1994. On the view that this document strongly influenced the flexibility debate prior to the Treaty of Amsterdam, by engendering, in many member states, the fear of being excluded from the Union's hard core, see A. Stubb, *Negotiating*..., *op. cit*., p. 67 ff..

[69] Address given by John Major at the University of Leiden on 7 September 1994, available at: http://www.johnmajor.co.uk/page1124.html.

The first model assumes that the states interested in differentiation will always be the same ones, even though the core group will remain open to new members; it also assumes that this group will, to an extent, be able to act independently of the states outside it. The second model, on the other hand, far from being based on the idea of giving rise to a sort of subsystem within the EU, seems, rather, to be driven solely by the intention of rendering the EU's decision-making mechanisms more efficient, *i.e.* able to circumvent the right of veto that may be exercised by one or more states on specific matters, preventing those countries wanting to undertake joint initiatives from being able to do so.

This duality of visions had also emerged during the Intergovernmental Conference before the Treaty of Amsterdam,[70] and this fact might potentially have allowed the rules on differentiated integration introduced by that Treaty to reflect both of them. However, if we consider the functioning of the mechanism of enhanced cooperation, also in the wake of the changes introduced by the Lisbon Treaty and in the light of its concrete applications in recent years, it is clear that second model is the one that has prevailed. Certainly, analysing the conditions that, according to the Court of Justice, must govern the establishment of enhanced cooperation, it emerges that many features of this form of flexibility — the fact that enhanced cooperations do not refer to a single pre-established group (each enhanced cooperation concerns a specific group of states);[71] the fact that they must be authorised by the Council, and may be implemented only as a last resort, *i.e.* after having first exhausted every effort to reach an agreement among all 28 member states;[72] the fact that they must remain within the areas of compe-

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[70] On this point see A. Stubb, *Negotiating...*, *op. cit.*, esp. p. 86 ff., who points out that during the negotiation of the Treaty of Amsterdam it was, above all, the French delegation that endorsed the idea of a core group of states advancing more rapidly than the others in the integration process.

[71] In this sense, see C.D. Ehlermann, *Différenciation...*, *op. cit.*, p. 209 ff., p. 210, according to whom "le problème institutionnel est moins influencé par la nature ouverte ou fermée du groupe que par son caractère préétabli ou non préétabli. Un groupe préétabli suggère beaucoup plus l'existence d'un mécanisme de direction distinct que la coexistence de différents groupements ouverts". In fact, the states participating in the four enhanced cooperations thus far authorised (three already established and one still in the planning stage) are not the same ones. The only member states participating in all of them are Belgium, Germany, France and Portugal. Unless one is of the view that a core group of states advancing more rapidly than the others will take shape within the Union indirectly, in other words as the sum of the states taking part in all the enhanced cooperations that have been established, the mechanism of enhanced cooperation thus seems to be inspired more by the idea of an *à la carte* Europe than by that of a two-speed Europe.

[72] On this point, see H. Bribosia, *Différenciation...*, *op. cit.*, p. 106.

tence of the Union, and may not therefore move into new areas;[73] and the fact that they must preserve the existing institutional structure of the EU and therefore cannot create new organs — make enhanced cooperations instruments more useful for getting around the problem of unanimity in certain areas than for creating a subsystem within the EU.[74]

This also seems to have been the reading of the European Parliament, which, in a resolution in 2000,[75] recommended excluding enhanced cooperation in areas not requiring a unanimous vote by the Council, thus showing that it understood enhanced cooperation as a mechanism for circumventing the right of veto and making decision-making mechanisms within the Union more effective.

The fact is that had the member states wanted to embrace a model of differentiated integration that allowed the creation, within the Union, of a more closely integrated core group of states, they would have included, in the Treaties, provisions far more similar to the one contained in the draft Constitution of the European Union presented to the European Parliament by the Institutional Committee in 1994 (the so-called Herman Report). Art. 46 of this document stated that "Member States which so desire may adopt among themselves provisions enabling them to advance more quickly towards European integration, provided that this process remains open at all times to any Member State wishing to join it and that the provisions adopted remain compatible with the objectives of the Union and the principles of its Constitution. In particular, with regard to matters coming under Titles V and VI of the Treaty on European Union, they may adopt other provisions which are binding only on themselves. Members of the European Parliament, the Council and the Commission from the other Member States shall abstain during discussions and votes on decisions adopted under these

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[73] On this point, see E. Philippart, M. Sie Dhian Ho, *Flexibility...*, *op. cit.*, p. 185.

[74] In this sense, see H. Bribosia, *Les coopérations...*, *op. cit.*, p. 160. On this point, see also Louis, *La pratique...*, *op. cit.*, p. 282 ff., who points out that the enhanced cooperation in the area of the law applicable to divorce and legal separation undoubtedly responds to the need for more effective decision-making mechanisms, whereas the enhanced cooperation in the area of the creation of unitary patent protection and the future enhanced cooperation in the area of the financial transaction tax highlight more than anything the many obstacles in the way of the implementation of the mechanism of enhanced cooperation. According to L.S. Rossi, *Cooperazione rafforzata e Trattato di Nizza: quali geometrie per l'Europa allargata?*, Il diritto dell'Unione europea, 6 (2001), p. 791 ff., esp. p. 800, the changes to the mechanism of enhanced cooperation introduced by the Treaty of Nice would instead favour a model inspired by the idea of creating a hard core of states within the Union.

[75] European Parliament resolution on enhanced cooperation, 25 October 2000.

provisions". Therefore, this provision made no reference to the requirement that differentiated integration be a last resort solution, nor did it underline the conditions of prior authorisation from the Council and the involvement of a minimum number of states, or the need not to interfere with the competences, rights and obligations of the non-participating member states. In contrast with the numerous boundaries and conditions imposed by the current Treaties in relation to the establishment of enhanced cooperation, all it demanded was compliance with the objectives and principles of the Union. Finally, a variable geometry mode of functioning was envisaged for all the political institutions, with the result that this article seemed to considerably reinforce the idea of giving a group of states wanting to advance more rapidly than the others the possibility to create an institutional subsystem of its own.[76] In other words, the wording of this article — in contrast to the current provisions on enhanced cooperation — left the member states wanting to advance towards integration plenty of freedom to do so, without being impeded by the member states not wanting to be part of this form of closer cooperation.

10. *The peculiarities of economic and monetary union, a "subsystem" within the European Union.*

With regard to the provisions on EMU, which is of course one of the most important examples of flexibility in the process of European integration, the drafters of the Treaty of Maastricht seem to have been inspired by the first of the above-mentioned models, namely the one geared at creating a more integrated core group of states within the Union. Indeed, when the time came to move into the third phase of EMU, which included the introduction of the single currency, the Council declared that only eleven member states, the so-called states without a derogation, had attained necessary requisites to join it (this number rising to twelve in 2001, with the accession of Greece); the member states that did not possess these requisites (*i.e.* the states with a derogation) would become part of the single currency only from the moment in which those requirements were met.[77] Denmark and the United King-

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[76] According to J.-L. Louis, *Quelques réflexions...*, *op. cit.*, p. 43, the fact that Art. 46 of the Herman Report contemplated variable geometry functioning of the three political institutions also paved the way for the creation of a separate budget for financing the activities covered by closer cooperation.

[77] Today, following the entry into the eurozone of Cyprus, Estonia, Latvia, Malta, Slovakia and Slovenia, the states without a derogation number eighteen. Although Art.

dom, in the meantime, had obtained, through negotiation with the other member states, the right to be excluded from the third stage; this was sanctioned by two Protocols which accorded them special status.

Clearly, then, EMU and enhanced cooperation have elements in common: both these forms of flexibility affect the working of the Council in the same way, envisaging abstention, from the vote, of those states that are not participating (in the single currency or cooperation, respectively),[78] while nevertheless adhering to a general principle of openness towards them.[79] On closer inspection, however, they are found to be based on two entirely different systems of logic or reasoning.

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139 TFEU contains a list of provisions that apply only to the states without a derogation, the treatment of the member states with a derogation and of those with special status is, essentially, the same. On the differences, albeit minimal, between the treatment of the United Kingdom and the states with a derogation, see J. Usher, *Legal Consequences of Non-Participation in the Euro: A View from the United Kingdom*, in *Mélanges en hommage à Jean-Victor Louis*, vol. II, Brussels, Editions de l'Université libre de Bruxelles, 2003, p. 357 ff., p. 361; J.-V. Louis, *EMU...*, *op. cit.*, p. 306.

[78] Indeed, a characteristic of EMU, like enhanced cooperation, is that when it is necessary, within the Council (*i.e.* the organ representing the states), to take decisions on monetary policy, in particular with regard to the measures set out in Art. 139(2), the voting rights of the members of the Council representing member states with a derogation are suspended; corresponding provisions are contained in the Protocols relating to the United Kingdom and Denmark. Instead, the voting arrangements of the other political institutions are not affected by the non-participation of some member states in the third phase of EMU. Therefore, the Council meets in its full composition, but acts only on the basis of the votes of the representatives of the states without a derogation. The Commission and European Parliament, on the other hand, meet and vote in accordance with the ordinary procedures, *i.e.* with the participation of the representatives of the 28 member states. On this point, see O. Clerc, *La gouvernance économique européenne*, Brussels, Bruylant, 2012, p. 331; T. Beukers, *Constitutionalisation of the Eurozone: A Possible Way Out?,* Paper prepared for the workshop "Revising European Treaties", EUI, 11 November 2013, p. 8 ff.. The enhanced cooperation solution was based on a desire to prevent a situation in which the formation of different cooperations involving different groups of states might lead the European Parliament to become splintered into various formations, resulting in a lack of clarity at institutional level; as regards EMU, on the other hand, the fact that the Commission and the European Parliament have the same composition seems to be based more than anything on the marginal role that these institutions play in sphere of monetary policy. On this point, see T. Beukers, *Constitutionalisation...*, *op. cit.*, note 40; S. Marciali, *La flexibilité du droit de l'Union européenne*, Brussels, Bruylant, 2007, p. 401.

[79] Actually, at first glance, EMU seems to be more closed than enhanced cooperation. Indeed, whereas enhanced cooperation, at its inception, is open to any state wanting to be part of it, given that no state can be excluded on the grounds of its economic political or social conditions, access to EMU is subject to a Council decision, whose purpose is to ensure that the member states meet certain requirements set out in Art. 140 TFEU. While this is true, it should not be forgotten, however, that the initial identification of the line-up of states that would participate in the single currency from the outset was undoubtedly politically motivated, with the result that, basically, the only states ex-

This situation can be traced back to the very origin of the two forms of differentiation. The drafters of the Treaty of Maastricht had in fact intended that EMU should be a sort of necessary stage in the integration process that would eventually lead to the actual elimination of the barriers to freedom of movement and culminate in the creation of a fully integrated European Union, in both the economic and the political sphere. The idea was that the Economic and Monetary Union would progressively include all the member states.[80] From this perspective, the first group of states, those without a derogation, were to be the vanguard group that would eventually be joined by all the remaining countries. Therefore, it was initially imagined that differentiation would be a temporary phenomenon, serving mainly as a means of overcoming the difficulties that the process of integration was bound to encounter in the course of the EU's further enlargement following the collapse of the Soviet bloc.

Precisely because it meant sharing a currency (and currency is one of the cornerstones of national sovereignty), EMU was conceived as a first step towards the creation of a not only monetary, but also economic Union, and as a step that would have repercussions on many other areas, such as economic policy coordination, fiscal harmonisation, social policy and employment. Indeed, for the EMU member states, sharing a currency meant sharing the same new needs, different from the needs of the member states with a derogation or with special status; in short, monetary policy differs in principle from other policy areas because it affects, and is closely bound up with, far more areas of EU law.[81]

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cluded were the ones that had actually expressed a desire to that effect. Indeed, even though the transition to the third phase of EMU should be (providing the specified conditions are met) automatic, the United Kingdom and Denmark managed to negotiate with the other member states their exclusion from that stage. Moreover, Sweden was permitted to hide behind its failure to meet certain legal requirements in order to conceal its unwillingness to take part in the single currency. Finally, countries like Italy were included among the states without a derogation despite failing to comply with the parameter relating to indebtedness. In short, the distinction between participating states and non-participating states was therefore determined primarily by the *will* of the states themselves, and not their actual *ability* to take part in the monetary union. On this point, see J.-V. Louis, *The Economic and Monetary Union, Law and Institutions*, Common Market Law Review, 41 (2004), p. 575 ff., esp. p. 604 ff.. On the role of will and capacity in the forms of differentiated integration, see C. Deubner, *Flexibilität und Entwicklung der Europäischen Integration*, in *Der rechtliche Rahmen...*, *op. cit.*, p. 117 ff., esp. p. 119 ff..

[80] In this sense, see F. Pocar, *Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato europeo*, Riv. dir. int. priv. proc., 37 (2001), p. 297 ff., esp. p. 298.

[81] On this point, see J.-V. Louis, EMU..., *op. cit.*, p. 307, who, referring to the time of the Maastricht Treaty, notes that "in a way there was an implicit idea that participation in

The mechanism of enhanced cooperation, on the other hand, seems to respond to a need for a permanent form of differentiation.[82] Indeed, the post-Maastricht Treaty period saw a growing awareness within the EU institutions and member states of the existence, among the states themselves, of different visions of the integration process, and thus also of the impossibility, in some areas, of reaching unanimous consensus due to the will of some states to avoid forms of closer integration. The mechanism of enhanced cooperation was introduced precisely in order to overcome this impasse. It may therefore be interpreted — as indeed may the many opt-outs granted to Denmark, the United Kingdom and Ireland in specific areas — as differentiation that is permanent in nature, but relates to individual policy areas.

The fact that the two forms of flexibility have different origins explains why EMU was allowed to derogate from the principle of institutional unity to which enhanced cooperation should instead adhere; indeed, EMU was based on the belief that the institutions created for the management of monetary policy would, eventually, involve all the EU member states and therefore that institutional unity would ultimately be respected.

If it is true that, as already highlighted, EMU and enhanced cooperation have in common the fact that they preserve the structure and functioning of the political institutions, impacting solely on the vote in the Council, it should not be forgotten that the transition to the third phase entailed the creation of a new institution, the European Central Bank, entrusted with managing monetary policy. It should be noted that the states not taking part in the single currency are not represented in the European Central Bank's two decision-making bodies: the Governing Council and the Executive Board. Indeed, the first of these bodies is composed of the members of the Executive Board and the governors of the national central banks of the euro area countries; the second is composed of the president, the vice-president and four other members, all citizens of eurozone member states; all the members of the Executive Board are appointed by the European Council, with the participation exclusively of the heads of state or government of the states shar-

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the EC would necessarily include, in the medium run, the adoption of the euro ... because of the far-reaching effects of the Monetary Union on other policies. In political terms, many believed that it was impossible for a member State not participating in monetary union to play a significant role in the EC/EU and, in the long run, to remain a member of it."

[82] On the view that the existence of different degrees of integration between the member states plays a rather exceptional and temporary role, see O. Feraci, *L'attuazione*..., *op. cit.*, p. 959.

ing the single currency.[83] Compared with what happens in the Council, therefore, there is a much more marked level of differentiation and the principle of institutional unity appears to have been overridden.[84]

Moreover, over the years and with the increasing realisation that some states will never be prepared to relinquish their monetary sovereignty, and thus that the third phase of EMU will never involve all Europe's member states, this trend towards the establishment of an institutional structure for the eurozone has actually become more pronounced.

First of all, in the "economic" arm of EMU, an informal body, the Eurogroup, has been created, composed solely of the economy and finance ministers of the member states sharing the single currency.[85] Although the Eurogroup is a body with no decision-making powers (but which nevertheless allows the positions of the eurozone member states to be coordinated prior to their participation in ECOFIN meetings), it provides another example of the principle of institutional unity being overridden. In fact, the provisions on voting in the Council allow the states that have not adopted the single currency to take part in the meetings and the discussion preceding the vote. On the contrary, according to the provisions on the Eurogroup, the states outside the single cur-

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[83] There also exist differences between the states inside and outside the eurozone with regard to the capital of the ECB. Indeed, only the former are required to pay the entire subscribed capital. On this point, see S. Marciali, *La flexibilité...*, *op. cit.*, p. 417 ff.. As noted by C. Zilioli, M. Selmayr, *La Banca...*, *op. cit.*, p. 290, "la regola alla base del processo decisionale differenziato all'interno della BCE è semplice: le banche centrali nazionali la cui sovranità monetaria non è stata trasferita alla BCE non votano né partecipano alla definizione e all'attuazione delle decisioni di politica monetaria della BCE". (English translation: The rule underlying the differentiated decision-making process within the ECB is simple: the national central banks whose monetary sovereignty has not been transferred to the ECB neither vote nor participate in the definition and implementation of monetary policy decisions of the ECB).

[84] In this sense, see F. Tuytschaever, *EMU and the Catch-22 of EU Constitution-Making*, in *Constitutional Change...*, *op. cit.*, p. 173 ff., esp. p. 185; J.-V. Louis, *EMU...*, *op. cit.*, p. 306. The only body of the ECB in which all 28 member states are represented is the General Council, whose role is to coordinate between the eurozone countries and the member states outside the eurozone, but it has no real decision-making powers. On this point, see J.-V. Louis, *Differentiation...*, *op. cit.*, p. 47; S. Marciali, *La flexibilité...*, *op. cit.*, p. 414.

[85] According to Art. 1 of Protocol (n. 14) on the eurogroup, "The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission". According to Art. 2 of the same Protocol, the ministers in question shall then, by a majority, elect a president for two and a half years.

rency would lack not only the right to vote, but also the right to participate in the meetings of this body.[86]

A further step towards progressively increasing autonomy for the eurozone within the European Union was taken by the Treaty establishing the European Stability Mechanism, which created two new bodies responsible for ensuring the operation and management of the mechanism itself, the Board of Governors and the Board of Directors, appointed by the member states without a derogation.[87] Finally, a trend in this same direction has also emerged from recent proposals on the future developments of the European Union. Indeed, the Commission, in its communication of 28 November 2012 entitled "A blueprint for a deep and genuine economic and monetary union",[88] seeking to identify the stages towards the achievement of the ambitious ultimate objective of creating "a deep and genuine EMU conducive to a strong and stable architecture in the financial, fiscal, economic and political domains, underpinning stability and prosperity", set the short-term goal of creating a "convergence and competitiveness instrument", consisting of a fund to support the timely implementation of structural reforms in the eurozone member states;[89] and also identified as medium- and longer-term objectives the creation of a eurozone autonomous fiscal capacity[90] and

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[86] Moreover, there is widespread agreement on the need to transform the Eurogroup into a true institution, with decision-making powers for the eurozone, a transformation that, according to some, should pave the way for variable geometry functioning of the Commission and European Parliament. On this point, see C.D. Ehlermann, *Différenciation...*, *op. cit.*, p. 216; J.-V. Louis, *Quelques réflexions...*, *op. cit.*, p. 40; C. Guillard, *L'intégration...*, *op. cit.*, p. 149; O. Clerc, *La gouvernance...*, *op. cit.*, p. 508. On the impossibility of carrying out such a transformation through the mechanism of enhanced cooperation, see P. Vigneron, *Instaurer une coopération renforcée pour l'Eurogroupe?*, in *Mélanges en hommage à Jean-Victor Louis*, *op. cit.*, p. 377 ff., esp. p. 388 ff.; J.-V. Louis, *EMU...*, *op. cit.*, p. 316. Moreover, Art. 12 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, *op. cit.*, has the effect of institutionalising the Eurosummits, too, *i.e.* the meetings of the heads of state or government of the EU member states whose currency is the euro. These meetings, convened twice a year, are attended by the President of the Commission, and the President of the European Central Bank is invited to them. The Eurosummit members appoint a president by simple majority. The president has a two-and-a-half year term, coinciding with the term of office President of the European Council.

[87] F. Tuytschaever, *EMU...*, *op. cit.*, p. 185, quoting C. Timmermans, defines the principle of institutional unity within EMU as a *trompe-l'oeil*.

[88] Communication from the Commission, *A blueprint for a deep and genuine economic and monetary union, Launching a European Debate,* COM(2012) 777 final.

[89] In particular, the implementation of reforms should be facilitated by contractual agreements between individual eurozone member states and the Commission, after being discussed in the Eurogroup.

[90] As stated in point 3.2.2. of the Communication from the Commission, "Building

a true economic and fiscal union, with a central budget, its own fiscal capacity, its own Treasury, and the possibility of issuing sovereign debt.

The tangible result of such a transformation, which — as the Commission itself underlines — would require amendment of the Treaties through the procedure governed by Art. 48 TEU, would be the creation of a true economic government of the euro area: the member states without a derogation would thus share monetary, fiscal and budgetary policy, and would emerge as a more integrated core group within the Union, equipped with its own institutional structure.[91]

11. *Enhanced cooperation and the future development of EMU*.

The Commission's proposals just mentioned, which, moreover, were taken up by the European Parliament in a recent resolution[92] and partly reiterated in subsequent communications[93] and in the December

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on the experience of systematic ex-ante coordination of major structural reforms and the CCI, a dedicated fiscal capacity for the euro area should be established. It should be autonomous in the sense that its revenues would rely solely on own resources, and it could eventually resort to borrowing. It should be effective and provide sufficient resources to support important structural reforms in a large economy under distress".

[91] As well as representing a departure from the principle of institutional unity, EMU also resulted in a violation of the principle of non-discrimination, and thus in a further barrier to the establishment of enhanced cooperation. Indeed, Denmark and the United Kingdom were permitted to refrain from taking part in the third phase of EMU even though both these counties possessed all the requirements necessary for participation. This has resulted in two different problems. First of all, this possibility is not granted to states that will join the single currency in the future or to those that joined it after 1 January 1999, the date set by the Treaties for the start of the third phase of EMU. Second, EU law reserves exactly the same treatment both for these two countries that have refused to participate in the monetary union and for the states that, instead, cannot be part of it because they lack certain requirements: in other words, it applies the same treatment in two different situations (lacking the will and lacking the capability are, after all, two different things). On this point, see F. Tuytschaever, *EMU*..., *op. cit*., p. 180. Such uniformity of treatment might be justifiable were all the member states ultimately destined to join the single currency; however, given that it is now clear that the United Kingdom and Denmark have no intention of relinquishing their monetary sovereignty, some (in this sense, see C.D. Ehlermann, *Différenciation*..., *op. cit*., p. 215; J.-V. Louis, *Quelques réflexions*..., *op. cit*., pp. 40 and 43) have proposed the introduction of different treatments for states that do not want to join the monetary union and those that do not yet possess the necessary requisites. In particular, while the former would be excluded from participating in the discussions and votes in the Council (and eventually, in the future, in all the political institutions) when the decisions to be taken are relevant only to the states participating in the third stage, the latter would have to refrain from voting but could nevertheless participate in the discussion. In this way, different situations would correspond to different treatments for the two groups of states, in line with the principle of non-discrimination.

[92] European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)).

[93] See Communication from the Commission to the European Parliament and the

2013 European Council Conclusions,[94] only reiterate, with clarity, the basic differences between EMU and enhanced cooperation. Indeed, the Commission, in relation to EMU, does not consider separately the individual sectors involved, but instead provides a global view of its future developments, given that its different aspects — fiscal, economic, budgetary, institutional — are closely intertwined.

In this framework, the tax on financial transactions is also indicated as a useful instrument, even though the institutions refer to it only in passing in the abovementioned documents. However, the Commission and the European Parliament, instead of seeing the introduction of this tax as an action in its own right, unrelated to other aspects of EMU, seem to set it within the context of an overall picture that makes it possible to overcome the previously mentioned concerns regarding the proposal for enhanced cooperation in relation to this same tax.

If the creation of a financial transaction tax is understood as a means of creating an initial autonomous fiscal capacity for the euro area, and thus for increasing the resources available to the Economic and Monetary Union, which would be channelled into a separate eurozone budget, it will clearly concern all the member states that have relinquished their monetary sovereignty; at the same time, however, the disadvantage, for institutions based in eurozone countries, of being subject to a further tax will be offset by the benefits to be derived from the availability, in an additional budget applying only to the eurozone states, of resources that can be used to address imbalances between member states and to support growth and development. The risk (inherent in the enhanced cooperation proposal) of this tax increasing the imbalances between the eurozone states, being applied only to some of them, or causing parties involved in financial transactions to move on mass to states where the tax is not applied, would thus be eliminated.

These last considerations should also be borne in mind when considering the first steps that can be taken towards a deep and genuine economic and monetary union. In fact, while realisation of many of the objectives set by the Commission and the Parliament implies Treaty amendment under the procedure provided for in Art. 48 TEU, some advances towards the final objective can already be achieved — as underlined by these institutions themselves — by using the flexibility instruments currently offered by the Treaties.

Council, *Towards a Deep and Genuine Economic and Monetary Union, The introduction of a Convergence and Competitiveness Instrument*, COM(2013) 0165 final.

[94] European Council – 13/14 December 2012 – Conclusions, EUCO 205/12.

For the reasons outlined above, enhanced cooperation does not appear to be a suitable instrument for this purpose. Indeed, the many conditions to its implementation, imposed by the Treaties, together with the fact that this is a form of cooperation open to all the member states and not a pre-established group of states defined by their sharing of a single currency, risk turning it into an obstacle to completion of EMU rather than a first step in this direction.

The EU institutions, too, seem to be aware of these difficulties. The Commission, attempting to identify the legal basis on which the abovementioned instrument of convergence and competitiveness might be based, refers in fact to Art. 136 TFEU, or alternatively to the possibility of resorting to Art.352 TFEU "if necessary by enhanced cooperation". Even though the use of enhanced cooperation is taken into consideration, the use of this instrument seems to be indicated as a last resort solution, to which the use of Art. 136 TFEU should be preferred. This latter provision, albeit based on an intergovernmental approach, in fact concerns only the states without a derogation, and thus a pre-established group of states defined by their sharing of a single currency; furthermore, it seems to impose on these states fewer conditions than those to which the establishment of enhanced cooperation is subject, as shown by the provisions of the Treaty establishing the European Stability Mechanism, which is based on this article.[95]

The same need to identify a form of differentiated integration that fits the needs of EMU was subsequently taken up, in more general terms, by the European Parliament, which, after referring, like the Commission, to the possibility of having recourse to Art. 136 TFEU and to Art. 352 TFEU, possibly by enhanced cooperation, stressed that "the treaty changes necessary for the completion of a genuine EMU and the establishment of a Union of citizens and states can build on the existing instruments, procedures, practices and philosophy of differentiated integration while *improving their effectiveness and coherence*", in this way highlighting the need to put in place specific flexibility mechanisms for the eurozone member states.

In fact, to prevent the completion of EMU from being accomplished

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[95] Through application of the simplified revision procedure provided for by Art. 48(6) TEU, and following a decision of the European Council decision on 25 March 2011, a paragraph was added to Art. 136 stating that "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

through the signing of a treaty between eurozone states outside the framework of the Union,[96] it is to be hoped that, in the revision of the Treaties, provision might be made — through an amendment of Art. 136 TFEU in order to render it applicable, in the future, to scenarios other than coordination of economic policies, or by providing for a new *ad hoc* mechanism, which could be inspired by Art. 46 of the Herman Report — for a clause[97] that, in general, makes it possible for the states without a derogation to move towards the fiscal, budgetary and economic union on which the survival of the single currency now depends.

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[96] On the view that the many requirements imposed by the Treaties for the implementation of enhanced cooperation are likely to encourage the member states to make use of forms of flexibility outside the institutional framework of the EU, see G. Gaja, *La cooperazione*..., *op. cit*., p. 75; J.-V. Louis, *EMU*..., *op. cit*., p. 324.

[97] Part of the literature proposes the introduction of an enhanced cooperation clause specifically "predefined" for the eurozone (H. Bribosia, *Les coopérations*..., *op. cit*., p. 164) or a flexibility clause similar to the one provided for by Art. 352 TFEU, but specifically for the eurozone (T. Beukers, *Constitutionalisation*..., *op. cit*., p. 1 ff.).

The ECB's Quantitative Easing Programme: Necessary, but Not Enough

ALFONSO SABATINO

Introduction.

The decisions taken by the Governing Council[1] of the European Central Bank (ECB) on Wednesday 3 December 2015, and the immediate negative reaction on the financial markets, have re-opened the debate on Quantitative Easing (QE), *i.e*. the programme of public and private bond purchasing introduced by the ECB in March the same year as a means of boosting inflation and reviving the economy of the eurozone.

In this regard, it should immediately be pointed out that the ECB programme, deployed on 9 March 2015, gave results that, with regard to both the above objectives, fell short of the initial expectations. And it is this circumstance that led the Governing Council, after analysing the results of economic and monetary analyses conducted by ECB internal bodies, to reach the decision, over recent months, to step up its efforts to increase the circulation of money.

In the light of these events, it is opportune to examine carefully the nature and real objectives of this monetary manoeuvre, the instruments used and, above all, its effectiveness.

In order to assess the ECB's programme, it is necessary, therefore, to examine a series of issues:

1. QE: an "unconventional" monetary instrument;
2. the reasons that prompted the ECB to adopt QE measures and then extend the programme;

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[1] The Governing Council is the ECB's main decision-making body and it is composed of the six members of the Executive Board plus the governors of the national central banks of the 19 euro area countries. It takes its decisions by majority according to a system of rotation of voting rights. This is a mechanism that allows it to make decisions without falling into the veto trap, https://www.ecb.europa.eu/ecb/orga/decisions/govc/html/index.en.html.

3. the ECB's observance of the Treaties and the principle of monetary stability;
4. the relationship between monetary and fiscal policy and the economic government of Europe;
5. the eurozone's real chances of reviving growth and employment;
6. QE in the USA and its international repercussions;
7. the complementary measures needed to revive the European economy.

Quantitative Easing: an "unconventional" monetary instrument.

QE is a method adopted in recent years by the major central banks of the OECD area in order to create new liquidity that can be injected into the financial system. It is used in periods of deflation, when commercial banks are reluctant to lend money to private individuals and businesses and there is no possibility of resorting to the "conventional" solution of reducing interest rates, since these have already fallen to zero or thereabouts. In these circumstances, central banks may decide to create money by unconventional means, through the purchase of financial assets (private and public equities and bonds), in order to increase the money in circulation and/or improve the budget structure of credit institutions and provide them with the means to grant more loans.

A key objective of this strategy is to bring inflation within the economic system close to (but always below) 2 per cent, a target believed by the main central banks to guarantee monetary stability, since it prevents prices from falling below the cost of production and thereby exposing businesses to losses and the risk of bankruptcy. Other related objectives are to revive economic growth and employment.

However, simply injecting liquidity into the financial system does not necessarily mean that this will immediately be fed into the economic system. There is always a risk that liquid assets obtained from the sale of government bonds could end up being deposited in the central bank. To avoid this, a central bank implementing QE combines the purchase of public and private bonds with the adoption of a negative deposit rate.

Schools of economics highlight two possibly critical aspects of this method that should be monitored carefully: 1) QE, in boosting inflation, also tends to increase the value of the financial and capital assets of those who already possess them, and this inevitably exacerbates social inequalities; 2) the purchasing of government bonds by central banks pushes up their price and consequently reduces their yield; while this eases the public debt burden on the issuing state, it also provides an incentive to postpone consolidation. Either way, the QE operation

should go hand in hand with government policies of income redistribution and fiscal consolidation.

These are the aspects that underlie the reservations expressed by the *Bundesbank* over the ECB's programme. Furthermore, the devaluations induced by QE policies are a further cause for concern, as they could give rise to a currency war between major world currencies.

The ECB's operation comes in the wake of other QE operations deployed, always with controversial results, elsewhere in the world: by the Bank of Japan, the Bank of England and the US Federal Reserve (Fed). The Bank of Japan, after reducing the cost of money to zero, has repeatedly resorted to QE in order to counter the deflation in its domestic economy that had already set in in the late 1990s. The latest Japanese QE programme, amounting to the equivalent of 1.4 trillion dollars, was authorised by the country's prime minister Shinzo Abe in 2013 for a period of two years; to date, its results appear disappointing in terms of reviving inflation, but very positive for the Japanese economy[2] and for exports, which have benefited from the devaluation of the yen.

The Bank of England implemented this policy in 2009. Between March and November that year, it acquired financial assets, mainly government bonds, worth 200 billion pounds. Further purchases followed: 75 billion in October 2011, 50 billion in February 2012, and 50 billion in July 2012, amounting to an overall total of 375 billion pounds. The bank has made no further purchases since 2012, but as the funds linked to maturing securities were reinvested, the UK's QE stock continues to stand at 375 billion pounds. The Bank of England has kept interest rates on hold at 0.5 per cent since 2009 and its chief economist recently expressed doubts over the wisdom of a possible rate hike, given the persistent weakness of inflation in the UK.

In the USA, the Fed responded to the explosion of the financial crisis in 2007 by rapidly cutting interest rates from 5.25 per cent to zero. The arrival of next crisis, in 2008, prompted its president Ben Bernanke, towards the end of that year, to launch the first round of QE. This consisted of the purchase of so-called toxic assets — these purchases served to free up the balance sheets of the banks and financial institutions — and US Treasury bonds. In June 2010, the Fed's balance sheet stood at US$ 2,054 billion, having risen from a pre-recession lev-

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[2] Cf. Kenji Ueno, *Giappone, probabile terzo Quantitative Easing in arrivo,* http://www.soldionline.it/analisi-scenario/giappone-probabile-terzo-quantitative-easing-in-arrivo.

el of 7-800 billion dollars. In November 2010 the Fed embarked on a second round of QE, buying further Treasury bonds worth a total of 600 billion dollars. In September 2012, it adopted a third round: the purchase of government bonds and ABS[3] to the value of 40 billion dollars per month, which subsequently reached 85 billion per month. In the US, the process of winding down (or tapering) of QE began in September 2013 and ended on 29 October 2014. Subsequently, with the Fed's balance sheet standing at a remarkable US$ 4,300 billion, the new president of the Federal Reserve, Janet Yellen, examined the possibility of a rate hike, which was duly announced on 16 December 2015,[4] albeit leaving the door open for a possible backtrack. This move provoked reactions, both in the United States and in emerging countries, linked to fears of an end to the flow of easy money.

Finally, in 2014, the ECB also decided to consider the possibility of launching a QE operation. This decision followed its attempts to resort to longer-term refinancing operations (LTRO) as a means of resolving the difficulties created by the crisis. Indeed, through auctions (one in December 2011 and the other in February 2012), the ECB granted commercial banks three-year loans at attractive interest rates, secured by selected government bonds. Although the LTRO plan resulted in an expansion of the ECB's assets to 3,000 billion euros, the effects on the production system were limited as the banks preferred to redeposit the available funds with the ECB or use them to feed speculative financial transactions. In 2014, a new plan of targeted longer-term refinancing operations (TLTRO), which consisted of longer-term bank loans granted as a form of credit support for manufacturing industries, gave similarly disappointing results.

The reasons that prompted the ECB to adopt QE measures and then extend the programme.

The BCE's ambitious QE programme, launched on 9 March 2015, was welcomed by a large section of the business and political worlds.

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[3] ABS stands for asset-backed securities, which are financial instruments based on loans made by banks to businesses. An ABS is a set of real loans incorporated into a single financial security that, like a bond, has a price and a daily quotation. Its redemption value is linked to the effective repayment, by businesses, of the underlying loans when they reach maturity.

[4] On December 16, 2015, the Fed decided to raise its key interest rate to 0.25 per cent. Furthermore, if the state of the economy allows it, there are likely to be three further increases, each of 0.25 per cent, in 2016, after which the rate will continue to rise, to reach 3.25 per cent in 2018.

The ECB's stated objective, in line with its statutory mandate to safeguard monetary stability, was to bring the average inflation rate of the eurozone, which was slightly negative at the time, to a level close to 2 per cent of the eurozone's GDP.

The financial market reacted positively from the outset, and this was apparent both in anticipation of the measure and following the official announcement of 22 January 2015, and in any case in the run-up to its actual deployment on 9 March the same year. Share prices were soon seen to be rising rapidly, albeit with temporary interruptions due to uncertainties generated by the negotiations on the Greek debt initiated by the government of Alexis Tsipras following his electoral victory on 25 January. In this regard, it is worth recalling that the ECB president, Mario Draghi, speaking on 22 January, had already ruled out the participation of Greek government bonds in the QE programme, due to the risks related to the precarious state of Greece's finances.

The announcement of the QE programme had other immediate effects: the appreciation of the Swiss franc, decided by the Swiss Central Bank, and the devaluation of the euro against the dollar, which had a positive impact on the EU's exports to non-member countries.

To understand the full significance of the operation, it is necessary to refer to the address given by Mario Draghi at the European Banking Congress on 21 November 2014.[5] On that occasion, Draghi confirmed the ECB Governing Council's inclination to activate a plan for the purchase of covered bonds, held in the portfolios of banks, as a means of allowing the latter to expand their loans to households and businesses. He also referred to the difficult economic situation in the euro area and its fragile growth prospects, due to the low level of investments and inflation; in particular, he warned of the risk of an excessively "prolonged period of low inflation [becoming] embedded in inflation expectations", a statistical concept that fails to take into account current temporary factors such trends in energy and food prices.

In short, on the basis of the ECB's internal surveys, Draghi warned of the possibility of Europe having to reckon with a long period of falling prices, which would: a) impact negatively on the strategic choices of companies and make it less appealing for them to invest (due to the difficulties they would have establishing remunerative prices for their products, and the increase in real interest rates on invested capital); and b) reduce the power of workers to negotiate higher wages, as

[5] https://www.eb.europa.eu/press/key/date/2014/html/sp141121.it.html.

well as their chances of seeing an increase in the purchasing power of their pay. In other words, the ECB president was concerned about the prospect of incorrect functioning of the production system, on both the supply side and the demand side.

All this explains the decision of the ECB Governing Council, announced by Draghi on 22 January 2015, to launch a programme, set to run from March 2015 to September 2016, of monthly purchases of 60 billion euros' worth of public and private bonds with maturities of between two and 30 years (the programme thus envisages total purchases worth 1.14 trillion euros). To appease the *Bundesbank* and some Nordic members of the Council, provision was made, within the mechanism, for only minimal sharing of the debt-related risks among euro area countries. Accordingly, it was established that the national central banks were to purchase bonds from their own country's credit institutions or government agencies (according to their stake in the ECB) to cover 80 per cent of the programme. This meant that the ECB would assume the remaining 20 per cent risk; in reality, however, the ECB actually assumed only 8 per cent, given that the remaining 12 per cent had to be made up by purchases of securities issued by Community institutions (EBI and EFSF/EMS). Moreover, the eurozone national central banks were not authorised to purchase more than 33 per cent of their own country's government bonds, or to purchase more than 25 per cent of any single bond issue.[6]

The operation was intended to free up the portfolios of banking institutions from the fixed assets represented by public and private bonds, inject liquidity into the system, and boost the eurozone economy through an expansion of credit facilitated by the rock bottom interest rates. The risk that the banks might, in reality, not circulate the liquid assets obtained, instead depositing them in the ECB, was averted by the fact that the ECB would apply a negative rate (-0.20 per cent) on these deposits, and also by the fact that the ECB's main refinancing rate still stood at the record low of 0.05 per cent set on 10 September 2014. The

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[6] These restrictions were introduced to avoid surreptitious financing of emissions of bonds by national central banks and to keep the economy's financing channels open. Indeed, the national central banks can sell a limited quantity of the public bonds in their portfolio to the ECB, however, since they have to deprive themselves of the yield, albeit limited, that these bonds offer, they have to make sure that the funds obtained from these transactions are used in credit operations that will make them interest rather than remaining idle in their accounts, a situation that would be damaging to them. The national central banks can also sell bonds in order to buy other higher yielding ones, but current rates on public bonds do not encourage this practice.

reasoning of the ECB was that these measures would induce commercial banks to increase their loans to households and businesses, invest in equities or real estate, and make direct investments abroad. In turn, all this was expected to arrest deflation and bring about a recovery of the economy.

It was thus an "unconventional" monetary policy action, designed to impact both on demand, by facilitating consumption, and on supply, by providing incentives for investment.

In truth, however, the period between March and November 2015 failed to bring decisive developments as regards either the eurozone GDP or the level of inflation.[7] According to forecasts by the ECB's internal departments, the rate of growth (expressed as a percentage of eurozone GDP) is now expected to be 1.5 per cent for 2015 (rising from the 1.4 per cent predicted in the summer of the same year), 1.75 per cent for 2016 (unchanged), and 1.9 per cent for 2017 (up from the original forecast of 1.8 per cent). Inflation rates are predicted to be 0.5 per cent higher than those recorded prior to the introduction of QE, and in detail to be 0.10 per cent for 2015, 1 per cent for 2016, and 1.6 per cent in 2017 (down from the original forecast of 1.7 per cent). All this adds up to a picture of slowly rising inflation.

For these reasons, on 3 December 2015, the ECB, wanting to bring about an overall strengthening of the favourable impact of the measures deployed as from June 2014, decided:

1. to lower the negative rate on bank deposits from -0.20 per cent to -0.30 per cent;
2. to extend the bond purchasing programme (originally due to end in September 2016) to March 2017, reserving the possibility, thereafter, to prolong QE further, if necessary;
3. to reinvest funds from bonds coming to maturity in the QE period so as to maintain the level of liquid assets in the financial system;
4. to include bonds issued by eurozone local and regional governments in the list of purchases;
5. to continue with the 60 billion euro monthly purchases;
6. to continue its main refinancing operations at least until 2017.

The ECB has thus undertaken to increase the total injection of liquidity through its QE programme from €1,140 billion to €1,500 billion.

In view of the financial markets' immediately negative reaction to

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[7] Cf. Mario Draghi, *Introductory Statement to the Press Conference*, Frankfurt, 3 December 2015, http://www.ecb.europa.eu/press/pressconf/2015/html/is151203.en.html.

the above measures, it should be stressed that it was certainly not the ECB's intention to encourage financial investors' speculations on zero, or quasi-zero, interest rates to shift towards more remunerative assets, and neither did it wish to endorse a weakening of the national governments' commitment to fiscal consolidation.

In words, it can be argued that the BCE's measures are focused on fighting deflation and the economic crisis that is afflicting the eurozone. It can also be added that the decisions reached on 3 December send out a very clear message to the financial markets and governments, on a par with Draghi's "whatever it takes" remark in July 2012.

Indeed, it is one thing maintaining interest rates at zero, or close to zero, in order to help governments keep their borrowing costs in check, or injecting into the banking system the liquidity needed to promote lending to households and businesses; it is quite another thing endeavouring to meet the expectations of easy money of speculative adventurers or those wanting to postpone the governments' much needed fiscal consolidation.

This clarification is necessary in order to ensure that the BCE's monetary policy operation is set in its correct framework, also in the light of the analysis that the ECB's internal services have been developing for some time and which Draghi has been explaining ever since the time of his meeting with the central bankers at Jackson Hole (Wyoming, USA) in the summer of 2014.[8]

In addition, Mario Draghi, meeting the press on 3 December 2015, duly recalled the responsibility of governments to ensure sustainable fiscal policies in order to sustain market confidence. He went on to exhort the eurozone governments to ensure a favourable environment for investments given the ability of the latter to affect current demand and the potential for future growth, provided that appropriate structural policies are deployed.

The ECB's observance of the Treaties and the principle of monetary stability.

The fact that the ECB decided to adopt a QE programme of the kind already implemented by other major central banks, namely the Fed, the Bank of England and the Bank of Japan, should not allow us to be misled over the institutional correctness of its action.

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[8] https://europeancentralbank.wordpress.com/2014/08/22/discorso-di-jackson-hole-2014.

It should be clearly understood that, contrary to the practice followed by other central banks outside the eurozone, the operations conducted by the European System of Central Banks (ESCB) are certainly not direct purchases of government bonds. Such purchases would be tantamount to funding the issuer, a practice that is prohibited under Art. 123 of the Treaty on the Functioning of the EU (TFEU). In the course of the crisis of recent years, Mario Draghi and his predecessor Jean-Claude Trichet have both made bond purchases, but all these concerned the portfolio stocks of commercial banks, in other words, they always operated on the "secondary market", being careful to avoid assuming the role of "lender of last resort" to the governments. In reality, these operations always amounted to the injection of liquidity into the credit circuits in order to support the economy, in accordance with the ECB's statutory mandate, under Art. 127 TFEU, to safeguard monetary stability. Reference to Art. 130 is also necessary in order to underline that the ECB took its decisions on QE in full autonomy, but with close attention to the state of the European economy.

It should be stressed that the objective of monetary stability (whose corollary is sound public finances), introduced through the Maastricht Treaty and the creation of the single currency, represents a decisive innovation in terms of protection of the democratic system and the citizens' control over public spending.

In fact, it should be underlined that independence of the central bank, a concept introduced into Europe's evolving "constitutional" framework, constitutes a great democratic revolution that effectively removes the "mint" from the hands of the "Prince", in other words removes all possibility of it being manipulated by politicians motivated by electoral concerns.

Independence of the central bank and monetary stability were, indeed, two principles that were imposed on the new Germany rising from the ashes of the Third Reich, precisely for the purpose, respectively, of preventing monetary financing of public expenditure on the military and keeping the state budget under close democratic control.[9]

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[9] As is well known, together with the principle of independence of the issuing institution (central bank), a federal model of state was introduced into the German system. In this way, extensive autonomy was attributed to the *Länder,* which were assigned responsibility for tax and administration, and co-determination was introduced in enterprises with more than 2000 employees. These mechanisms amounted to a strengthening of democratic control over public spending and investment. The cornerstone of the public budgetary system is the *Bundesrat* (federal council), which controls the distribution of

This was a lesson that the Germans learned and appreciated, and today, after having demanded in Maastricht that the ECB be constructed in the image of the *Bundesbank*, it is one that they preach at European level. But since everyone is accustomed to the easy spending and monetary expansion that was fuelled, in other eras, by the dollar, politicians and scholars in the other member states (which would like to see an ECB that resembles the Fed) fail to understand them. It is important that we, as federalists, remember that we have never criticised the "fiscal discipline" introduced by the Fiscal Compact ("rigour for the member states" as Tommaso Padoa Schioppa called it), only the absence of "economic discipline" (*i.e.*, a European development plan) and "democratic discipline" (*i.e.*, federal decision-making powers of the European Parliament — to be exercised in concert with the Council — on EU "own resources"). Today there is much complaint about the effects of austerity in the euro area (recession and deflation) and the high social cost of this approach, but it must be recognised that the responsibility for all the difficulties experienced by the economic system and for all the social hardship lies firmly with the national governments, which, anxious not to relinquish any share of fiscal and budgetary sovereignty, failed to consider and address the other side of the coin ("development for Europe", in the words of Padoa Schioppa).[10]

Monetary stability, which the ECB is required to pursue, prevents arbitrary transfers of resources and guarantees, within the monetary union, structural solidarity:
— between social classes (the cost of inflation is borne by those on a fixed income; Einaudi regarded inflation as the most iniquitous of taxes);
— between generations (inflation erodes the savings made by current

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tax revenues collected by the *Länder* between the federal government and regional governments, and horizontally among the latter, implementing additional transfers in favour of the less developed regions through the mechanism of fiscal equalisation, or fiscal sharing (*Finanzausgleich*). It also implements a multilateral surveillance system to monitor the efficiency of public spending in the various settings. Co-determination, for its part, allows union representatives to monitor corporate resources and investment policies, and is thus, over time, an important means of strengthening the assets of large enterprises and promoting shared production policies.

[10] The 2012 "Four Presidents' Report" entitled *Towards a Genuine Economic and Monetary Union* indicated the objective of the progressive realisation of the banking, fiscal, budgetary and political unions. In particular, it stated: "A fully-fledged fiscal union would imply the development of a stronger capacity at the European level, capable to manage economic interdependences, and ultimately the development at the euro area level of a fiscal body, such as a treasury office. In addition, the appropriate role and functions of a central budget, including its articulation with national budgets, will have to be defined", http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132413.pdf.

generations for their old age and, in the same way, growing government debts result in the transfer of the financial burden to future generations);
— between regions (devaluation and competitive devaluation alter the factors of competitiveness in the exchanges between monetary regions; they interfere with fair competition).

The relationship between monetary and fiscal policy and the economic government of Europe.

The monetary stability rule thus assigns the governments and parliaments the task of tackling, using resources deriving from taxation, a series of issues: the social distribution of income, the promotion of investment and employment, bank bailouts,[11] and public funding of production activities. Its application demands that development objectives be pursued through structural reforms and fair and efficient fiscal policies, concerted income policies, structural policies designed to protect savings and the soundness of the financial system, and structural policies for income redistribution among regions (*Finanzausgleich* or fiscal sharing), the extent and affordability of which can, through calculation of the sustainable and necessary tax burden, be democratically assessed by political representatives and citizens.

These constraints, in fact, are already applied thanks to the Fiscal Compact, the Six Pack and the Two Pack[12] and they create the narrow conditions within which national fiscal policies are debated. However,

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[11] On this topic, see the article by Andrea Bonanni, *A chi tocca pagare gli errori*, La Repubblica, 13 December, 2015. In the wake of the recent collapse of four Italian banks, which wiped out their customers' savings, the author provides a clear explanation of how, through the activation of the EU banking union, following the bank bailouts necessitated by the 2007-2008 crisis, it was decided, at European level, to protect taxpayers against the risk of having to contribute to the rescue of reckless or dishonest administrations. The new European legislation underlines the primary responsibility of bank stakeholders to prevent the cost of the bailout from being borne by public finances (ultimately the taxpayer). At European level a resolution fund has been established for such interventions, financed by the banks themselves, however, it will be eight years before it is fully operational, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.2.4.html.

[12] These constraints were introduced through the intergovernmental Fiscal Compact treaty of 12 March 12 2012 and through the Commission's six-pack and two-pack regulations: http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_ pack _en.htm. The Fiscal Compact, formally called the "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union", which was signed on 12 March 2012 by 25 EU member states and came into force on January 1 2013, introduced the basic rules regulating the balanced budget target to be met by the signatory countries. It should be noted that this objective was also shared by some countries that, for the moment, are not part of the eurozone. The UK, the Czech Republic and Croatia did not sign the Fiscal Compact.

in order to produce all its virtuous effects, this rule, on which the ECB is based, needs:
1. the European system of government to assume a multilevel federal structure based on the financial autonomy of municipalities, regions, states and federation, and on mutual coordination between federated entities in order to allow dual democratic control: parliamentary (by the "lower chambers" of each level of government) and institutional (by the "higher chambers" representing regional entities);
2. the political forces in such a system to become bearers (again at each level of intervention) of realistic and responsible programmes that are capable of opening up, within the body of society, an in-depth debate on long-term choices and on the ultimate goals of government action (planning), also with regard to foreign policy, security and the protection of institutional values.

The model is valid for Europe and for the process of world unification, as well as for the functioning of any supranational monetary union.

It is a golden rule because it takes the "mint" out of the hands of the "Prince" (or, in today's terms, out of the hands of politicians interested only in winning electoral support) and brings it under democratic control (by making monetary stability a constitutional requirement).

The eurozone's real chances of reviving growth and employment.

To understand the reasons behind the ECB's adoption of the QE progamme, it is necessary to refer back to Mario Draghi's address before central bankers meeting on 22 August 2014 in Jackson Hole (Wyoming, USA).[13] On that occasion, after remarking that, in the wake of the 2007-2008 crisis of the financial institutions, unemployment in the USA had begun to decline in 2011, he went on to warn that the euro area faced a second period of growing unemployment due to the sovereign debt crisis. The ECB president explained that the sovereign debt crisis conditioned fiscal policy in different ways in different countries. At this point, it should also be underlined that, in the continued absence of a fiscal union, this conditioning continues to exist, and, as Draghi underlined at Jackson Hole, the ECB in its monetary management has to deal with as many fiscal policies as there are countries adopting the euro. In this setting, in the absence of a common intervention (as implemented elsewhere, in countries whose central banks were able to act as lender of last

[13] Mario Draghi, *Unemployment in the Euro area*, https://www.ecb.europa.eu-press/key/date/2014/html/sp140822.en.html.

resort to the respective governments), the eurozone fiscal consolidation policies have led to declining employment in areas financed by public spending (administration, procurement and public investment, economic aid), which has to be summed with the declining levels of employment being recorded in the private sector. In particular, the euro area countries in difficulty have had to face an increase in the cost of capital, in a context in which monetary policy and fiscal policy are, together, putting the economy under further pressure. Therefore, as the ECB president never tires of repeating, the need to repair the monetary policy transmission mechanism in order to support aggregate demand goes hand in hand with the need to intervene on the labour markets and on the evolution of the economy. The unfavourable conditions, in terms of flexibility and new opportunities, that characterise the labour markets in some European countries mean that people are taking longer to find new jobs and often ultimately abandoning the search. In his Jackson Hole address, Draghi also underlined the structural nature of the crisis, caused by the emergence and establishment of new processes and new products. These changes have contributed to the large-scale destruction of jobs, particularly low-skilled ones, and thus created a need for active policies in a range of areas: education systems, professional training, the product market and the operating environment for business — policies that would clearly be different from country to country since they would depend on each one's specific production capacity and employment situation, and need to promote the process of EU convergence.

Accordingly, given that the European countries cannot compete with the low labour costs of the emerging countries, and also that the European social model must be preserved, it follows that Europe must specialise in high value-added production, and that employment levels can be increased only through coordinated monetary, fiscal and structural measures designed to support aggregate demand and counteract any fall in inflation.

This is why the ECB president, in his address, stressed the importance of giving fiscal policy a key role, while leaving the Fiscal Compact intact. In this sense he suggested that:

1. the existing flexibility for national fiscal policies should be exploited, within the framework of the Treaty rules;
2. a more growth-friendly composition of fiscal policies should be achieved at European level, in particular a reduction of the tax burden on labour in order to give confidence to businesses and encourage investments;

3. more effort should be made to improve coordination of fiscal policies in the euro area;
4. supplementary measures should be taken to encourage EU-wide investments (Cf. Juncker's 315 billion euro investment plan).

It can therefore be underlined that, contrary to the interpretations of some,[14] the ECB president called for fiscal policy to play a decisive role in support of monetary policy as implemented by the ECB. In other words, Draghi called for a coordinated policy, at EU and at national level, designed to support aggregate demand, which would replace the role, as "lender of last resort", that is played by the central banks of Japan, England and the USA.

In fact, more than once, through his contributions to discussion papers on the EU and the revival of the integration process,[15] Draghi has clearly expressed his support for Juncker's 315 billion euro plan aimed at enhancing investment at European level, and also for completion of the monetary union with fully-fledged banking, fiscal, budgetary and political unions.

Quantitative Easing in the USA and its international repercussions.

In the light of Draghi's appeals for substantial European economic policy interventions, it is appropriate to look back at what the USA did in order to overcome the 2007-2008 crisis of the financial institutions. In fact, the 3.5 trillion dollar QE programme deployed by the Fed from 2009 to 2014 (a longer and more substantial programme than the ECB one implemented to date) was associated with a large programme of federal investment spending.

On 19 February 2009, just a few weeks after the start of his first term in office, President Barack Obama signed the American Recovery and Reinvestment Act (ARRA),[16] a public investment plan worth 787 billion dollars, which was increased to 840 billion with the federal budget of 2012.

The plan had three immediate objectives:
— to create new jobs and save existing ones;

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[14] See, among others, Jean Pisani-Ferry, *La sveglia di Draghi per la politica*, Il Sole24Ore, 15 September, 2014.

[15] In addition to the aforementioned report entitled *Towards a Genuine Economic and Monetary Union*, see *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*, http://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en.

[16] Cf. http://www.recovery.gov/arra/About/Pages/the_Act.aspx.

— to support economic activity and invest in long-term growth;
— to bring about an unprecedented level of transparency and accountability in government spending.

The federal government introduced a series of measures: tax breaks and help for households and businesses, funding for specific programmes, such as unemployment benefits, federal aid and loans to boost the economy.

However, in spite of these considerable combined efforts by the Fed and the federal administration, their intervention produced mixed results.

At the level of the real economy, it has been shown that the activation of each stage in the bond purchasing programme was followed, a year later, by a 1 per cent increase in industrial production;[17] the response in employment terms, on the other hand, was slower — an increase of 0.4 per cent. For several years now, the US economy, albeit with ups and downs, has once again been running at growth rates of over 2 per cent, with quarterly rates even coming close to the 4 per cent mark; furthermore, it has absorbed the unemployment generated by the 2007-2008 crisis: indeed, in 2015 the rate of unemployment in the US fell to the level (considered structural) of 5 per cent.[18]

While some consider that the changes in GDP, employment and wages can be attributed to other reasons, and that the impact of QE was actually negligible, others argue that without the QE plan, the USA would have seen deflation at -1 per cent in the third quarter of 2009, a GDP fall of 10 points in the same year, and unemployment rising to 10.6 per cent.

Conversely, the plan seems to have had more noticeable effects on the distribution of wealth, given that share prices have returned to pre-crisis levels. Between 2007 and 2010 the share of wealth held by the top decile of the population rose from 81.3 per cent to 85.6 per cent. In the same period, the expenses-to-income ratio of the wealthiest 40 per cent of the population is reported to have increased, whereas for the second 40 per cent this ratio fell.[19] This suggests that, in practice, QE led to an increase in social inequalities.

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[17] Industrial capacity utilisation in the USA, which stood at 85.0 per cent in 1994-1995, dropped to 66.9 per cent in 2009 before rising to 77.7 per cent in October 2015, http://www.federalreserve.gov/releases/g17/Current/default.htm.

[18] In November 2015, the unemployment rate stood at 5 per cent (whites 4.3 per cent, blacks 9.4 per cent, Asians 6.4) while the employment-population ratio was 59.3 per cent, http://www.bls.gov/news.release/empsit.nr0.htm.

[19] Cf. Stefano Corsaro, *Un bilancio del Quantitative Easing della Fed*, posted on 3 June 2014 on https://www.finriskalert.it/?p=1128.

The reported decline in the rate of unemployment (to 5 per cent of the workforce) should be interpreted in the context of the recent reduction (from 63 per cent to 60 per cent of the population) in the size of the workforce as a whole, which is the result of the exit, from the job market, of the children of the post-WWII baby boom and those who have given up hope of finding work. It is also interesting to note that the areas in which employment has grown the most are those that offer precarious and low-skilled, low-paid jobs (trade, catering, hotels, family and medical support, construction work), with the result that there has been no significant increase in the average wage. However, the increase in employment has driven a rise in domestic consumption,[20] which is compensating for the effects of both a temporary decrease in the level of public investment and the presence of difficulties in the economy and in international politics.

Various factors have contributed to the recovery in the USA: a) policies promoting the "migration of talent" and legalisation of foreigners, which have had positive effects on the production system, on tax revenue and on consumption; b) the increased flexibility of the labour market, which, through lower salaries, has made it possible to kick start the economy; c) the support for entrepreneurship through government policies promoting technological advancement (Cf. ARRA); d) the growth in productivity to 2.5 per cent; and e) the recovery of a degree of energy autonomy (thanks to shale gas and shale oil).

These are, essentially, the economic conditions that have inclined the Fed to opt for a gradual increase in its benchmark interest rate in order to curb speculative behaviour during the recovery. In this regard, there need be no concerns for US exports, given the high added value of US production, while increased imports from the rest of the world should help to keep domestic prices stable.

In actual fact, it is the global economy that should be the main focus of concern, given that the prospect of progressively increasing US interest rates may encourage an inflow of foreign capital to cover the enormous US debt,[21] in particular from emerging countries, depriving them

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[20] Consumer credit, which had dropped to -1 per cent in 2010, rose by 7 per cent in 2014 and by 9.9 per cent in October 2015, http://www.federalreserve.gov/releases/g19/current/default.htm.

[21] Rising interest rates may encourage greater foreign placement of public and private US debt, which cumulatively stands at 270 per cent of GDP. Cf. Giulia Ugazzo, *Il debito Usa è la bomba ad orologeria dell'economia mondiale*, in "Diario dal web", 3 October, 2015, http://economia.diariodelweb.it/economia/articolo/?nid=20151003_351986.

of resources. In addition, rising interest rates objectively increase the cost of these countries' debts in dollars, and of any new credits opened in their favour. Finally, the prospects for international trade could worsen with the possible start of a new era of competitive devaluations; although these would mainly involve the fragile economies, they could also be introduced by the major economies, in addition to the ones already implemented (by China, Japan and the eurozone), — and all this would result in further destabilisation of the international economy.

The complementary measures needed to revive the European economy.

So far, the reactions in the European economy to the ECB's programme of QE have fallen short of expectations. From this perspective, the coordinated intervention implemented by the central bank and federal government in the USA could be instructive.

According to Tommaso Monicelli,[22] for example, QE is not working well in the eurozone because of the climate of low confidence that is pervading its markets and manufacturing industry; indeed:

1. ever since 2008, the rate of money circulation, which indicates the extent to which the money supply is transmitted to economic activity (GDP), has been falling; this is because individuals, families and businesses, perceiving the future as uncertain, are preferring to defer spending decisions and investments;
2. although banks and businesses know that monetary expansion will be absorbed and that loans must be repaid, they are struggling to identify remunerative investments;
3. reviving inflation is difficult in the context of a stagnant economy and persistent unemployment;
4. certain groups of consumers (the unemployed, temporary workers, the elderly) may be unaffected by changes in consumer credit interest rates;
5. the average inflation rate in the euro area is the result of the inflation rates in the different eurozone member states, which are in turn determined by their economic policies; the overriding problem, therefore, is to adjust the relative inflation rates (between the countries), and thus their real exchange rates.

What Monicelli is really highlighting is the generalised lack of confidence within the European economy that derives from the lack of

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[22] Tommaso Monacelli, *QE e inflazione: poche illusioni*, http://www.lavoce.info/archives/38149/qe-e-inflazione-poche-illusioni.

structural coordination between the centralised monetary policy and the heterogeneous national economic policies, an aspect repeatedly underlined by Draghi.

Sound and sustainable national public finances are, indeed, the positive result of the crucial stability mission pursued by the ECB; the budget deficit and excessive debt of any country will always create problems for the economies of other countries, as the Greek crisis so strikingly illustrated.

In a eurozone seeking to overcome the structural differences in development between its members and lacking a common fiscal policy and, above all, a common political strategy, responsibility for making the necessary adjustments lies with the national governments, which find themselves falling into the austerity trap.

No country, Germany included, can afford expansionary policies. In fact, Germany, which in the past few years has had to save its banking system first from the American banking crisis and then from the Greek crisis, has learned its lesson and is now striving to achieve the dual objective of a balanced budget and a reduction of its accumulated debt.[23] Correction of excessive deficit and excessive debt is the shared objective of the 25 countries that adopted the Fiscal Compact. Moreover, the bank bailouts impacted on the finances of a number of important member states; as a result, eurozone public debt rose to 91.9 per cent in 2014.[24]

Furthermore, in the face of their own resistance to the creation of an additional European budget for the eurozone, financed by new own resources, all the euro area countries have found themselves caught in the austerity trap, whose negative effects on them have been multiplied by the fact that the macroeconomic measures to achieve consolidation have been implemented in the setting of a strongly interdependent single market. Europe has seen investments in production cut, welfare systems eroded, and labour costs curbed, all in order to ensure fiscal consolidation. This has naturally resulted in a loss of confidence in the future.

Nevertheless, alongside the damage to the European economic system deriving from the asymmetry between the centralised monetary

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[23] The German plan to achieve a balanced budget in 2015 and a reduction of its debt has necessitated a policy of fiscal consolidation, which in turn has led other euro countries to accuse Germany of not wanting to practice expansionary policies to boost aggregate demand in the eurozone. In any case, Germany achieved a balanced budget at the end of 2014, a year ahead of its deadline.

[24] http://ec.europa.eu/eurostat/statistics-explained/index.php/Government_finance_statistics/it#Debito_pubblico.

policy, serving to control inflation, and the national economic policies, which are deflationary as they are pursuing fiscal consolidation, we should also highlight the need for a change in development strategy, in terms of the promotion of advanced technologies and modification of the labour market, on the basis of what has been done in the USA.

The ECB president, Mario Draghi, has clearly invoked this change in strategy on numerous occasions — every time he has referred to the need for Europe to focus on higher value-added products and the development of a more skilled workforce.

Indeed, because of globalisation, the recent years of economic crisis have seen the establishment of a major structural change in the global economy following the affirmation of emerging countries that are proving able to dominate the field of intermediate and even advanced technology at far lower labour costs than are possible in the industrialised economies. Furthermore, changes in the global production system mean that some important sectors of the European economy are struggling, since they no longer correspond to the needs of the market and the way the modern workforce operates.

Another aspect to consider is the fact that across industry and the services sector we are witnessing a proliferation of labour-saving technologies (3D printers, remote-controlled machines, online banking and shopping services, driverless trains, vending machines).

It is, indeed, significant that in the United States, employment growth has occurred mainly in the trade and services sector, rather than in industry; in Germany, meanwhile, the current 5 per cent unemployment rate conceals the fact that more than 10 per cent of those in employment (over 6 million workers) do part time jobs or have been channelled into the field of community service work as an effect of the Hartz labour market reforms of the past decade.

What these brief considerations show is that, as a result of the change in the types of jobs available and in the mode of production, we now find ourselves faced with a trend towards the formation of a dualistic structure of the labour market. This is reflected in the presence of, on the one hand, a highly qualified category of workers offering specialist skills with high added value, who enjoy high salaries and an employment market characterised by dynamic interaction between supply and demand — this explains the American and German policies designed to encourage the "immigration of talent" —, and on the other, declining and increasingly poorly qualified categories in which demand exceeds supply, giving rise to pockets of structural unemployment.

In the absence of strategic guidelines defined by continent-wide public policies, this whole situation only generates uncertainty and makes it difficult to make business choices. In this regard, it should be recalled that following the crisis of the 1930s, the New Deal provided indications on how to manage a major industrial power and the Beveridge Plan completed the design by introducing the welfare state. Furthermore, the Bretton Woods agreements introduced the instruments necessary to govern the international monetary system: a regime of adjustable fixed exchange rates, the World Bank and the International Monetary Fund.

Today, Europe — the eurozone primarily — needs to work out how to manage the ongoing technological and scientific revolution, what kind of welfare state model is needed to support a new phase of development, and, finally, what interventions are required at global level in order to ensure adequate governance of globalisation through, to begin with, reform of the international monetary system (so as to stabilise the system of exchange rates of major currencies) and reform of the International Monetary Fund. It is a Herculean and ground-breaking task that the national governments are not equipped to undertake; however, it is one that could be taken on by a political class placed at the helm of the EU by a federal reform of the European institutions — a reform giving power to the European Parliament and a global parliamentary mandate to the Commission. This would be a political class capable of recognising Europe's responsibility to create a new and solid global framework, in whose absence the future continues to offer only uncertainty. Furthermore, given the interdependence between economic government and the governance of external relations and security in defining Europe's destiny in today's rapidly changing world and in influencing its development, its mandate clearly could not be limited exclusively to economic government.

These complex issues, only touched upon here, bring us back to the QE programme introduced by the ECB. There can be no doubt that it is a monetary policy action designed to support the European economy and keep it afloat, thereby giving politics time to reform the system of eurozone governance and thus the European Union.

In other words, it is certainly a necessary operation, but it is not enough.

The New Role of the ECB in the European Sovereign Debt Crisis*

LUCA LIONELLO

"If the euro fails, Europe fails".[1] With these words, German Chancellor Angela Merkel summed up the political, even more than the economic, importance of the single currency for the process of European integration. In recent years, the risk of the Economic and Monetary Union (EMU) imploding under the weight of a series of defaults by one member state after another has necessitated the adoption of a series of measures to ensure the financial stability of the euro area. In this context, the European Central Bank (ECB), due to its federal vocation, has emerged as the institution best equipped to tackle the economic and financial emergency, and it has used all the appropriate instruments at its disposal in order to ensure the survival of the monetary union.[2] In shouldering this responsibility, the ECB has necessarily broken free from the role originally assigned to it by the Treaties and become a new driving force of the process of European political integration.

The action of the ECB during the first phase of the crisis.

At the outbreak of the sovereign debt crisis, the ECB was already busy dealing with the effects of the global financial crisis that had be-

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* This essay was written in April 2015.

[1] "Scheitert der Euro, dann scheitert Europa", address by Angela Merkel to the *Bundestag*, 19 May, 2010.

[2] According to D. Wilsher, there are several reasons why the ECB was able to play a key role in the management of the sovereign debt crisis. "First, it is relatively immune from political or legal challenges to its decisions; second, core member states, unable to secure political agreement through parliamentary processes for large-scale transfers to peripheral states, were content to allow the ECB to provide funds that did not feature in their national debt figures and third, its legal remit has turned out to be rather more flexible than previously imagined, allowing it to become, uniquely, a non-sovereign lender of last resort to maintain financial stability." D. Wilsher, *Law and the Financial Crisis: Searching for Europe's New Gold Standard*, European Law Journal, 2014, p. 254.

gun in the US in 2007. The extraordinary measures it had taken to inject liquidity into the financial system suddenly became insufficient when some member states, due both to previous bad management of their public finances and to the considerable cost of rescuing their banking systems, lost the ability to borrow on the international markets. The risk of multiple defaults due to the close interdependence between the member states led to a general destabilisation of the euro area. As levels of interest on the national debts of weaker states rose to unsustainable levels,[3] the European banking sector, which had invested heavily in the bonds of states at risk of default, found itself plunged into an even more acute liquidity and confidence crisis. In this way, a vicious cycle started between the sovereign debt crisis and the banking crisis, which international financial speculation, exploiting the structural fragility of European economic governance, helped to fuel. Basically, the absence of a European treasury able to intervene in support of the EU financial system as a whole left the monetary union vulnerable to the weaknesses of the individual member states.

Faced with the deficiencies of the economic union, the ECB stepped in, introducing various measures of a conventional and an unconventional nature in order to mitigate the effects of the crisis. As well as gradually reducing the interest rate on the euro,[4] it approved a set of "enhanced credit support" measures for the banking and financial sector in the euro area in order to support financing conditions[5] and credit flows.

At the same time, in response to the speculative attacks on the sovereign debts of several member states, the ECB launched an extensive programme of government bond purchases on the secondary market. In

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[3] In the wake of the outbreak of the crisis in Greece in 2009, the cost of national debt rose to unsustainable levels in other countries: in Ireland and Portugal in 2010, followed by Italy and Spain in 2011, and finally Cyprus in 2012. To a lesser extent, speculation also affected the sovereign debt in France and Belgium.

[4] Since July 2011, the ECB has gradually reduced the interest rate on the euro from 1.50 per cent to 1.25 per cent, 1.00 per cent, 0.75 per cent, 0.50 per cent, 0.25 per cent, 0.15 per cent, and finally 0.05 per cent in September 2014.

[5] The ECB has ensured the availability of credit for the European banks in several different ways. First of all, it provided them with liquidity through fixed-rate full allotment auctions, which resulted in the immediate availability of huge amounts of resources. Second, the ECB approved longer-term refinancing operations in order to increase capitalisation of the financial sector. Third, the requisites for receiving credit from the Eurosystem were relaxed. Finally, the ECB authorised the national central banks to provide liquidity to solvent financial institutions or financial groups experiencing temporary liquidity problems.

May 2010 the ECB approved the Securities Market Programme (SMP)[6] worth 209 billion euros. Even though the objective of this programme was, officially, "to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism",[7] its main effect was to curb refinancing costs for countries whose bonds were sold at unsustainable interest rates on international markets.[8]

The second phase: Outright Monetary Transactions and quantitative easing.

Following the introduction, in March 2012, of the European Stability Mechanism (ESM), whose role is to offer conditional financial assistance to countries in difficulty, the ECB was able to develop a more structured policy of bond purchasing on the secondary market. In his famous speech at the Global Investment Conference in London on 26 July 2012, Mario Draghi, the President of the European Central Bank, reiterated the irreversibility of the single currency and declared that the ECB, within its mandate, was prepared to do whatever it takes in order to preserve the euro.[9] The significance of these words, which immediately had the effect of reducing speculation and lowering interest rates on government debt, became clear in September 2012,[10] when the ECB set up a new government bond purchasing programme, called Outright Monetary Transactions (OMT). This programme marks a qualitative leap in the role that the ECB is prepared to play in the face of the sovereign debt crisis. Whereas the SMP had been a temporary measure

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[6] See Decision 2010/281/EU of the European Central Bank of 14 May 2010 establishing a securities market programme. Text available at https://www.ecb.europa.eu/ecb/legal/pdf/l_12420100520en00080009.pdf.

[7] Press release from the European Central Bank, "ECB decides on measures to address severe tensions in financial markets", 10 May 2010. The monetary policy transmission mechanism is the process through which the monetary policies of the central bank affect the real economy. Cf. P. Sester, *Plädoyer für die Rechtmassigkeit der EZB-Rettungspolitik*, Recht der internationalen Wirtschaft, 2013, pp. 454-455.

[8] Indeed, when demand for bonds on the market increases, interest rates fall. Since massive purchasing of government bonds can increase the money supply and consequently the level of inflation, the ECB decided to neutralise its previous monetary policy operations by re-absorbing from the market all the liquidity that it had injected into the system.

[9] "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro, and believe me, it will be enough". Address by Mario Draghi at the *Global Investment Conference* in London, 26 July 2012.

[10] Press release by the European Central Bank, *Technical features of Outright Monetary Transactions*, 6 September 2012.

with an upper limit on the resources available, the OMT programme, on the other hand, made provision for the *unlimited* purchasing of government bonds[11] of countries receiving *conditional* financial support in the framework of the ESM.[12] Essentially, the ECB declared that it was ready to provide unlimited monetary support as long as the country receiving the assistance was implementing a programme of macroeconomic adjustment under European and international supervision. Once again, the ECB justified this programme as a response to the need to restore correct functioning of the monetary policy transmission mechanism, which is influenced considerably by the government securities market.[13] Officially, then, the purchasing of bonds of different countries serves as a means of guaranteeing the basic financial conditions necessary to carry out ordinary monetary policy operations. In reality, however, the ECB's choices now seem to be guided by more fundamental considerations on the causes of the debt crisis and the responsibility that the central bank must shoulder in order to ensure the survival of the single currency. The ECB and its president realise, in fact, that the causes of the sovereign debt crisis are essentially endogenous, in other words, they are linked to the internal fragmentation of the economic union, which still lacks common debt guarantees and effective coordination of budgetary policies. Therefore what is at stake, as a result of the crisis, is not only the smooth management of monetary policy, but also the very survival of the single currency, which has been se-

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[11] The ECB purchases government bonds under the same conditions as private investors (*pari passu*). Even though this constitutes a risk for the ECB, which would suffer hefty losses in the event of a state defaulting on its sovereign debt, the presence of a preference on credit could discourage other purchasers from investing in the debt of the states involved in the purchase plan. Cf. R. Bardy, *Le mécanisme européen de stabilité et la BCE*, RAE-LEA, p. 745; P.J.J. Welfens, *Die Zukunft des Euros*, Berlin, 2012, p. 128. It is to be remarked that, to date, the ECB has recorded good earnings from its purchases of government bonds. Cf. C. De Sousa, F. Papadia, *Has the European Central Bank transformed itself into a hedge fund?,* 8 March 2013, www.bruegel.org.

[12] The ECB did not specify, however, how the support programme would be monitored by the Troika and whether purchased bonds could be got rid of as a means of penalising a state failing to respect the terms of the agreement.

[13] In fact, Art. 18 of the Statute of the European System of Central Banks (ESCB) establishes that the ECB can purchase government bonds on the secondary market in order to guarantee the ordinary management of its monetary policy. The ECB's intervention on the secondary market is envisaged by Council Regulation (EC) No. 3603/93 of 13 December 1993. The current debate on the legitimacy of the OMT programme could make it necessary to specify more precisely the monetary operations that the ECB can carry out. Cf. F. Cromme, *Von ESM und Fiskalpakt zu einem makroökonomischen Rechtssystem der EU,* Die Öffentliche Verwaltung, 2013, p. 596.

riously endangered by financial speculation against the sovereign debts of weaker states. Of course, if the single currency were to disappear, so would any possibility of implementing a monetary policy oriented towards price stability. It is with this in mind that the ECB has intervened to reduce financial instability of the euro area by using all the legitimate instruments at its disposal.

The quantitative easing (QE) measures adopted in January 2015 seem to bear out this new interpretation of the ECB's mandate. The QE progamme is a new plan to purchase, each month until September 2016, 60 billion euros' worth of bonds issued by all the eurozone countries and by the European institutions. The ECB will assume a 20 per cent share of the risks associated with this operation, while the rest will be borne by the national central banks of the Eurosystem. The programme is designed to pursue the objective of price stability in a context that sees the European economy stuck in a prolonged state of stagnation accompanied by dangerous deflationary effects, which could trigger a new recession.

Considering that, for the ECB, price stability consists of keeping the annual inflation rate just below 2 per cent, the massive purchases of bonds by the ECB should ease the current financing situation, making it easier for companies and families to borrow, and thus supporting a recovery of investments, consumption and prices. In this case, too, the objective of the action, in first instance to avoid a deflationary spiral detrimental to price stability, must also be interpreted in consideration of the causes and risks of Europe's ongoing economic crisis. Indeed, if the eurozone relapsed into an acute crisis phase, the financial stability of the monetary union and the stability of the single currency could once again be under threat. Because European governments have not yet succeeded in restoring growth at continental level and the process of fiscal consolidation has not been completed in many member states, the ECB wanted to create the best monetary conditions for bringing about a steady increase in the stability of the eurozone through economic growth underpinned by greater availability of liquidity and lower interest rates. As pointed out by Mario Draghi at the launch of the QE programme,[14] it is up to the governments to take advantage of the situation created by the ECB in order to boost the economy through structural reforms and, at the same time, consolidate their public finances.

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[14] Press conference with the President of the ECB, Mario Draghi, 22 January 2015. The text is available at: www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html#qa.

The legality of the work of the ECB.

The new responsibilities taken on by the ECB in the management of the debt crisis have resulted in a transformation of its role, and this has inevitably led to numerous criticisms, particularly in relation to the less conventional measures, namely the OMT and QE programmes. The main objection to the work of the ECB is that it does not pursue genuine monetary policy objectives, but is intended, rather, to support the finances of some member states, given that the central bank in fact bears some of the risk associated with national government insolvencies within the monetary union.[15] The debate on the legality of the work of the ECB is not confined to the academic field, but has now drawn in the constitutional courts, too. Indeed, in January 2014 the German Constitutional Court (*Bundesverfassungsgericht*), for the first time in its history, raised a preliminary question before the European Court of Justice (ECJ) after receiving a complaint from a group of German citizens (Gauweiler and others) who questioned the legality of the OMT scheme.[16] The judges in Karlsruhe put two fundamental questions to the European court.[17] The first was whether the OMT pro-

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[15] Cf. J. Weidmann, (2013) *Eingangserklärung anlässlich der mündlichen Verhandlung im Hauptsacheverfahren ESM/EZ*. The text is available at: www.bundesbank.de/Redaktion/DE/Kurzmeldungen/Stellungnahmen/2013_06_11_esm_ezb.

[16] The unconventional monetary policy measures taken by the ECB have been harshly criticised by a broad section of the German legal doctrine which argued that the ECB's true objective was to supply monetary financing to member states in breach of the European Treaties. In short, the adoption of the OMT programme would have led to a sharing of the risk of default within the euro area. See, in this regard, M. Seidel, *Europäische Währungsunion und rule of law,* ZEI Working Papers; M. Seidel, *European Currency Union and Rule of Law*, CESifo DICE Report 10 (3) (2012), p. 39; A. Winkler, *EZB – Krisenpolitik: OMT-Programm, Vollzuteilungspolitik und Lender of Last Resort*, Wirtschaftsdienst, 2013, p. 282; M. Vogel, *Die europarechtliche Bewertung der Euro-Rettung*, Zeitschrift für Staats- und Europawissenschaften, 2012, pp. 487-488.

[17] *Decision of the German Constitutional Court*, 14 January 2014. In the Gauweiler case, the German court exercised its jurisdiction *ultra vires*, reaching the non-definitive conclusion that the ECB had in fact operated outside the limits established by the Treaty. On the basis of the Honeywell case law, the judges in Karlsruhe, before taking a final decision, nonetheless raised a preliminary question before the ECJ. Cf. A. Hinarejos, *The Legality of the OMT Programme: The AG Opinion in Gauweiler,* text available at: http://eulawanalysis.blogspot.co.uk/2015/01/is-ecbs-omt-programme-legal-advocate.html. The German Constitutional Court has developed a consistent body of case law on the relationship between European integration and the constitutional identity of the Federal Republic. In particular, Germany's decision to join the monetary union was conditional upon compliance with adequate guarantees of stability. "Diese Konzeption der Währungsunion als Stabilitätsgemeinschaft ist Grundlage und Gegenstand des deutschen Zustimmungsgesetzes". *Judgement of the German Constitutional Court*, 12 October 1993, par. 148. What is more, Art. 88 of the German Constitution states that the func-

gramme can be considered an economic rather than a monetary policy measure, and on this basis in conflict with the ECB's mandate.[18] The second was whether these transactions infringe Art. 123 TFEU which prohibits the ECB from providing member states with monetary financing.[19] The German court put these questions in order to establish whether the work of the ECB undermines the *Stabilitätsgemeinschaft* of the monetary union, given that this is a necessary condition for Germany's membership of the single currency.

In January 2015, Advocate General (AG) Cruz Villalón delivered his Opinion on the question referred for a preliminary ruling in the Gauweiler case. In principle, he confirmed the compatibility of OMT with the EU Treaties. Aware of previous case law of the *Bundesverfassungsgericht* in matters of European integration and of its concerns over the legitimacy of the measures taken by the ECB, the AG recalled the principle of sincere cooperation on the basis of which the ECJ should listen carefully to the doubts raised through the referred question, while the national courts must respect the ruling of the European judge.[20] Hoping that, in this way, the German court would comply with the decision of the ECJ, the AG adopted an eclectic argumenta-

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tions and powers of the *Bundesbank* "can be transferred, within the framework of the European Union, to the European Central Bank, which is independent and is bound to pursue the primary purpose of safeguarding price stability". An evolution of the Economic and Monetary Union towards a transfer union in which the ECB could effectively finance countries in difficulty, pooling the risks associated with their debts, would be incompatible with the German Constitution for two reasons: because it would affect the conditions necessary for monetary stability, and because it would interfere with the exclusive sovereignty of the *Bundestag* in economic and budgetary policy matters. Cf. *Judgement of the German Constitutional Court on the compatibility of the Treaty of Lisbon with German Basic Law*, 30 June 2009, par. 249.

[18] According to the German judges, these doubts were substantiated by the fact that implementation of the OMT programme was to be conditional upon, and go hand in hand with, the activation of a support programme within the framework of the ESM, the fact that the programme was to involve the bonds of only some member states, and the fact that, through the provision of additional monetary support, the limits and conditions of the ESM aid programmes would effectively be circumvented.

[19] According to the German court, these doubts were substantiated by the fact that, in the case of the OMT programme, no provision was made for a quantitative limit on the purchase of government bonds, or for the need to allow a specific interval of time to elapse between the emission of government bonds on the primary market and their purchase on the secondary market by the ECB; neither was it stipulated that all government bonds purchased should be held until their expiry, in contrast with the logic of the market; that no specific requisites should be required regarding the reliability of the government bonds for sale, or that the ECB should not be treated as a preferential creditor for the purchase of securities.

[20] *Opinion of Advocate General Cruz Villalón*, *op. cit.*, Case C 62/14, par. 64-66.

tive strategy, making use of both literal and teleological interpretation of the Treaty rules in order to declare the setting up of the OMT programme legitimate.

First, the AG confirmed that the instruments adopted by the ECB are monetary and not economic policy measures and that, in line with what had previously been stated by the ECJ in the Pringle case, the objectives ascribed to different policies are the only criterion that can be used to distinguish between them.[21] In the case of the OMT programme the ECB wanted to restore correct functioning of the monetary policy mechanism which had been undermined by the speculative attacks against the sovereign debts of some of Europe's member states. Therefore, according to the AG the real objective of the OMT programme was to ensure the conditions that would allow the ECB to pursue a monetary policy geared at achieving price stability,[22] and not to provide economic support to states hit by the financial crisis. The only spilling over of OMT into the sphere of economic policy would derive from the ECB's role in the adoption of the conditionality policy demanded by the ESM. Indeed, under the Treaty establishing the European Stability Mechanism, the international institutions (European Commission, ECB and IMF) and the government needing financial support are required to sign a memorandum of understanding that sets out a plan of macroeconomic adjustment upon which the provision of the aid is conditional.[23] For this reason, in the AG's view, in the case of implementation of the OMT programme, the ECB should, in any case, distance itself from the actions of the Troika.[24] Finally, even though the

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[21] Court of Justice, *Judgement of 27 November 2012, Case C-370/12, Thomas Pringle v Government of Ireland,* (2012) ECR 1 – 413, par. 54-56. According to the ECJ, whereas the monetary union is responsible for pursuing objective of price stability, in accordance with Art. 127 TFEU, the ESM, which is an economic policy instrument, must instead ensure the stability of the euro area as a whole.

[22] "In view of the situation mentioned above, the OMT programme has, so the ECB continues, a two-fold objective, the first direct or immediate and the other indirect: in the first place the aim is to reduce the interest rates demanded for a Member State's government bonds in order, subsequently, to 'normalise' the interest rate differentials and thus restore the ECB's monetary policy instruments." *Opinion of Advocate General Cruz Villalón, op. cit.*, par. 136.

[23] Art. 13.3 Treaty establishing the European Stability Mechanism "the Board of Governors shall entrust the European Commission — in liaison with the ECB and, wherever possible, together with the IMF — with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen."

[24] *Opinion of Advocate General Cruz Villalón*, *op. cit.*, Case C-62/14, par. 150.

Treaty acknowledges that the central bank should enjoy broad discretion in the pursuit of its monetary policy objectives, the ECB must still introduce detailed regulations on the conditions and modalities of application of the OMT programme in order to comply with the principle of proportionality.

As for the second question regarding the prohibition of the provision of monetary financing to euro area countries under Art.123 TFEU, the AG confirmed that this remains a fundamental rule of European economic governance as it ensures the stability of the monetary union.[25] For this reason, it must be applied in a strict and not a formalistic way, and its application should require more than simple ascertainment that the purchasing of securities was made on the secondary market and not on the primary one, which is prohibited by the Treaty.[26] The AG, despite being aware of the potential incompatibility of the OMT programme with Art. 123 TFEU, argued that no conflict with the Treaty exists as long as the bonds are purchased after a market price has naturally developed: "any implementation of the OMT programme must, if the substance of Article 123(1) TFEU is to be complied with, ensure that there is a real opportunity, even in the special circumstances in issue here, for a market price to form in respect of the government bonds concerned, in such a way that there continues to be a real difference between a purchase of bonds on the primary market and their purchase on the secondary market".[27] In this way, the work of the ECB would not undermine the fiscal discipline of the states, as the bond purchases would not be made under conditions excessively favouring states needing to borrow on the markets.[28] Accordingly, the OMT programme would retain

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[25] The Treaty prohibits the ECB from providing monetary support to member states both because this phenomenon, in itself, produces inflationary effects incompatible with the objective of price stability, and because, in this way, the states' fiscal discipline would be weakened, encouraging them to engage in moral hazard behaviours.

[26] *Opinion of Advocate General Cruz Villalón*, *op. cit.*, Case C-62/14, par. 225. Note that the preamble to Council Regulation (EC) n. 3603/93 states specifically that "purchases made on the secondary market must not be used to circumvent the objective of Art. 123 TFEU".

[27] *Opinion of Advocate General Cruz Villalón*, *op. cit.*, Case C-62/14, par. 252. The AG also specifies that it is up to the ECB to evaluate when a market price has actually been formed. In this way, the ECB is guaranteed a wide margin of discretion in the implementation of the OMT.

[28] *Opinion of Advocate General Cruz Villalón*, *op. cit.*, Case C-62/14, par. 262. The objection that, as the ECB had not requested to be treated as a preferential creditor, the OMT could cause losses in the event of sovereign default was rejected by the AG on the basis that it nevertheless concerned a hypothetical scenario. *Opinion of Advocate General Cruz Villalón*, *op. cit.,* Case C-62/14, par. 233-246.

its character as a monetary policy geared at restoring the financial conditions necessary for the pursuit of price stability, and avoid turning into true monetary financing of public finances in the member states.

Towards a more precise definition of the responsibility of the ECB in safeguarding the single currency.

The AG's argument is convincing only up to a point. Just as the ECJ did in the Pringle case, the AG upheld the soundness of the European legal system by subjecting the action of the ECB to a number of conditions designed, in any case, to ensure its legitimacy. Therefore, this opinion, too, fits into the process of jurisprudential legitimation of EMU reform on which the further strengthening of the eurozone depends. However, the effectiveness of the support that the European court and the Advocates General are lending to the process of reform is determined by the strength of their legal arguments. In the case in question, although most of the AG's points of analysis can be shared, he failed to take into consideration the scope of the ECB's action as a whole, in other words, the real risks that the monetary union is running. Instead of merely mending the snags inevitably appearing in the European legal framework as a result of the ongoing process of transformation, the European judge should adopt a more substantive approach, taking into consideration the fundamental objectives of the EU Treaty and the unsustainable asymmetry between the economic union and the monetary union.

As we have already said, the shockwaves created by the outbreak of the sovereign debt crisis undermined the stability of the whole EMU. In fact, the real aim of the financial speculation was to weaken not the single member states, but rather the single currency as a political project. Even though the ECB's official line was that it was acting to guarantee the correct functioning of the monetary policy transmission mechanism,[29] its real objective was actually more ambitious. Since the system of economic governance currently in place made it impossible to intervene sufficiently rapidly and through adequate policies, the ECB took it upon itself to act, using all the instruments at its disposal, in order to protect the single currency. This assumption of responsibility certainly required it to abandon its rigid adherence to the terms of

[29] The ECB has justified its action also recalling the secondary objective of monetary policy, notably to lend support to the economic policies in the Union in accordance with Art. 127 TFEU. Cf. *Opinion of the European Central Bank of 16 February 2011 on economic governance reform in the European Union*.

the EU Treaty.[30] Whereas the AG's opinion confirming the nature of the OMT programme as a monetary measure is satisfactory, the arguments he used to refute the presence of occult monetary financing are rather weak. Indeed, the ECB would be unlikely to purchase government bonds that have first been allowed to reach a market price. After all, the OMT scheme was invented precisely because bond purchase prices established by the market had become excessive and an unbearable cost for the states. Moreover, in a situation of severe financial instability and speculation, the market would be unlikely to establish a balanced price that takes into account both the risk of the investment and the level of availability of bonds. Clearly, then, bond purchases by the ECB are designed to correct distortions in the market, and guarantee the member states access to funding. The parallels between the action of the ECB and that of the ESM confirm the existence of a common objective: indeed, in their different ways, both these subjects want to provide financial support to states in crisis in order to guarantee the stability of the EMU. Whereas the ESM pursues the financial stability of the EMU as a whole, as already stated by the ECJ in the Pringle case, the ECB is interested in monetary stability. This, however, must no longer be understood simply as price stability, but as the safeguarding of the single currency.

In the light of these remarks, the AG's analysis must be completed with two caveats. First of all, a more convincing solution to the apparent incompatibility of the OMT programme with Art.123 TFEU needs to be found. The purchasing of government bonds on the secondary market, given the size and the modalities of these operations, is in fact an indirect and limited form of monetary financing, independent of market logic. This conflict can probably be solved only through the adoption of a teleological interpretation of Art. 123 TFEU. Considering that the ban on monetary financing is meant to strengthen fiscal discipline in the member states, obliging them to seek resources on the international markets under the same conditions as other economic operators, this result is in any case ensured by subjecting the OMT programme to the implementation of the conditionality policy demanded by the ESM.[31] Even though OMT produce a partial risk sharing of sov-

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[30] Cf. S. Cafaro, *L'azione della BCE nella crisi dell'area dell'euro alla luce del diritto dell'Unione europea, op. cit.*, p. 65.

[31] According to F. Allemand and F. Martucci, a relaxation of Art. 123 TFEU was necessary in order to ensure the survival of the monetary union, which is one of the objec-

ereign debts, recourse to them does not weaken the fiscal discipline of member states given that it still requires the application of a macroeconomic adjustment programme under European supervision. In this way, the monetary union remains a *Stabilitätsgemeinschaft*, as required by the German Constitutional Court. Second, it is necessary to identify a more appropriate legal basis for the introduction of the extraordinary operations of the ECB. On the basis of a systematic interpretation of the EU Treaty, rather than the objective of price stability set out in Art. 130 TFEU, the most appropriate legal basis for the work of the ECB can be found in Art. 3.4 TEU, which states that "the Union shall establish an economic and monetary union whose currency is the euro". The safeguarding of the single currency is, in fact, the ECB's real objective, which in turn gives rise to all the other monetary policy objectives. The survival of the euro is the *raison d'être* of the European Central Bank: a monetary policy that respected this Treaty rigidly and to the letter while failing to do everything within its power to save the endangered currency would be inadequate and constitute an infringement of Art. 3.4 TEU. Clearly, these considerations derive from the fact that the EMU does not have an economic government — the body that, in times of crisis, normally acts in order to guarantee the stability of the financial system. This is precisely why the role assumed by the monetary pillar, although not strictly orthodox, may be considered justified on the basis of the ultimate goal that drives its actions. This interpretation of the interventions of the ECB opens the way for less rigid application of the Treaty provisions, including Art. 123 TFEU, in view of the extraordinary crisis situation in which the eurozone still finds itself.

Concluding remarks.

There are two general considerations that can be drawn from the above analysis.

First of all, the need to guarantee the survival of the single currency during the sovereign debt crisis has transformed the role of the ECB; once the guarantor of price stability, now it has become the guarantor of the stability of the monetary union as a whole. The ECB has thus earned itself a new role as *conditional* lender of last resort within the eurozone banking system and sovereign debt market.[32] This role is

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tives of the Treaty. Cf. F. Allemand, F. Martucci, *La nouvelle gouvernance économique européenne*, Cahiers de droit européen, 2012, p. 430.

[32] Cf. P. De Grauwe, *The European Central Bank as Lender of Last Resort in the*

clearly provisional. The ECB is prepared to provide unlimited liquidity to the states and to the banks, but must insist on compliance with certain conditions, in particular, in the case of member states, the signing of a memorandum of understanding within the framework of the ESM. The ECB cannot, on the other hand, become a full lender of last resort because of the weakness of the economic union. The availability of unconditional monetary support could, in fact, lead the states into moral hazard phenomena and could expose the ECB to an excessive risk of losses, creating new threats to the financial stability of the eurozone and the very survival of the single currency.

Second, even though the efforts of the ECB so far have served to keep the worst at bay, they have nevertheless not been sufficient to bring the eurozone out of the crisis. This, as we have said, is because the ECB has acted only as a substitute for an economic union that is still structurally weak, and because it is not equipped to compensate, effectively and definitively, for the absence of an economic government. Growth policies, risk sharing, enhanced competitiveness and the consolidation of public finances can be guaranteed only through the establishment of a European treasury able to flank the ECB and relieve it of the additional responsibilities it has assumed during the crisis. It is therefore urgent to continue the process of transforming the EMU along the lines traced by European Commission's blueprint and the 2012 report by the four presidents,[33] both of which envisage comple-

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Government Bond Markets, CESifo Economic Studies, No 59, 3/2013, 520-535; W.H. Butther, E. Rahbari, *The ECB as Lender of Last Resort for Sovereigns in the Euro Area,* CEPR Discussion Paper, n. 897. This is a function typically fulfilled by national central banks that are the ultimate holders of cash reserves and can therefore meet the needs of the market. The lender of last resort is responsible for avoiding financial panic and avoiding defaults by financial institutions that might trigger chain reactions liable to lead to the collapse of the entire market. A country's central bank is able to fulfil this function because its ultimate source of financing is the power of taxation of the state. In short, a central bank cannot default unless the state to which it belongs also defaults. Cf. D. Wilsher, *Law and the Financial Crisis: Searching for Europe's New Gold Standard,* European Law Journal, 241-283 (2014), pp. 255-256.

[33] Communication from the Commission, *A Blueprint for a Deep and Genuine Economic and Monetary Union Launching a European Debate*, Brussels, 30 November 2012, COM(2012) 777 final/2. Text available at: http://ec.europa.eu/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf. The Blueprint was developed in accordance with the Report by the President of the European Council, Hermann Van Rompuy, in close collaboration with the President of the European Commission, the President of the Eurogroup and the President of the European Central Bank, *Towards a genuine economic and monetary union*, Brussels, 5 December 2012, available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.

tion of the monetary union through the creation of a banking, fiscal, economic and therefore political union. While the establishment of the banking union already represents a decisive step forward in terms of achieving risk sharing and financial stability of the eurozone, the real challenge is still the creation of the fiscal union. This, in particular, requires the euro area to adopt an additional budget of its own and acquire its own fiscal capacity on the basis of a transfer of sovereignty to European level.[34] If the eurozone countries delay any further the creation of an economic government, the crisis could enter a new acute phase, at which point the risks taken on by the ECB in order to guarantee the stability of the financial system could cause it heavy losses and result in a general weakening of its monetary policies.

[34] On the creation of a separate budget for the eurozone, see: G. Rossolillo, *Enhanced Cooperation and Economic and Monetary Union: a Comparison of Models of Flexibility,* The Federalist, this issue.

A Clash of Courts: German and European Judges Dispute the New Role of the ECB (and the Future of the Integration Process)

LUCA LIONELLO

The present paper is a continuation of my analysis of the new role of the ECB. I here consider the question in the light of the judgement delivered by the European Court of Justice (ECJ) on the Gauweiler case in June 2015.

As I recalled in my first article, also published in this issue of the review,[1] the Gauweiler case concerns a preliminary question raised by the German Constitutional Court (*Bundesverfassungsgericht*) after Gauweiler and other plaintiffs complained to the *Bundesverfassungsgericht* that the Outright Monetary Transactions (OMT) programme, which entitles the ECB to unlimited purchases of government bonds of countries receiving conditional financial support in the framework of the European Stability Mechanism, violated the sovereign prerogatives of the *Bundestag*.[2] The judges in Karlsruhe, after an initial appraisal, deemed the complaint founded, but before declaring the action of the ECB *ultra vires* (*i.e.* falling outside the competences transferred, under the terms of the Treaties, to the European institutions) they decided to seek confirmation of their interpretation from the ECJ.[3]

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[1] L. Lionello, *The New Role of the ECB in the European Sovereign Debt Crisis*, The Federalist, 57 (2015), p. 80.

[2] The plaintiffs argued that the OMT programme violates the principle of democracy laid down in the German Constitution (Art. 20 of the German Basic Law) and the constitutional identity of Germany, whose fundamental features are protected by the eternity clause (Art. 79 of the German Basic Law) and cannot be undermined by the process of European integration.

[3] In the Honeywell case, the German Constitutional Court ruled that when EU institutions commit *ultra vires* acts it is necessary to raise a preliminary question before the ECJ through a referral under Art. 267 TFEU. Cf. Decision of the German Constitutional Court, 6 July 2010, Honeywell, 2 BvR 2661/06, par. 303, par. 304.

Specifically, the German court considered the OMT programme to breach the ECB's mandate to deal exclusively with monetary policy, and also saw it as an infringement of Art. 123 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the ECB from providing member states with monetary financing.

Echoing some of the arguments formulated by the Advocate General Cruz Villalón and developing others, the European court rejected the position of the German judges, ruling that the OMT programme, in fact, complies with the TFEU. As regards the alleged breach, by the ECB, of its mandate to focus solely on monetary policy, the ECJ rejected the German court's claim that OMT constitute covert economic policy measures.

Although the two courts reached opposite conclusions, their analysis of these issues started from essentially the same legal premise. Indeed, they both accept that the nature of a given measure should be inferred primarily from its objectives, as well as from the instruments used to pursue it in practice.[4] In the case of the OMT programme, the main effect of the transactions is that they reduce interest rates on the bonds of states that are beneficiaries of programme. However, the two courts interpreted this phenomenon differently: for the German court, OMT are an instrument intended to help finance the debt of struggling countries, whereas in the ECJ's view they are meant to serve as a means of restoring correct functioning of the monetary policy transmission mechanism.[5] The problem is that neither interpretation is sup-

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[4] The ECJ first developed this argument in the Pringle case. Cf. ECJ, 27 November 2012, C-370/12, *Thomas Pringle v Government of Ireland*, (2012) ECR 1-413, para. 56; ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 46; Decision of the German Constitutional Court, 14 January 2014, 2 BvR 2728/13, par. 69.

[5] Restoration of correct functioning of the monetary policy transmission mechanism is not an end in itself (*Selbstzweck*), but serves to guarantee the ECB the conditions it needs to develop a monetary policy geared towards price stability. "The ability of the ESCB [European System of Central Banks] to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability". ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 50. Various economists agree that the monetary policy transmission mechanism was not functioning correctly during the crisis and that the ECB's intervention on the bond mar-

ported by a true legal argument; both are, rather, the based on the analyses provided by the different expert authorities that intervened in the legal debate on the Gauweiler case.[6] The German court based its opinion on the "convincing expertise" of the *Bundesbank*,[7] which argues that spreads on sovereign debt interest rates reflect countries' different levels of reliability risk, and that it is not possible to "divide interest rate spreads into a rational and an irrational part". On the basis of the argument that all the financial markets do is fulfill the regulatory role assigned to them by the European Treaties, it was concluded, by the German court, that interfering with the formation of interest rates would have fiscal implications, making OMT an economic and not a monetary policy measure. The ECJ, on the other hand, espoused an entirely different analysis based on the opinion of the ECB, which instead considers the introduction of the OMT programme to have been prompted by the economic situation in the euro area, where the bonds of some member states were subject to high volatility and large spreads. The latter were attributable not only to macroeconomic differences between the member states, but above all to financial speculation linked to the numerous fears over the stability of the euro area as a whole.[8] For this reason, the ECJ felt that the OMT programme could be deemed to have been implemented not primarily as a means of bypassing the market's regulatory function, but rather for the entirely acceptable purpose of correcting the distortions and excesses

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ket played a fundamental role in rectifying this situation. Cf., Z. Darvas, S. Merler, *The European Central Bank in the Age of Banking Union*, Bruegel Policy Contribution, 2013, p. 3; G. Wolff, *The ECB's OMT Programme and German Constitutional Concerns*, Think Tank 20, 2013.

[6] The ECB's opinion drawn up by Prof. Schorkopf was submitted to the ECJ on 17 January, 2013. Cf. F. Schorkopf, *Stellungnahme gegenüber dem Bundesverfassungsgericht in den Verfassungsbeschwerden, 2 BvR 1390/12, 2 BvR 1439/12 und 2 BvR 1824/12 Organstreitverfahren 2 BvE 6/12*. The *Bundesbank* presented its opinion on OMT in December 2012. Cf. *Stellungnahme gegenüber dem Bundesverfassungsgericht zu den Verfahren mit den Az. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1439/12, 2 BvR 1824/12, 2 BvE 6/12, 21.12.2012*.

[7] Decision of the German Constitutional Court, 14 January 2014, 2 BvR 2728/13, par. 71.

[8] ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 72. Thus, compared with Germany, Spain was paying a higher interest rate on its debt not only because of the fragility of its public finances, but also because it was considered a weak country that would be an easy target in the event of a speculative attack against the euro area as a whole. For this reason the spread between the interest rates on the different countries' sovereign debts no longer reflected only the macroeconomic differences between them, but also their degree of vulnerability to speculative attack against the euro zone.

caused by financial speculation, thereby restoring, on the bond market, the normal conditions necessary to ensure correct functioning of the monetary policy transmission mechanism.[9]

As regards the matter of the compliance of the OMT programme with Art. 123 TFEU, the two courts once again based their respective analyses on the same premise, namely that the ECB, in accordance with Art. 18 of its statute, may legitimately purchase government bonds on the secondary market, but cannot use these as a means of circumventing the ban on direct purchases.[10] However, they failed to agree on the question of whether, in practice, the ECB's programme amounts to a form of monetary financing. The view of the judges in Karlsruhe was that OMT, in the way they are designed at least, circumvent Art. 123 TFEU insofar as they do not allow natural price formation on the bond market and could cause the ECB itself to suffer losses, especially as it is not treated as a preferential creditor for the purchase of securities.[11] The ECJ dismisses these arguments. First of all, OMT can have an only limited impact on the formation of bond market prices, given that the ECB is required to allow a minimum period of time[12] to elapse between the emission of government bonds and their purchase on the secondary market. Moreover, this purchase may not be either announced or quantified in advance.[13] Instead, as regards the possible risks taken on by the ECB in purchasing government bonds of a country at risk of default, the European court points out that the ECB routinely takes decisions involving the risk of losses. From a legal point of view, the acceptability of a risk must be established primarily on the basis of the

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[9] "Having regard to the information placed before the court in the present proceedings, it does not appear that the analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment". ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 74.

[10] The ECJ clarified in the Pringle case that Art. 123 TFEU, unlike Art. 125, does not have a restrictive nature. Cf. ECJ, 27 November 2012, C-370/12, *Thomas Pringle v Government of Ireland*, (2012) ECR 1-413, par. 132.

[11] in the event of debt restructuring, the ECB, not having preferential creditor status, would be treated in exactly the same way as the other creditors.

[12] These criteria were introduced by the ECJ. On the conditions regulating concrete implementation of the OMT programme, see *infra*.

[13] The intervention of the ECB could, in practice, produce the same effect as direct purchases of government bonds: if the bond buyers on the primary market knew for certain that the ECB would buy the same bond within a certain period of time on the secondary market, this would effectively transform these buyers into mere intermediaries. Cf. ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 104.

marketability of the government bonds purchased.[14] Even though the ECB's lack of preferential creditor status exposes it to the risk of the other creditors opting for a debt reduction, this cannot be considered sufficient proof that these transactions amount to a form of monetary financing, given that this risk is, in any case, an inherent part of bond purchasing on the secondary market, which is an activity explicitly provided for in the ECB statute.

In its judgement, the ECJ did not merely to respond to the German judges' single objections, but tried to put together a more complex legal argument, dwelling on the objectives of Art. 123 TFEU and on the possible threats to correct economic policy management posed by the application of the OMT programme. Clearly, the prohibition of monetary financing, which deprives countries of the support of their central banks, is designed to encourage member states to pursue sound budgetary policies. In the opinion of the European court, the ECB's application of the OMT programme should be subject to certain conditions, serving to ensure that member states are not induced to reduce their efforts to achieve fiscal consolidation. First of all, government bond purchasing on the secondary market should be allowed to continue only for as long as is necessary to restore proper functioning of the monetary policy transmission mechanism, and should therefore cease immediately upon the achievement of this objective. In addition, these transactions should not serve as a means of giving states the security of knowing that they can, in any case, count on the purchase of securities by the ECB on the secondary market, and that the interest rates of national government bonds will be harmonised without taking into account the macroeconomic differences between the different countries.[15] Indeed, the programme should concern only marketable bonds

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[14] ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 116. The conditions determining the marketability of bonds are established in Directive 2004/39/EC. Under Art. 40, "financial instruments admitted to trading in a regulated market are capable of being traded in a fair, orderly and efficient manner". According to the ECJ, it falls not to the German judges, but to the ECB to assess whether a government bond meets these conditions. Some authors have argued that the bonds subject to the OMT programme are not really marketable since no investor is willing to buy them. Cf. M. Rüffert, *The European Debt Crisis and European Union Law*, Common Market Law Review, 2011, pp. 1777-1806, specifically p. 1788.

[15] ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 113. "The adoption and implementation of such a programme thus do not permit the Member States to adopt a budgetary policy which fails to take account of the fact that they will be compelled, in the event of a deficit, to seek financing on the markets, or result in them being protected against the consequences, which a change in their

of countries that are required to implement a structural adjustment plan in the framework of the European Stability Mechanism, and that are actually complying with this requirement.[16] In addition, the ECB should retain the possibility of selling, at any time, the bonds it purchases, so as to be able to adapt the OMT programme to the behaviour of the member states and the evolving economic situation.[17] These conditions, which effectively mean that member states cannot count on unconditional monetary support, serve to prevent the OMT system from encouraging states to reduce their commitment to achieving fiscal consolidation.[18] In conclusion, the unlimited purchases of government bonds that the ECB undertakes to make are not to be understood as "unconditional" purchases, merely as purchases for which there are "no *ex ante* quantitative limits".[19] As the Court of Justice rightly points out,[20] unlimited purchases of bonds that fail to respect the conditions outlined above would conflict with the rules of the European Treaties, for at least two reasons: first, the transactions could have the effect of giving some member states excessively favourable financing conditions, which could be entirely independent of their macroeconomic situation;[21] and second, the programme would effectively result in instances of indirect pooling of the member states' sovereign debts.[22]

This debate between the European Court of Justice and the German

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macroeconomic or budgetary situation may have in that regard", *ibidem*, par. 114.

[16] In this way the ECB, in fact, restricted the volume of government bonds available for purchase under the OMT programme, and consequently limited the effects that this programme on the financing conditions of the eurozone member states. Cf. ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 116.

[17] The German judges, on the other hand, believed that the ECB would hold on to the bonds purchased until they matured, and interpreted this as further confirmation of the existence of a violation of Art. 123 TFEU. Cf. Decision of the German Constitutional Court, 14 January 2014, 2 BvR 2728/13, par. 126, par.127.

[18] At the same time these guarantees also reduce the risk of losses for the ECB. Cf. ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 125, par. 126.

[19] Precise quantification of the bonds available for purchase would reduce the effectiveness of the programme.

[20] Cf. ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 88.

[21] In his conclusions, the Advocate General stated that the OMT programme should not reduce interest rates on bonds in order to put them on a par with those of the other countries, but must take into account the market situation and the macroeconomic situation of the state involved. Cf. *Opinion of Advocate General Cruz Villalón* delivered on 14 January 2015, C-62/14 *Peter Gauweiler (and Others) v. Deutscher Bundestag*, par. 198.

[22] This would be the case, in particular, if the transactions covered most of the states' debts and if non-marketable bonds were also accepted and kept until they matured.

Constitutional Court is extremely important not only because it provides an opportunity for assessing whether the OMT programme really is compatible with the European Treaties, but also because it allows us to see how national and European case law is reacting to the transformations taking place within the Economic and Monetary Union. Clearly, these two courts both realise that the need to manage the emergency created by the ongoing economic and financial crisis has resulted in a gradual centralisation of powers at EU level. In this context, the ECB, as one of the new holders of sovereignty at supranational level, has assumed political responsibility for protecting the single currency, being prepared to do everything within its power to achieve this. In the exceptional situation that saw every EU member state in danger of being overwhelmed by the financial collapse of the monetary union, the ECB stepped in to avert this risk; to this end it introduced a series of extraordinary measures, the boldest of which was the OMT programme. Considering that the Maastricht Treaty had not envisaged the Union ever having to face a crisis like the one Europe is currently experiencing, this undertaking clearly demanded a broad interpretation of the ECB's mandate. In the case in point, therefore, the ECB deemed it acceptable, in order to bring down sovereign debt interest rates, to adopt a plan of unlimited purchases of government bonds. Given the close interdependence that exists between economic and monetary policy, it is not easy to demonstrate that this measure infringes the limits set by the TFEU; similarly, it is difficult to reach an unambiguous interpretation of economic phenomena. Clearly, a system like the OMT programme produces multiple effects together, insofar as it plays a role both in restoring correct functioning of the monetary policy transmission mechanism, and in alleviating the costs of funding member states hit by speculation. In other words, the programme produces hybrid effects that help to guarantee the sustainability of the national debts of European member states, but also to ensure the effectiveness of the European monetary policy. However, when it comes to identifying the main effects of the transactions and deciding whether they are acceptable in the light of the European Treaties, the two courts do not see eye to eye. Referring back to the analysis just presented, it is possible to identify two main reasons for their disagreement.

First, the European and German judges chose to base their conclusions on the arguments presented by two different but equally authoritative institutions, respectively the ECB and the *Bundesbank*. There were no legal reasons for this choice, which in reality was motivated by

trust: whereas the German court decided to trust the *Bundesbank*, the European court preferred to accept the ECB's economic analysis. From a legal standpoint, neither of these choices can be said to carry more weight than the other. As remarked German judge Lübbe-Wolff in her dissenting opinion in respect of the decision to refer the question to the ECJ for a preliminary ruling, whenever the legitimising power of the law is weak due to a lack of clarity, judges should refrain from deciding.[23] Since the judges, in this case, lacked appropriate knowledge for interpreting economic phenomena and the law does not provide elements allowing an adequate evaluation of the question of the OMT programme, the judgement issued is at risk of reflecting mere opinion rather than application of the law. In the Gauweiler case, it would probably have been more appropriate if the German court had deemed the reference inadmissible.

Second, the ECJ and the German court interpreted European law using two quite different approaches. The judges in Karlsruhe adopted a literal interpretation, namely that the EU institutions and member states are bound to avoid conduct prohibited by TFEU, and on this basis any interference of monetary policy with fiscal discipline is illegal. Accordingly, a monetary policy measure is not admissible if it has the effect of helping, even indirectly, to finance the sovereign debts of the member states.[24] The European court, on the other hand, applied a teleological interpretation of EU law, supporting the idea that ECB should be allowed a broad margin in the exercise of its mandate, as long as the objectives of the Treaty rules are guaranteed. For this reason, the formal interference of the OMT programme with the rules of fiscal discipline set out in the Treaty, particularly in Art. 123 TFEU, is not *a priori* illegal, but acceptable to the extent that the rationale of these rules is preserved.

Moving on to a comparison of the two approaches, the German court's literal interpretation is open to criticism for two reasons: first, because it sees the law as inapplicable to changing realities, and second, because it fails to accept the natural process of transfer of sover-

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[23] Dissenting opinion of Judge Lübbe-Wolff, Decision of the German Constitutional Court, 14 January 2014, 2 BvR 2728/13, par. 7.

[24] In order to declare these transactions valid, the German judges have requested compliance with a series of conditions that effectively distort the programme. Specifically, any form of reduction of the debts of the states involved should be excluded, bond purchases should be limited *ex ante*, and there should, as far as possible, be no interference in the formation of their price.

eignty from national to European level. On this basis, the teleological interpretation applied by the ECJ is preferable as it allows European law to be used to manage current problems, while nevertheless ensuring that the objectives of the legal provisions continue to be respected. In concrete terms, it is indeed entirely possible that one of the reasons the ECB wanted to reduce the spread between government bonds was to drive away the risk of default by some of the eurozone member states. From a legal point of view, this is acceptable to the extent that it can be justified by the real need to fix the monetary policy transmission mechanism; furthermore, it does not undermine the rules of fiscal discipline set out in the Treaty. Clearly, it is impossible for the German Court to accept this interpretation because it clashes with its reading of EU primary law, which is that the ECB must deal exclusively with monetary policy, while it is the responsibility of the national governments to bail out member states in difficulty.

As I see it, it would be better, rather, to acknowledge the reality of the current situation, in which the pursuit of price stability hinges on the survival of the single currency. An ECB monetary policy that focuses stubbornly and rigidly on efforts to reduce inflationary risks, but proves unable to do all that is legitimately within its power to do in order to eliminate the threats to the survival of the single currency, would fail in its mandate, which is (even before pursuing price stability) to safeguard the stability (and the very existence) of the single currency. The ECB can and must play its part in ensuring this objective, for example by adopting measures (like the OMT programme) designed to contain spreads, and thus to restore correct functioning of the monetary policy transmission mechanism and limit speculative attacks on struggling countries. Clearly all this must be accompanied by a set of guarantees, for example that there will be no violation of the rules of fiscal discipline set out in the TFEU and that the ECB will not assume any direct obligations for the debts of member states.[25]

It is very likely that the stance adopted by the *Bundesverfassungsgericht* stems not only from a legal culture characterised by stricter (or

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[25] The ECJ has clarified that application of the OMT programme does not completely exclude the possibility of losses for the ECB. Cf. ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 116. This clearly means that the programme may, to an extent at least, produce fiscal effects and have the inevitable consequence of mutualising part of the member states' sovereign debts. This effect, natural in a monetary union, complies with EU Treaty regulations to the extent that these effects are limited and, in any case, reversible.

more rigid) interpretation of rules, but also (above all) from the desire to continue to exert a certain influence over the evolution of the European legal order, by vetoing all acts liable to result in implicit transfers of sovereignty to the European level, beyond a level deemed acceptable. The BCE's shouldering of new responsibilities, in order to safeguard the monetary union, is incompatible with this stance, as it requires a pragmatic approach to the application of the Treaty rules and rejects a rigid and intransigent one.

In now remains to be seen whether the German court will, in fact, be prepared to accept the preliminary ruling issued by the ECJ. Since the difference between the viewpoints of the two courts depends on factors such as their different analyses of economic phenomena and the opposite interpretation techniques they chose to use, the outcome of this issue will, in the end, depend not so much on the strength of legal arguments, but on the relationships between the various authorities involved and the competences of the two courts. In relation to the Gauweiler case, the German judges have already declared that they will not regard the ruling of the ECJ as either definitive or binding, given that ultimately, responsibility for judging compliance with the German Constitution lies with them.[26] In response to this declaration, the European court preferred not to remind the German judges directly of the duty of national courts to comply with its judgement, merely recalling, in its ruling, the different roles and responsibilities of courts involved in a preliminary reference.[27] For its part, the national court is required to verify the facts and establish whether there are any question marks over the interpretation of EU law that must be ironed out in order to decide whether there is a case to answer. It falls to the ECJ, on the other hand, to judge the interpretation or validity of EU law only on the ba-

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[26] The Advocate General underlined the ambiguity of the situation facing the court. "[T]here is a national constitutional court which, on the one hand, ultimately accepts its position as a court of last instance for the purposes of art. 267 TFEU, and does so as the expression of a special 'cooperative relationship' and a general principle of openness to the so-called 'integration programme' but which, on the other hand, wishes, as it makes clear, to bring a matter before the Court of Justice without relinquishing its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own state is concerned. That ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to disregard it entirely when analysing the case". *Opinion of Advocate General Cruz Villalón* delivered on 14 January 2015, C-62/14 *Peter Gauweiler (and Others) v. Deutscher Bundestag*, par. 49.

[27] Cf. ECJ, 16 June 2015, C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag,* (2014) ECR 1, par. 15.

sis of the facts reported by the national court. That being said, whereas the decisions of the Court of Justice on referrals under Art. 267 TFEU are binding on referring courts, national courts do not have the faculty to annul or declare invalid an act of an EU institution.[28] Obviously, if the judges in Karlsruhe were to refuse to respect the ruling of the European judges, declaring the OMT programme *ultra vires*, the consequences would be tragic: the German court, in the name of German sovereignty, would deprive the BCE of a necessary tool for tackling the ongoing crisis and therefore prevent it from acting; in addition, by rebelling against the authority of the ECJ, it would be the author of a grave infringement of EU law and be responsible for creating a rift between the national and European legal orders.

This possible breakdown in relations between the courts is clearly the fruit of the current phase in the process of European integration, where, in order to safeguard hard-won achievements, like the single currency, there is a need for new transfers of sovereignty to European level — something that can be achieved through, for example, the kind of extensive and flexible application of the ECB's mandate illustrated by the OMT programme. As these developments unfold, the national governments still have to make the decision to embark upon a constituent phase through an amendment of European and national law. In the current transitional phase, every court is still endeavouring to fulfil its role as best it can: the European judges want to preserve the authority and unity of Europe's evolving legal framework, while the national ones are trying to avoid conspicuous changes to their respective constitutions. The only way forward, in the face of this clearly untenable situation, is to seek a political solution through a process of treaty change aimed at resolving the current legal aporias created by measures introduced in order to address the sovereign debt crisis.

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[28] "Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice," ECJ, 22 October 1987, C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost,* (1987) ECR 1- 4199, par. 17.

The Dangers of Climate Change: Another Reason to Build Europe Now

FRANCO SPOLTORE

The world's countries have been trying, since 1992, to stipulate binding international agreements designed to limit greenhouse gas emissions. In 1997, a first agreement was reached, although this merely amounted to an undertaking on the part of the world's most developed countries to reduce their carbon dioxide emissions; moreover, the agreement was never ratified by the United States and the reduction targets it set have never been met. In 2009, as a result of the irreconcilable differences in the field of environmental protection between the developed, the emerging and the developing countries of the world, the Copenhagen summit came to nothing. Most recently, at the 2015 United Nations Climate Change Conference (COP21) in Paris, a total of 195 countries, plus the European Union, approved a new agreement whose aim is to keep global warming to 1.5 degrees Celsius above pre-industrial levels throughout the rest of this century. In actual fact, however, it is the approval of this agreement more than its content that can perhaps be considered the greatest and perhaps the only real achievement of the Paris meeting.

What does the future hold after COP21?

"It's a fraud… There is no action, only promises. As long as fossil fuel remains the cheapest energy option, it will be used." This is how American scientist James Hansen, one of the first to raise awareness of man-made climate change and to conduct studies of the phenomenon, tersely summed up the results of COP21.[1] Hansen's renown derives not

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[1] *James Hansen, father of climate change awareness, calls Paris talks 'a fraud'*, The Guardian, 12 December, 2015. http://www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud. Equally cutting was the comment, entitled *COP21: The Toothless Paris Agreement*, published on 18 December 2015 by the Institute for Defence Studies and Analyses (IDSA) in India. http://www.idsa.in/idsacom-

only from his studies, but also from his position, until a few years ago, as a government advisor and, in particular, from the famous day in 1988 on which, as director of NASA's Goddard Institute for Space Studies, he presented the US Senate Committee on Energy and Natural Resources with the results of climate change studies conducted by US scientists, who had concluded that it was 99 per cent certain that the global warming trend [over the previous 130 years, editor's note] was due to a buildup of carbon dioxide and other artificial gases in the atmosphere, caused by man.[2]

Today, more than a quarter of a century later and after 21 disappointing international climate change conferences, it is impossible not to share Hansen's sour appraisal of the Paris conference and his frustration over the lack of political action: "It's … embarrassing …. [to] realise as a scientist that politicians don't act rationally."

However, there is one question that Hansen, in delivering these judgements, overlooks, namely: is it possible in the current global power system for politicians to act rationally for the good of the world? Press coverage of the final stages of the latest conference seems to show that the answer is no. As reported by several newspapers, despite the celebratory tone that accompanied the close of the Paris meeting, the negotiations for the approval of the agreement were actually in danger of breaking down right to the very end: the various national interests and positions were simply too diverse be reconciled; in addition, the currents opposed to a possible challenging of the sovereignty of individual states were too strong, and the various delegations were too concerned with efforts to delete from the final text any reference liable to result in overly restrictive interpretations. One episode in particular is emblematic of the confrontation between the various delegations, namely the negotiation of the wording of one of the paragraphs of Article 4 of the agreement, which in the final version of the text reads as follows: "Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different nation-

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ments/cop21-paris-agreement_dadwal-malaviya_181215.

[2] *Global Warming Has Begun, Expert Tells Senate*, The New York Times, 24 June, 1988. http://www.nytimes.com/1988/06/24/us/global-warming-has-begun-expert-tells-senate.html?pagewanted=all.

al circumstances".[3] Ultimately the crucial factor allowing approval of this paragraph was the use of the conditional tense *should*, rather than the future *shall*. It was only after the American and Chinese delegations had reached a compromise on this wording that the agreement could be submitted to the delegates for approval.

Decabonisation: yes, but how?

The main topic on the agenda at the Paris conference was that of decarbonisation, *i.e.* the reduction of energy consumption resulting from the use of fossil fuels. This term has now become a watchword for all countries, the majority of which, ahead of COP21, set out, in detail, voluntary long-term national decarbonisation programmes in which they indicated the period of time (by 2030 in the case of China, for example) within which they expect their greenhouse gas emissions to peak, after which these levels should start to be reduced. The problem is that it is not easy to understand exactly what is meant by decarbonisation, as in practice this term can mean two different things. Indeed, as used by some scientists and governments, the term refers to the change over time in the ratio of emissions to GDP, while for others it refers to the relationship between emissions and total energy consumption. Applying this second definition, which is also the most technically meaningful, it emerges that the trend of global emissions has been moving towards decarbonisation for years. Basically, thanks to evolving technology and the introduction of various national legislative measures, the decarbonisation process is already under way. The problem is that the dynamics of this trend, which can be considered almost spontaneous, are too slow: in short, the reduction targets established by the various climate change conferences[4] will certainly not be met if decarbonisation continues at its current sluggish pace.

Many sceptics continue to argue that no climatologist can yet predict what will happen in each specific region of the world in the coming decades in the wake of the release into the atmosphere, over a period of just two hundred years, of carbon dioxide accumulated in the ground over millions of years. However, the scientific community is largely in agreement on two points: a) that both historical and current

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[3] https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.

[4] Marzio Galeotti and Alessandro Lanza, *Si fa presto a dire "meno carbonio"*, lavoce.info, 4 December, 2015. http://www.lavoce.info/archives/38784/meno-carbonio-nella-nostra-energia-cosa-non-ha-funzionato.

climate data show that there is a relationship between greenhouse gases and changes in climate cycles, and b) that unless there is a drastic (but currently unforeseeable) reversal of the current trend of continually increasing levels of emission of these gases into the atmosphere, we can expect to see profound global-scale changes in the climate and ocean currents over the coming decades. In addition, it has been established that if the trend towards global warming is not reversed by the middle of this century, *i.e.* within the lifetime of many of those who are living today, the global average temperature could, in that time, rise by between 2 and 5 degrees Celsius, which is a significant increase if one considers that the world today is only 5 degrees Celsius warmer than it was at the end of the last ice age. The most likely consequences of this would be: an increase in extreme weather phenomena, resulting in increasingly serious problems of desertification in some regions and flooding in others, as well as damage to crops and agricultural production; a return to glacial climates in some regions and climatic overheating in others; and rising water levels, a phenomenon that would have serious consequences for countries like Bangladesh, but also for coastal megalopolises such as London, Shanghai and New York, to name but a few. The rapidity and relentless succession of climate changes would seriously test the capacity of many countries to deal with the resulting, and inevitable, economic crises, and the migration of populations towards regions that still have a temperate climate.

As regards the fiscal and economic remedies that should be implemented, the scientists are in agreement. These remedies were summarised in a recent study, again led by Hansen, which was published shortly before the start of the Paris conference (and was also at the root of the decision to include, in the resulting agreement, the reference to the restriction of the rise in the world's temperature to less than two degrees Celsius).[5]

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[5] J. Hansen et al., *Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2 °C global warming is highly dangerous,* Atmospheric Chemistry and Physics (ACP), 2015. See, for example, the following passages: "The first order requirement to stabilize climate is to remove Earth's energy imbalance … If other forcings are unchanged, removing this imbalance requires reducing atmospheric CO_2 from ~400 to ~350 ppm … The message that the climate science delivers to policymakers, instead of defining a safe "guardrail", is that fossil fuel CO_2 emissions must be reduced as rapidly as practical [which] implies a need for a rising carbon fee or tax, an approach that has the potential to be near-global, as opposed to national caps or goals for emission reductions. Although a carbon fee is the sine qua non for phasing out emissions, the urgency of slowing emissions also implies other needs in-

Science has made us well aware of the climate change-related risks faced by mankind. We have also seen the introduction of technological innovations that make it possible to envisage the phasing out of fossil fuels and their replacement with other sources of energy. Moreover, instruments able to speed up this transition have already been identified. But the problem is that the political tools for governing all this at international level are completely inadequate. What is more, while the scientific debate on the nature and possible consequences of global warming can be considered to have been concluded years ago, political debate in this field is still struggling to advance in a rational manner towards the necessary responses in terms of economic and regional planning and the creation of appropriate institutions. Unfortunately, even the involvement of major political figures, such as the former US Vice President Al Gore, and the development of well-financed international campaigns organised by leading environmental NGOs[6] have failed to overcome this discrepancy.

The state, the market, taxation and CO_2.

The point is that if we accept that urgent steps must be taken to reduce CO_2 emissions into the atmosphere in order to keep global warming under control, then we must also accept that taking them demands the creation and governance, at international level, of a true global carbon market. And it is in relation to the capacity to manage this aspect of the problem that there emerge the main obstacles that are preventing the awareness of the risks faced from being translated into effective political action. These obstacles can be considered both ideological and political in nature.

They are ideological because of the still widespread and deep-rooted conviction that environmental goods should not be subject to the rules of economic incentives and disincentives that are used to govern the production and consumption of all other goods. This is a conviction shared by those who always want to see state intervention in the "free market" kept to an absolute minimum (such as the majority of pro-free market conservatives in the USA) and those who confuse condemna-

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cluding widespread technical cooperation in clean energy technologies". http://www.atmos-chem-phys-discuss.net/15/20059/2015/acpd-15-20059-2015.pdf.

[6] James F. Tracy, *CO2 and the Ideology of Climate Change: The Forces Behind "Carbon-Centric Environmentalism"*, Global Research, Centre for Research on Globalization, 12 November 2013. http://www.globalresearch.ca/co2-and-the-ideology-of-climate-change-the-forces-behind-carbon-centric-environmentalism/5342471.

tion of market malfunctioning with condemnation of the market itself (such as sections of the far left). And it has the effect of fueling a generic and dangerous lack of trust in political governance of the economy — a lack of trust that, without questioning the good intentions involved, even emerges in Pope Francis's encyclical letter on environmental issues, in which, in several passages, he appears to be more concerned with denouncing economic behaviours per se than with explaining how and in what framework they might be governed.[7]

But, as we have said, efforts to understand and tackle the problem are impeded, above all, by obstacles of a political nature. Indeed, contrary to what people too often tend to think, or are encouraged to think, the climate change problem, like other environmental emergencies, is not born of immoral or consumeristic behaviours on the part of individuals, or of the desire for excessive profits — in other words, behaviours that, beyond certain thresholds, should normally already be regu-

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[7] Cf., in this regard, the following paragraphs of Pope Francis's encyclical letter *Laudato Sì – On Care for Our Common Home (*http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html *)*:

— "Even as the quality of available water is constantly diminishing, in some places there is a growing tendency, despite its scarcity, to privatize this resource, turning it into a commodity subject to the laws of the market." (para. 30);

— "…economic powers continue to justify the current global system where priority tends to be given to speculation and the pursuit of financial gain, which fail to take the context into account, let alone the effects on human dignity and the natural environment. Here we see how environmental deterioration and human and ethical degradation are closely linked. Many people will deny doing anything wrong because distractions constantly dull our consciousness of just how limited and finite our world really is. As a result, "whatever is fragile, like the environment, is defenceless before the interests of a deified market, which become the only rule." (para. 56);

— "There are no uniform recipes, because each country or region has its own problems and limitations. It is also true that political realism may call for transitional measures and technologies, so long as these are accompanied by the gradual framing and acceptance of binding commitments. At the same time, on the national and local levels, much still needs to be done, such as promoting ways of conserving energy. These would include favouring forms of industrial production with maximum energy efficiency and diminished use of raw materials, removing from the market products which are less energy efficient or more polluting, improving transport systems, and encouraging the construction and repair of buildings aimed at reducing their energy consumption and levels of pollution. Political activity on the local level could also be directed to modifying consumption, developing an economy of waste disposal and recycling, protecting certain species and planning a diversified agriculture and the rotation of crops. Agriculture in poorer regions can be improved through investment in rural infrastructures, a better organization of local or national markets, systems of irrigation, and the development of techniques of sustainable agriculture. New forms of cooperation and community organization can be encouraged in order to defend the interests of small producers and preserve local ecosystems from destruction. Truly, much can be done!" (para. 180).

lated and sanctioned by law. Instead, environmental degradation, both local and global, is primarily the result of malfunctioning of the market at various levels in a setting characterised by a lack of proper regulation, by the institutions, of the prices of natural resources. As recently pointed out by William D. Nordhaus, in a debate started in the *New York Review of Books* on the significance of the Pope's encyclical, principles and maxims may educate and encourage people to behave better, but in themselves they can do little to reduce the tens of billions of tons of carbon dioxide emissions released into the atmosphere each year by seven billion people through their many modes of energy consumption: "To solve environmental problems, we need to move to the practical arts of economics and politics. When scientists and economists began studying climate change four decades ago, neither the scope of the problem nor the solutions were evident. After years of experiments with different approaches, it has become clear that the most reliable approach to bending the curve of emissions and slowing climate change is market-based instruments like near-universal carbon taxes or cap-and-trade policies that raise the price of carbon emissions. Voluntary measures, actions of people of goodwill, and even regulatory actions on cars and power plants will not come close to meeting the targets of governments and Pope Francis".[8]

Europe at the crossroads between paradoxes and possible solutions.

Cap-and-trade policies, in other words policies designed to limit emissions by allowing the buying and selling, by carefully monitored companies, of CO_2 emission permits on the carbon market, have in fact already been launched in some parts of the world. For example, such policies have been adopted in California, Australia, Canada and, above all, the European Union, whose Emissions Trading System (ETS) was the first international system for controlling greenhouse gases and remains the most advanced. China, too, has announced its intention to start a CO_2 emissions trading system, whereas in the United States, cap-and-trade markets have been created for different emissions caused by acid rain and considered harmful to heath, but not for carbon dioxide. India, in 2014, created an energy efficiency market embracing

[8] William D. Nordhaus, *The Pope & the Market*, New York Review of Books, 8 October, 2015. http://www.nybooks.com/articles/2015/10/08/pope-and-market, and *The Pope & the Market: An Exchange*, New York Review of Books, 19 November, 2015, http://www.nybooks.com/articles/2015/11/19/pope-and-market-exchange.

eight industries that consume more than fifty per cent of the energy produced in the country. There thus exists a wide range of policies that are already implemented and, among these, those of the EU have proved to be quite effective. Europe's ETS has helped several companies involved in the scheme to cut their emissions by as much as 10 per cent, without this impacting on their competitiveness. Furthermore, the experience accumulated over the decade since the European control system was launched, together with data on trends in carbon emission permit prices over that time, provides a useful benchmark for establishing the limits of a system that is still based on cooperation between states, rather than regulated by an actual government.

As pointed out by an article in *The Economist*, "The benefit of allowing trade in carbon permits is that market participants can determine who emits what, and when. If the price signal is distorted because of uncertainty over the future of the policy, firms will consume too many permits today. What's more, there is insufficient incentive to make crucial investments in energy-saving equipment and low-carbon R&D. This could not only considerably raise future costs of meeting the cap, but also become a self-fulfilling prophecy: if meeting the cap becomes too expensive, policymakers may dismantle or weaken the ETS. … Direct financing by the EU Commission or member states is probably the most straightforward fix, especially for ramping up clean energy R&D which is growing but still far below early 1980s levels as a share of GDP. This extra money could be provided by the ETS itself. Many permits are still allocated for free to ensure international competitiveness. But the EU is unnecessarily generous. Ralf Martin and co-authors find that up to 3 billion could be raised annually by better targeting free permit allocation, without having much impact on competitiveness. With this money, the EU could double its spending on renewable energy technology R&D".[9]

Certainly, thanks to the experience accumulated over recent years, the European system of emission control has registered some successes; indeed, the European Union is responsible for only about 10 per cent of total global emissions of greenhouse gases. That said, it is very hard to imagine that the European countries, to help achieve the targets set by the Paris conference, will be willing, or even able, to reduce this per-

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9 Arthur Van Benthem, Ralf Martin, *Europe's carbon-trading system is better than thought, and could be better still*, The Economist, 11 December, 2015, http://www.economist.com/blogs/freeexchange/2015/12/schr-dinger-s-emissions-trading-system.

centage to zero in the space of a couple of decades, perhaps in order to compensate for the delays on the part of other continents. Therefore, to meet these targets, systems similar to the European one, based on political control of the market and of carbon prices, should therefore be implemented immediately in the other continents. But at the same time, and in conjunction with this, Europe should and could do more. For example, to be more effective and, in turn, generate revenue over time, the ETS must, as soon as possible, a) provide for the establishment of an adequate basic minimum price for pollution-permits; b) be able to count on the availability and use, in Europe and in other continents, of adequate resources to be invested in energy transition and in R&D, an activity that, in Europe, would be supervised by the European Commission, which should be assigned a proper role of government in these areas.

However, all this, to come about, will require a decisive intervention of politics in a historical phase in which, with fossil fuel prices falling all the time, it has become difficult to fix prices of pollution permits; and in which an increase in European budgetary resources and a greater role for the European Commission (particularly in the current institutional framework) seem inconceivable. The slump in the price of fossil energy in particular could have devastating implications, both for the cap-and-trade markets and for the future of our planet's climate. To meet the objective of limiting global warming to under 2 degrees Celsius in the present century it will be necessary to pursue that of reducing consumption of fossil fuels by 80 per cent. But with the price of a barrel of oil, having been 115 dollars in June 2014, now standing at between 30 and 40 dollars, and according to some (including Goldman Sachs) looking set to drop to 20 dollars, what country is going to be willing to take on the costs of this energy transition?[10] It had been hoped that oil shortages would help to speed up the energy transition process, but for the moment this possibility looks to have vanished. Similarly, the idea that the use of renewable energy could be boosted simply through policies of incentives at national level has also turned out to be illusory. In fact, the governments and national parliaments, anxious not to excessively penalise their own economies, have shown

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[10] The price of natural gas, which in many countries had been chosen as an alternative energy source to oil, is also plummeting (liquefied gas costs 70 per cent less than in 2013), putting it in competition with renewable energy sources, the use of which would help to further reduce CO_2 emissions. To make matters worse, the increased production of shale gas in the US — which has started exporting oil again —, together with the abundance of coal, is helping to keep prices of fossil energy down.

little interest in reducing direct and indirect incentives for the consumption of fossil fuels. As argued by Nicholas Stern, as long as governments (as well as political parties and public opinion) do nothing to dismantle national aid policies that continue to favour the use of fossil fuels (and leave scant resources for promoting R&D and the use of renewable energy), then all efforts to prevent the risks of climate change will be in vain.[11]

As things stand, what did not happen in 2015 cannot reasonably be expected to happen in 2016 either. The blame for this lies partly with Europe, which has proved unable, and unwilling, to propose an adequate system of governance and bolder European-wide policies in response to the climate change problem. And in so doing, it has failed to assume, in the international arena, the task of balancing and influencing the other major world areas.

To make the world safer from the climate point of view, it is not enough to develop the policies, admittedly good and necessary, that already exist; what is needed is the establishment of a framework of governance that overcomes the current impasse and allows proper management of the problems facing the world. The world's future is trapped in a paradox: global prosperity depends on the success of globalisation, but at national level this phenomenon is producing economic and political reactions that prevent the possibility of pursuing globalisation strategies, while at global level it is producing unchecked environmental changes.

With Europe's help, a decisive step to overcome this situation could be taken. Europe is the area that, for decades, has been the setting of the world's most advanced process of integration between states; it is

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[11] The authors of the 2015 IMF working paper cited by Stern (David Coady, Ian Parry, Louis Sears, and Baoping Shang, *How Large Are Global Energy Subsidies*, https://www.imf.org/external/pubs/ft/wp/2015/wp15105.pdf) quantified the subsidies paid by states for the extraction and use of fossil fuels, taking into account both direct ones, *i.e.* incentives (such as those serving to encourage the use of diesel fuel in Europe), and indirect ones, *i.e.* non-taxation (as in the case of coal, which currently costs about $ 50 per ton, but should cost four times that amount if one considers the damage it does). They found that the value of these subsidies was a staggering five thousand billion dollars, or 6 per cent of world GDP, and that the G20 nations contribute about 80 per cent of this total. The study concluded that "Eliminating post-tax subsidies in 2015 could raise government revenue by $2.9 trillion (3.6 per cent of global GDP), cut global CO2 emissions by more than 20 per cent, and cut pre-mature air pollution deaths by more than half." See also Nicholas Stern, *Action on fossil fuel subsidies must be accelerated*, Financial Times, 13 November, 2015, http://blogs.ft.com/the-exchange/2015/11/13/action-on-fossil-fuel-subsidies-must-be-accelerated.

also the area where the most successful policies of coordination and co-operation at international level have been implemented. For this reason, it is also the continent that has seen the greatest evolution of the struggle between political and social forces in favour of extending the sphere of government to supranational level and those that, clinging to the now illusory idea of national sovereignty, oppose this advance. It is a struggle that, in practice, is reflected in the attempt, by the former, to complete the monetary union with economic and political union and to reorganise, on this basis, power relations between the EU states and European institutions.

The possibility of building a more cooperative system of governance between the great continental regions — a system that is fairer and safer and more rational — depends, among other things, on the outcome of this struggle.

The TTIP: Opportunities and Risks

DAVIDE NEGRI

1. *The background to the TTIP.*

The economic crisis that began in 2008 has shattered the dream of creating a fully globalised economy: for years now the increasing strength of the BRICS group has prevented the WTO from going beyond the Doha Round. The impossibility of creating a single global free trade area leaves room for the coexistence of a number of macro-regions that are integrated to varying degrees.

The free trade agreement[1] currently being negotiated between the European Union and the United States, which seeks to gain leverage from the (fragile) superiority of the sum of the economic strength of the United States and the EU, can perhaps be seen as the most ambitious attempt yet to overcome the current impasse.

The USA and EU account for around 50 per cent of the global GDP and almost a third of global trade flows. USA-EU bilateral investment stock stands at 2.394 trillion euros, and goods and services worth an average of almost 2 billion euros are traded between these two areas every day. Thus, their progressive integration cannot fail to seem mutually advantageous.

In November 2011, on the basis of these premises, a body named the High Level Working Group for Jobs and Growth was instated, its task being to evaluate possible areas of collaboration between the two sides of the Atlantic. In December 2012, the Group presented an interim report that anticipated the conclusions of the final report, which was released in February 2013, just a few hours after the US president, in his annual State of the Union address, called for the start of negotiations for a free trade agreement between the US and Europe, to be

[1] Free trade agreements are a means of creating strong economic links between states by removing, as far as possible, barriers to the exchange of goods and services between economies through regulation of the "rule of preferential origin" of goods, which, in turn, is a means of determining when a given commodity can be considered a product of a given country.

called the Transatlantic Trade and Investment Partnership (TTIP). The report's recommendations on the reduction and elimination of barriers to trade and investment concern a range of economic sectors. Particular importance is attached to the need to reduce technical barriers and enhance regulatory cooperation in order to strengthen convergence of standards and prevent new barriers from being introduced in the future.

The report identified three main areas on which negotiations should focus: 1) market access: elimination of tariffs and quotas for industrial products, agricultural products and services, liberalisation of investments, access to government procurement opportunities; 2) cooperation on regulatory matters: harmonisation of standards and removal of technical barriers to trade; 3) cooperation on global issues of common interest, in particular, the environment, employment, intellectual property, energy and SMEs.

In March 2013, the European Commission presented the Council with an impact assessment of the possible agreement. The document was based on previous studies and traced four hypothetical scenarios. However, the one emerging as most advantageous for both parties was that which envisaged a particularly aggressive programme of liberalisation, namely: total elimination of tariffs; 25 per cent reduction of non-tariff barriers (NTBs); 25 per cent reduction of barriers to services; 50 per cent liberalisation of public procurement. It is estimated that such a scenario would, over a ten-year period (2017-2027), allow the EU's GDP to increase at an average annual rate of 0.48 per cent, which represents around 86.4 billion euros, while the increase in the US GDP would amount to 0.39 per cent, or 65 billion euros. At the same time, European exports to the United States would increase by 28.03 per cent (about 187 billion euros), while America would see its exports to the EU rising by 36.57 per cent (159 billion euros).

The agreement would also impact positively on world trade, generating an approximately 100 billion euro increase in global wealth. It is felt that this effect would be generated largely by the reduction of bilateral NTBs through greater regulatory convergence, which in turn would effectively result in an affirmation of global standards.

After nine rounds of negotiations (the most recent having taken place in April 2015), the European Parliament is now called upon to vote on the draft agreement, while in the United States Obama is struggling to push through Congress the changes needed to satisfy the Europeans.

The main aim of the present paper is to show how the TTIP represents, for both the Americans and the Europeans, an attempt to react to

the growing geopolitical instability worldwide. In particular, the aim of the United States is to counter the loss of its hegemony in the economic-commercial field by joining forces with the countries that have historically been its allies. The EU member states, on the other hand, see the TTIP as an opportunity to secure a privileged commercial relationship with the world's leading economy, negotiating with it on "almost" equal terms.

In Europe, however, the lack of a political body able to make decisions, together with the lack of a common foreign policy, is currently precluding the formation of a clear and precise common will. Instead, the illusion is perpetuated that it is more democratic to involve the 28 national parliaments, even individually, in the decision-making process — this would mean the agreement would need to be ratified in 28 different countries, in some cases through a referendum —, an argument that actually amounts to yet another attempt to defend national sovereignty in an increasingly fast-moving and volatile world in which, instead, the evolution of the economy needs to be governed more strongly and from a continental perspective.

2. *From the globalised economy to the birth of regional economic networks*.

In the post-Lehmann Brothers world, globalisation (or, rather, semi-globalisation) no longer exists in the form in which we once knew, admired and feared it: what we have today is a surrogate, a form of globalisation organised on the basis of regional networks, in other words, a sort of "economic regionalisation".

When the WTO member states, with the sole exception of the developing countries, opened up their markets they laid the foundations of economic globalisation. But since then, the WTO has not succeeded in pursuing a true multilateral free trade agreement. In fact, the Doha programme has ground to a halt.

The economic and financial crisis that started in 2008, originating in the USA and then spreading to the rest of the world as an effect of the extremely high level of financial market integration, was stemmed only thanks to the states' direct intervention in the economy through costly bailouts and support actions that increased the level of public debt. As we know, the crisis in the private sector was attenuated thanks to the states taking on the burden of the damage caused by the excessive deregulation of the financial system that had been part of the reason for the creation of the credit bubble.

Within this context of strong public intervention, the states used all the instruments at their disposal to help their economies. However, the problem is that the level of international cooperation that would make it possible to impose a balanced and far less confrontational course of action — in other words, so-called global governance of the economy — continues to be lacking. Moreover, it is globalisation itself that, by allowing new geo-economic players to enter the world stage, created the causes of its own downsizing. The BRICS countries, plus a group of 15 nations that are rapidly shedding the status of developing countries, need to find adequate economic space in order to grow. As a result, the old economic order based on large international institutions largely led by the United States and, to a lesser degree, its European and Asian allies (World Bank, WTO, International Monetary Fund), is no longer able to issue recommendations to new geopolitical players with the same efficacy as in the past.

In this setting, both the advanced and the emerging countries, in order to boost their own economies, make use of all the economic policy instruments available to them, namely:

1) competitive (currency) devaluation. This is a process that began with the Federal Reserve's policy of quantitative easing and was subsequently taken up by all the advanced economies, such as Switzerland, the UK and, most recently, Japan (and the eurozone). Obviously, it has to be remembered that the emission of dollars presents no risk to the US economy, since the dollar is the reference currency in international trade.

2) The creation of new NTBs.[2] Unlike tariff barriers (currently prohibited by the WTO), NTBs have increased in number; moreover, they are a far more insidious form of protection as they use regulations, certifications, customs and control procedures and authorisations as a means of increasing import and export costs.

3) Privileged access to selected and complementary markets through the signing of free trade agreements between states, or between groups of states and others.

4) The use of soft and hard power tools in international affairs. This is a practice both of emerging countries and of advanced countries (the USA above all).

We are thus witnessing a gradual movement towards a world characterised by more marked divisions between geographical areas in

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[2] Reference should be made to the Commission's 2012, 2013 and 2014 reports to the European Council on barriers to trade and investment.

competition with each other — a world in which preferential trade agreements are tracing new economic boundaries and spheres of influence. Each of the areas created is an expression of the power of geopolitical influence wielded by the dominant player in the region. It is no coincidence that the United States has, for some time, also been negotiating an agreement — the TPP (Trans-Pacific Partnership) — with the main Pacific Rim countries. At the same time, China, which is the only Pacific Rim country not included in the TPP negotiations, has been negotiating the FTAAP (Free Trade Area of Asia Pacific) with the very same countries, its intention clearly being to create an Asian economic community that has China at the forefront and from which the United States is excluded.[3]

3. *The strategic choices of the United States*.

The financial crisis finally prompted the ruling class in the US to abandon the idea that American economic growth could be driven solely by the financial and housing sectors, while the manufacturing sector is recklessly neglected. Furthermore, also as a result of the loss of millions of jobs, especially in the service sector where there is less trade union protection and greater exposure to economic shocks, an economic orientation in complete contrast to the economic theory professed in the years leading up to the crisis has now begun to prevail in the USA.

Faced with the fact that it had proved unrealistic to think that the global economy could go on becoming more and more open, America's ruling class saw that there was a need to revive investments in the manufacturing industry. In this regard, a study by the Interindustry Forecasting Project at the University of Maryland, seeking to establish whether the impact of the manufacturing industry in the US economy — it currently generates around 11.6 per cent of GDP — could return to the level (around 15 per cent of GDP) recorded in 1998, *i.e*. before the sector was hit by the wave of global recession, highlighted the profound changes in the structure of supply and demand that would be needed in order to achieve such an increase in added value, *i.e*. equivalent to around 4 per cent of GDP. Briefly, the following conditions are necessary to bring about a revival of the US manufacturing industry:

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[3] On 10 November 2014 during the APEC summit in Beijing, the Chinese president illustrated his "Asia-Pacific dream", namely his vision of a free trade area that together with free trade agreements and investment opportunities will provide funds for infrastructural investments that will connect East Asia with Europe: the Silk Road and Maritime Silk Road initiatives.

1) more exports and fewer imports; 2) a lower rate of price growth and more energy resources compared with current levels; 3) fewer regulatory requirements and corporate taxes in order to promote increases in production, investments and revenue (in all the other sectors too); 4) faster productivity growth in major service sectors, particularly the healthcare, construction, financial and trade (wholesale and retail) sectors, in order to meet workforce redeployment needs.

The model developed envisages a scenario in which, between now and 2025, the manufacturing industry would grow to 15.8 per cent of GDP and, in the same period, the sector's total turnover would amount to 1,500 billion dollars, a figure representing a 49 per cent increase on current values, while personal savings and personal income would increase, and private consumption decrease. In this setting, over 3 per cent of GDP (including the capital investment share) would be diverted from services to the manufacturing sector.

But all this will be possible only if the US manufacturing industry is able to assert itself on the international markets. The model predicts an 8.2 per cent annual growth rate of exports; given that this parameter has stood at 7.8 per cent since the start of the recovery, all that is needed is a small increase, and in the context of the gradual strengthening of the global economy, this is a target that appears within easy reach.

Another growth factor is the energy boom now under way in the country. The policy of cutting energy costs is advantageous for all producers, especially those operating in energy-intensive sectors such as the chemical and metallurgical industries. Furthermore, the US government has authorised three new LNG export terminals, and exports of refined products such as diesel fuel are also likely to increase, especially if — as announced — projects for the conversion of natural gas into diesel fuel go ahead. Furthermore, in the "manufacturing revival" scenario envisaged, the production of natural gas would increase by barely 2.9 per cent a year, which is far lower than the growth rates recorded recently in this sector. What is more, the impact of the increase in oil production (which, at the very least, is destined to reduce imports and drive a growth in exports of refined products) is probably underestimated. As of now, the USA has around 130 thousand shale gas wells, mainly concentrated in the North East of the country. When the USA decides to export shale gas to India and China, this will undoubtedly pass via Europe and the Mediterranean, and this will pose a considerable threat to the European petrochemical industry. Moreover, the significance of shale gas does not end there: indeed, being available at

such low prices, it is not just an instrument that lowers energy costs, but also a way of creating difficulties for countries that have built their fortunes on petrodollars and gas dollars, and thus of threatening the positions of countries not aligned with US policy (Russia, Venezuela, Iran, for example).

Internally, the USA is implementing aggressive measures to boost the revival of its manufacturing sector, such as the adoption of a local tax system and special taxation for companies. But revival of the manufacturing industry is an objective whose achievement also depends, to a large extent, on a strengthening of economic growth, compared with the results recorded following the start of the recovery, in the countries that are the USA's main trade partners — particularly the EU, Japan, China, Mexico, Brazil, India and the four Asian tigers. Trade policy therefore plays a key role: indeed, it is only by finding outlets in new markets and ensuring the application of existing international standards that a country can increase the level of its exports.

The intention, therefore, is that the TTIP should serve as the foothold for gaining access to the mature markets on which the high-added value, high-tech goods produced by a newly thriving American manufacturing industry can be placed. Accordingly, the sectors most involved in the TTIP are the chemical and metallurgical industries, the aerospace industry (only in part) and the automotive industry. Shale gas and shale oil should become part of the agreement at a later stage, a development facilitated by the crisis in Ukraine and the instability in political relations with Russia.

4. Who in Europe really wants the TTIP?

Even though the European Union and United States continue to hold the largest shares of global trade and investments,[4] trade between them has declined over the past two decades. This decline can only be explained as a cumulative effect of various factors, such as the affirmation of emerging markets as new destinations for European and American exports and the impact of American NTBs (the various "buy American" provisions), although it should be pointed out that the dense web of transatlantic intra-company trade relations is not reflected in the official statistics on foreign trade.

Even taking this last point into account, the decline in bilateral trade

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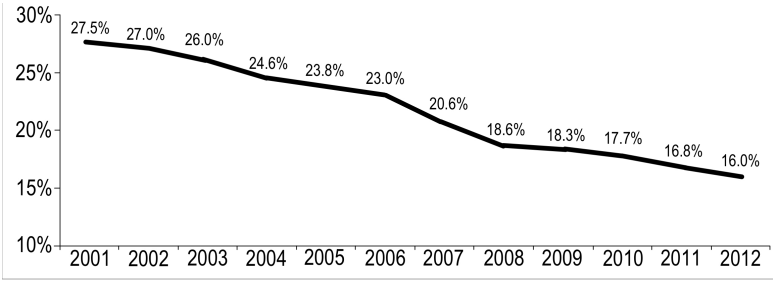
[4] EU: 25.1 per cent of world GDP and 17 per cent of world trade; USA: 21.6 per cent of world GDP and 13.4 per cent of world trade.

flows remains substantial and many commentators interpret the TTIP as a last-resort attempt to reverse this negative trend.



Source: Confindustria, based on Eurostat data.

Figure 1 – US share of total EU exports (2001 – 2012

The growth of the global economy has come about, thanks to globalisation, through the development of long value chains, in other words, through the fragmentation of the whole process of research and development, engineering, production (manufacturing), distribution, logistics, marketing and customer services. Free trade agreements, when they involve economies in close geographical proximity to each other, allow exponential growth of value chains, especially in the manufacturing sector.[5] That said, it is easy to see that the TTIP strongly encourages the relocation not so much of production and manufacturing (given the equivalent cost of labour in Europe and in the USA), but rather of the upstream and downstream activities in value chains, such as research and development (and related intellectual property rights) and the functions and services associated with the final stages of the chain (from marketing to customer services, logistics and distribution). Indeed, if we examine the objectives declared in the official documents, it is possible to see that less importance is attached to tariff than to non-tariff protectionism. As regards the former, given that tariff levels currently stand at an average of around 3 per cent, the lowering of tariff barriers is an issue that really applies only to agricultural products. Instead, negotiations on non-tariff measures concern the convergence of regulatory

[5] One might think, for example, of the recent free trade agreements between the EU and the countries of North Africa and Eastern Europe, or with Turkey (with which a customs union agreement is in force), which have made it possible to create large manufacturing areas and allowed the relocation of Italian, French and German enterprises to those countries.

standards, the improvement of protection of foreign investments, and access to the services, supply and procurement markets.

In short, we are faced with a free trade treaty in which what is being pursued is not so much "access to the goods market" — this is already largely guaranteed by the low level of tariff protection — as an agreement concerning both investment protection and liberalisation of services. In fact, what both parties are wanting and hoping to obtain is the possibility of relocating adequately protected systems and technologies connected with the liberalised exchange of goods and services.

How does European industry stand to benefit? According to a recent study by the European Parliament's research service published in January 2015,[6] the sectors that will benefit most from the TTIP are — considering the ambitious liberalisation scenario — motor vehicles (+148 per cent), metals and metal production (+68.2 per cent), processed food (+45.5 per cent), other manufactured goods (+22.8 per cent), chemicals (+36.2 per cent), electrical machinery (+35 per cent), other transport equipment (+25.5 per cent), wood and paper products (+19.9 per cent).

These figures seem to suggest that Germany, given its industrial tradition, stands to benefit the most. But in actual fact, the TTIP, by reducing the bureaucratic procedures that previously represented fixed costs, will also support the industrial fabric of countries where SMEs are the backbone of the economic system: indeed, it is forecast that Sweden, Finland, the UK, Ireland, Spain, Bulgaria, Cyprus, Greece, Malta and Latvia are the countries that will benefit most from the TTIP.

The main concerns of European industrialists are being voiced in energy-intensive sectors such as the steel, chemicals, cement and paper industries, where operators fear that their products may become less competitive as a result of the lower cost of American energy generated from shale gas and shale oil.

As a further consideration, it can be noted that half of USA-EU trade concerns value chains that are controlled by networks of medium-sized and large enterprises and transnational groups, and that the SMEs will benefit along with them: indeed, being subcontractors to large industrial groups they will enjoy the benefits of the new trading opportunities open to the latter.

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[6] *TTIP impacts on European Energy Markets and Manufacturing Industries*, IP/A/ITRE2014-02, study provided at the request of the Industry, Research and Energy Committee of the European Parliament.

A final point worth noting, given that public opinion at European level is often absent, dormant or divided between the different nations, is that the TTIP is a topic that has contributed to the formation of a "European" public opinion. When a broad debate evolves at the level of public opinion, with expressions of either support for (through agricultural producers' and industrial manufacturers' associations) or opposition to (through consumer associations and various political parties) a given treaty, it results in the exercising of greater control, which in turn confers greater legitimacy on the work of the European institutions. This is the only possible explanation for the fact that many previously confidential documents relating to the negotiations have now been made public, and also for the desire to make both the debate in the European Parliament and the current negotiations as transparent as possible. This debate is helping to increase the member states' awareness that singly they are not in a position to negotiate with large countries (like the United States, but also Russia, China and India), and that they need the European dimension in order to express a single political will (only one) and, in so doing, act with more responsibility on the world stage.

An example of all this is provided by the Bernd Lange's report (S&D, Germany) on the TTIP,[7] which, were it to be approved, would send out a strong political signal that the Commission would have to take into account in further negotiations. Thanks to the report some mediation proposals have been drawn up on the most debated and controversial topics, which include the so-called ISDS (investor-state dispute settlement) system. The proposed solution is to create an international court of investments whose work would be made public and whereby a mechanism of appeal would be provided for, the consistency of judicial decisions would be guaranteed, and the jurisdiction of European courts and the member states would be respected.

5. *Final considerations*.

While the TTIP presents the EU with important objectives and, above all, has considerable strategic value, the Europeans nevertheless need to be aware that "more trade" does not automatically mean "more growth" and that the latter depends on the existence of a decision-making centre able to implement appropriate policies for growth. Free trade is, as we know, a great opportunity offered to everyone, but it is an area

[7] The vote on the Lange report, initially scheduled for June 8, was postponed to allow consideration of the large number of proposed amendments.

in which the better prepared are often the ones that benefit the most. If the Europeans truly want to exploit to the full the creation of the world's largest free trade area, they must complete their political integration and thus ensure that the continent's economy can count on a solid and coherent control room for the coming decades, just as the United States can. Otherwise Europe is destined to remain trapped by the need for a unanimous vote in order to implement any decision. The TTIP itself is an emblematic case in point. It can be approved through two possible avenues: the first is to consider the TTIP a *mixed agreement*, wherein the Union and the member states share responsibility for ratifying the treaty, which means there must be a ratification procedure in each of the 28 member countries (with the added risk that some of these might opt for a vote by referendum with all its attendant consequences); alternatively the TTIP can be considered exclusively a competence of the European Union, and thus as a *non-mixed agreement* whose ratification requires only a qualified majority vote in the Council and the European Parliament. And at this point there arises an institutional paradox: it will take a unanimous vote in the European Council in order to opt for the non-mixed state agreement solution; if this is not achieved — there need be only one vote against — then it will be necessary to go down the route of ratifying the TTIP in each of the 28 member countries.

John Pinder: Like a Pilgrim*

John Pinder OBE was that rare thing: an intellectual leader in politics. A *résumé* of his career speaks for itself: after maths and economics at Cambridge — at King's College, that of Alan Turing and Maynard Keynes — he joined up to the Royal Artillery in 1943 and evermore kept that style of a military officer, smart, upright, patriotic and moustachioed. Like a lot of his generation, the experience of war against fascism settled his trajectory. His first civilian job was as press officer to Federal Union (1950-52), at that stage an influential political force not only among those who were smartly engaged in constructing post-War Europe but also with those hard-pressed in managing the gradual but decisive closure of the British Empire.[1] John had been brought up in India where his father was involved in building trams and railways: making India run on time gave his son a lasting affection for travel, foreign languages and punctuality.

From 1952, Pinder joined the Economist Intelligence Unit where with others he continued to develop the hard and fast case for British membership of the European Communities. From 1964 to 1985 he was Director of the leading social science think-tank in London, Political and Economic Planning (PEP) — subsequently renamed the Policy Studies Institute (PSI). The list of publications he authored or oversaw, and the quality of those he employed is impressive by any standards. A Pinder network grew of scholars, journalists, civil servants and politicians (of all parties) who were committed in the best sense to the goals of social justice, economic growth, democratic deepening and internationalism.

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* John Pinder died on March 7, 2015. To remember his long association with *The Federalist*, which dates back to 1977, we are republishing the last essay written by him for our journal (issue n. 3, 2002), preceded by the text of Andrew Duff's tribute to him at the meeting of the Federal Committee of the Union of European Federalists in April 2015.

[1] See John Pinder & Richard Mayne, *Federal Union: The Pioneers*, London, Palgrave MacMillan, 1990.

The Pinder network, of course, did not stop at Dover. He drew especially close to the Movimento Federalista Europeo (MFE). With Jacques Vandamme he co-founded the Trans-European Policy Studies Association (TEPSA) in 1974, and kept up a busy schedule of teaching as Professor at the College of Europe in Bruges for thirty years (where so many of Europe's political class sat at his feet). He served as President of the Union of European Federalists (UEF), which he loved, from 1984-90 (the Thatcher years); and he was always as active as could be in the service of the European Movement both in the UK and internationally. Few invitations to speak or write were declined, and engagements accepted were fulfilled conscientiously.

From 1985 to 2008, John Pinder was the Chairman of the Federal Trust for Education and Research, founded by William Beveridge in 1945. Although always shy and self-effacing, John was also soldierly bold. He would never hesitate in calling on friends in high places — such as Roy Jenkins, Edward Heath, Altiero Spinelli and even Valéry Giscard d'Estaing — especially when he deemed them (all too often) to be lacking in zeal or consistency for the European cause. His own high standards led him to expect much of others.

John was a brilliant editor of others' works, as well as a kindly but critical mentor of those younger (like me) whom he recruited to work alongside him. His lengthy bibliography very well illustrates the rich breadth of his intellect and politics: economist, *politologue*, environmentalist, historian, teacher, benefactor. And we are truly fortunate that after his death on 7 March at the age of 91 his writing and example are still with us — liberal, continuing and humane.

He was a very good writer, tackling complex subjects with scruple and without condescension.[2] Here he is on the Treaty of Maastricht: "The question at issue is whether the powers [of the European Union] are to be exercised in common by an intergovernmental system, which is both inefficient and undemocratic, or by an effective system which respects the principles of democratic government, with the rule of law based on fundamental rights and with properly representative government under which representatives of the people — together with, in federal systems, the representatives of the states — enact the laws and control the executive. This system is based on British, more than on any other, political philosophy. It is very sad that British governments

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[2] See for example John Pinder, *The European Union: A Very Short Introduction*, Oxford, Oxford University Press, 2001.

should oppose its application to the European Union where interdependence renders a new level of government necessary."

John strongly promoted the EU's enlargement to the east as well as its democratic reinforcement. He was one of the first to advocate the holding of a European constitutional convention. "Such a procedure is a novelty for the British. Our constitution has developed in a different way. But the exercise of political power in common with our neighbours to deal with the problems of mutual interdependence has reached a point where a constitution will be needed to ensure that it is properly controlled; and the need will become more acute as the number and diversity of member states increases. The European constitution cannot evolve over the centuries as the British one did. Nor should it be allowed to develop much further by the methods employed to negotiate the Maastricht Treaty. The Treaty is a positive achievement. But it is confusing and obscure and it has not carried the people with it. Europeans need an effective Union with a democratic structure, which must be established in a way that can secure the consent of the citizens. …Only thus can Europeans provide for the security, prosperity and environment that they should have in the intensely interdependent Europe of the twenty-first century".[3]

In *Who's Who*, John recorded his interests as "music, walking, foreign languages and literature". His holidays with Pauline walking in France and Italy never ceased to rejuvenate him. We can picture him thoughtfully trudging on, in high spirits like a pilgrim, with stubborn perseverance towards a destination becoming ever clearer and nearer.

Andrew Duff

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[3] Andrew Duff, John Pinder and Roy Pryce (Eds), *Maastricht and Beyond: Building the European Union*, London, Routledge, 1994, pp. 283 and 285.

Mario Albertini in the History of Federalist Thought*

JOHN PINDER

It is a great honour to be invited to give this address in honour of Mario Albertini, a man who did so much for us federalists, for Europe and for mankind. This honour is particularly significant for me because he, like Altiero Spinelli, made the thought of the British federalist school of the 1930s and early 1940s, together with that of the American founding fathers, the basis of his own federalist thought. Albertini explained that while the thinking founded on the British source gave an answer to the question "why create the European federation?" that founded on the American source answered the question of "how to create it?";[1] and it seems to me that as regards the question "what form of federation?" the source for Albertini, as for the British, was the Constitution of the United States of America.

The question that I wish to address today is "how did Albertini's thinking develop these two federalist traditions?" The general response is that Albertini was the major exponent of Hamiltonian thought in the second half of the twentieth century as well as creator of the Italian federalist school. He was, however, not just an exponent but also an innovator, often in a way that illuminated the thinking of other schools, sometimes in an interestingly divergent manner.

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* This is John Pinder's contribution to a study conference (April 8, 2002), jointly organised by the University of Milan, the University of Pavia and the European Federalist Movement (MFE), on Mario Albertini, scholar and militant, five years after his death.

[1] For example M. Albertini, *L'unificazione europea e il potere costituente*, (1986), in Id., *Nazionalismo e Federalismo*, Bologna, Il Mulino, 1999, pp. 302, 304. (Many of Albertini's writings have been reprinted, and the original sources given, in two anthologies: *Nazionalismo e Federalismo* and *Una rivoluzione pacifica. Dalle nazioni all'Europa*, to which the first citation of each essay below refers. In each reference, the date of the original essay is given in brackets after its title, in order to help readers to appreciate the context and to trace the chronological development of his thought).

What Form of Federation.

For Albertini, as for Spinelli and for the British school, the central question was the transformation of absolutely sovereign states into federated states within a federal state. For them, the federalism of Althusius or of Proudhon, seen by Albertini as "a technique… for the decentralisation of political power",[2] was not of much importance. Albertini indicated that Proudhon "remained, in his conception of the state, an anarchist", though he also called him a remarkable prophet, "who foresaw what the tragic limits of national democracy would be, should it not find its correctives in local democracy and European democracy". Albertini also affirmed that federalism requires "the creation of spheres of democratic government located at every level of concretely manifested human relations".[3] But he concentrated his thought on the creation of a federation of sovereign states, essential to guarantee peace among them.

While the writers of the British school had given a classical exposition of the form of such a federation, Albertini provided the best exposition of the second half of the twentieth century.[4] Both, however, while following the principal elements of the American constitution, preferred the European system of a parliamentary executive to the American presidential system. Albertini underlined the merit of a "government responsible to the European Parliament… as the source of democratic control of the activity of the Union".[5]

Albertini also enriched federalist thought with his analysis of the relationship between nation and state.[6] For Albertini, the nation-state, with its arrogance, damages the life of the citizens, constraining economic production and producing war.[7] Its defects are also manifested in the "contradiction between the achievement of democracy in the national framework and its negation in the international framework", which also makes both liberalism and socialism impotent at the na-

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[2] M. Albertini, *Il Risorgimento e l'unità europea* (1961), in Id., *Lo Stato nazionale*, Bologna, Il Mulino, 1997, p. 184.

[3] M. Albertini, *La federazione* (1963) and *Le radici storiche e culturali del federalismo europeo* (1973), in Id., *Nazionalismo e Federalismo, op. cit*., pp. 99, 128, 114.

[4] M. Alberini, *La Federazione*, *ibid*.

[5] M. Albertini, *Moneta europea e Unione politica* (1990), in Id., *Una rivoluzione pacifica. Dalle nazioni all'Europa*, Bologna, Il Mulino, 1999, p. 323.

[6] M. Albertini, *Lo Stato nazionale*, Bologna, Il Mulino, 1997, containing a reprint of the previous editions of 1960 and 1980.

[7] M. Albertini, *The Nation, Ideological Fetish of Our Time* (1960), The Federalist, 32 (1990), p. 83.

tional level.[8] The nation-state should be replaced by a plurinational federal state; the European federation would be "a people of nations, a federal people" instead of "a national people"; and federalism foresees a structure of democratic plurinational states right up to the world level.[9] The thinking of the British school on this subject was similar, but Albertini' s analysis was more refined.

In the thirties, the British school advocated federalism as a general remedy against war. World federation was the logical solution, but realisable only in the long term. Many supported Clarence Streit's proposal for a federation of fifteen democracies, including the United States, to prevent a war provoked by the Axis. But isolationist America was not available for this and in 1939 the leaders of the British school decided to base their thinking on the idea of a federation of European democracies, pending the accession of the fascist states after they returned to democracy. This was naturally the starting point for Albertini who, after the refusal of the United Kingdom to participate in the European Community, foresaw, to begin with, "a European federation which will include at least the six countries that have assumed the leadership of the process of unification", and then its "gradual expansion to the whole of Europe".[10] When the UK entered the Community, he added that it is necessary "to wait until membership of the Community bears fruit".[11] We are still waiting for all this fruit to be harvested, and hoping for the best.

Kenneth Wheare cited "similarity of political institutions" among the member states as a condition for the establishment of a federation.[12] Albertini was more precise, affirming the necessity, in both the federation and its states, of "the attribution of sovereignty to the people in the framework of the representative system of government, with the possibility of dual representation through the dual citizenship of each vot-

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[8] M. Albertini, *Le radici storiche...* (1973), *op. cit*., pp. 126-7; Id., *L'integrazione europea, elementi per un inquadramento storico* (1965), in Id., *Nazionalismo e Federalismo, op. cit*., p. 235; Id., *Quest-ce que le fédéralisme? Receuil de textes choisis et annotés*, Paris, Société Européenne d'Etudes et d'Informations, 1963, p. 32.

[9] M. Albertini, *For a Regulated Use for National and Supranational Terminology* (1961), The Federalist, 35 (1993), p. 191.

[10] M. Albertini, *The Strategy of the Struggle for Europe* (1966), The Federalist, 38 (1996), p. 53.

[11] M. Albertini, *Il problema monetario e il problema politico europeo* (1973), in Id., *Una rivoluzione pacifica, op. cit*., p. 185.

[12] K.C. Wheare, *Federal Government*, London, Oxford University Press, 1951 (1st edn 1946), p. 37.

er".[13] This condition has become particularly relevant as regards the new democracies that are candidates of accession to the Union, and remains a crucial problem for world federation.

Why Federation.

In 1937 Lionel Robbins's *Economic Planning and International Order* was published, analysing why an international federation was essential for the good government of an international economy. In 1939, in *The Economic Causes of War*, he explained why the cause of war was not capitalism, but national sovereignty, and concluded with a passionate appeal for a European federation.[14] Albertini noted that these books were the most important federalist sources for Spinelli when confined in Ventotene.[15]

For post-war British federalists, as for Robbins in 1939, peace was the aim of federalism. For Albertini too, the aim was peace: federalism's "particular value" and "supreme goal".[16] But the complexity of Albertini's thinking was sometimes concealed by the simplicity of his formulations. He had followed Lord Lothian in defining peace, not as "the mere fact that war is not being waged", but as "the organisation of power that transforms power relationships between states into relationships based truly and properly on law".[17] By 1981, Albertini recognised that "with the struggle for European unification the first forms of political Europe have been achieved together with the end of military rivalry between the old nation-states of Western Europe".[18] That is to say, for relations among these states that objective had been attained, while for some states of Eastern Europe, and above all for the world as a whole, it would remain the supreme objective.

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[13] M. Albertini, *L'unificazione europea e il potere costituente* (1986), in Id., *Nazionalismo e Federalismo, op. cit*., p. 296.

[14] L. Robbins, *Economic Planning and International Order*, London, Macmillan, 1937, and Id., *The Economic Causes of War*, London, Jonathan Cape, 1939.

[15] See M. Albertini, *L'unificazione europea...* (1986), *op. cit*., p. 302. See also J. Pinder (ed.), *Altiero Spinelli and the British Federalists: Writings by Beveridge, Robbins and Spinelli 1937-1943*, London, Federal Trust, 1998, p. 46.

[16] M. Albertini, *Quest-ce que le fédéralisme?* (1963), *op. cit*., p. 32; Id., *War Culture and Peace Culture*, The Federalist, 26 (1984), p. 9.

[17] M. Albertini, *Le radici storiche...*(1984), *op. cit*., p. 114; Lord Lothian (Philip Kerr), *Pacifism is not Enough, nor Patriotism Either*, London, Oxford, Clarendon Press, 1935, p. 7, reprinted with a preface by Sir William Beveridge, 1941, and in J. Pinder and A. Bosco (eds), *Pacifism is not Enough: Collected Lectures and Speeches of Lord Lothian (Philip Kerr)*, London, Lothian Foundation Press, 1990, p. 221.

[18] M. Albertini, *La pace come obiettivo supremo della lotta politica* (1981), in Id., *Nazionalismo e Federalismo, op. cit*., p. 151.

For the citizens of the Union of today, other objectives have become more salient. Albertini cited from the manifesto of Ventotene the affirmation that the issue as to who controls the "planning" of the economy is the "central question":[19] the same question as Robbins had posed in 1937. Albertini also identified other values essential for contemporary federalism: ecological security;[20] the rejection of hegemony (c.f. the preoccupations of Carlo Cattaneo and of the American founding fathers);[21] and democracy in the nation-states, which is being increasingly constricted by their interdependence.[22] These elements, it seems to me, are necessary in order to explain federalist values to citizens of the Union today, whereas those in some states of Central and Eastern Europe will still see peace as the outstanding objective.

World Federation.

In his book *The Price of Peace*, published in 1945, Beveridge explained that national sovereignty is the cause of war, and its renunciation in a world federation the way to abolish it.[23] Although he recognised that this was a distant aim and that meanwhile only a confederation could be realised at the global level, this book was my introduction to federalism as the response to the terrible experience of the war. After Hiroshima and Nagasaki, world federation seemed an urgent necessity to millions of people, among whom about half a million bought Emery Reves's *The Anatomy of Peace*.[24]

World federalist movements flourished, above all in the anglo-saxon countries and Japan; political leaders like former prime minister Clement Attlee became supporters; and a world federalist literature was developing. But the climate of the Cold War discouraged most supporters and this field was almost abandoned by federalist thought.

Albertini was an exception. He was more consistent, more tenacious, more resolute than others, in confronting the facts of power and their consequences. For him, "the risk of destruction of mankind" by the atomic bomb was "absolutely unacceptable".[25] But he recognised,

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[19] M. Albertini, *L'unificazione europea*... (1986), *op. cit*., p. 304.
[20] M. Albertini, *War Culture and Peace Culture* (1984), *op. cit*., p. 18.
[21] M. Albertini, *Le radici storiche*... (1973), *op. cit*., p. 140.
[22] M. Albertini, *The Strategy of the Struggle for Europe* (1966), *op. cit*., pp. 57-58.
[23] W. Beveridge, *The Price of Peace*, London, Pilot Press, 1945.
[24] E. Reves, *The Anatomy of Peace*, New York, Harper, 1945; London, Allen & Unwin, 1946; Harmondsworth, Penguin Books, 1947.
[25] M. Albertini, *La pace come obiettivo supremo della lotta politica* (1981), *op. cit*., p. 184.

like Beveridge, that the conditions for creating the world federation were not present. The struggle for a constituent assembly, fundamental for his doctrine with respect to European federation, was not yet practicable. So his strategy for world federation was similar to that of the anglo-saxons: "the strengthening of UN", together with other "intermediate goals" in the "process of transcending the exclusive nation-states", which had "already reached a very advanced stage" in the European Community.[26] Typical of his federalist thought was the emphasis on federalist militants: on the need "to build up… a world political vanguard" to work for the creation of world federation.[27]

How to Create the Federation.

Albertini and the British federalists were generally in agreement about the what and the why of federation. But their ideas differed on how to create it.

The British sought to influence their government to adopt a federalist policy: in the thirties and forties to initiate the establishment of a federation, and later to support the building of pre-federal elements into the institutions and powers of the Community. Albertini's fundamental principles were, instead, the constituent assembly and the separation of the federalists from the struggle for national political power.

Spinelli wrote that in the period from 1945 to 1954, he had "worked on the hypothesis that the leading moderate European ministers… would set about constructing the federation":[28] a method quite similar to that of the British federalists. Then, after the failure in 1954 of the project for a European Political Community, he founded the Congress of the European People and launched the campaign to initiate a constituent assembly, creating "a growing popular protest… directed against the very legitimacy of the nation-states".[29] When it became evident to Spinelli that the campaign was not having the success he desired, he conceived the proposal that the federalists should gain power in an increasing number of important towns, as the basis for a subsequent campaign. Albertini was unable to accept this idea, which contradicted his fundamental federalist principles; and the Movimento federalista europeo agreed with him. Spinelli, vexed, wrote in his diary that

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[26] M. Albertini, *Towards a World Government*, The Federalist, 26 (1984), pp. 5-6.

[27] *Ibid*.

[28] A. Spinelli, *Come ho tentato di diventare saggio. La goccia e la roccia*, ed. by E. Paolini, Bologna, Il Mulino, 1987, p. 18.

[29] *Op. cit*..

for Albertini, "to try to prepare the event (of the final struggle) was squalid opportunism, it was necessary to prepare oneself for the event".[30] Spinelli was a brilliant politician with the capacity to conceive and conduct campaigns of action, culminating in the remarkable success of his final campaign to create the European Parliament's Draft Treaty to establish the European Union. He was not constrained by fixed roles; and his tendency to initiate "new courses", or strategies, caused too many difficulties for a movement such as the MFE. Albertini was absolutely convinced of the necessity to respect certain fundamental principles, which he did with exceptional consistency and tenacity. These characteristics were crucial for his place in the history of federalist thought, enabling him not only to develop his own intellectual oeuvre, but also to found the Italian school of Hamiltonian federalism.

One cause of the difference between Albertini and the British was his form of historical thinking, where he followed Weber's method according to which, in his words, "there is no historical knowledge without specific theoretical frames of reference within which to arrange the facts and arrive at their significance ('ideal types')", though "the elaboration of theory should be pursued only up to and not beyond the point at which it renders historical knowledge possible, because beyond that point it becomes the presumption of substituting theoretical knowledge… for historical knowledge".[31] The British empirical tradition does not lack the capacity to develop theories, as witness liberalism and Darwinian evolution. But the development of theory may come earlier in the weberian tradition and its adaptation to the facts later; and perhaps this difference between their ways of thinking was a cause of the differences between the approaches of Albertini and the British.

The Development of the European Community and of Albertini's Thought.

Although the British developed their democracy through a reformist process, without a constituent assembly, the idea of such an assembly was acceptable to many. In 1948, R.W.G. Mackay, a leading federalist member of parliament, obtained the support of a third of all MPs for a resolution proposing a European constituent assembly.[32]

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[30] A. Spinelli, *Diario europeo, I, 1949-1969*, ed. by E. Paolini, Bologna, Il Mulino, 1989, p. 417.

[31] M. Albertini, *L'unificazione europea e il potere costituente* (1986), *op. cit*., pp. 293-4.

[32] R. Mayne and J. Pinder, *Federal Union: The Pioneers - A History of Federal Union*, Basingstoke, Macmillan, p. 96.

But while for British federalists a reformist process of preparation would also be seen as useful and the European Coal and Steel Community a valid point of departure, in 1961 the point of departure for Albertini remained only "giving constituent power to the European people… all or nothing"; it was necessary to "refuse any power… until all of it can be obtained"; the solution of the Community "inspired by so-called functionalism (the bright idea of making Europe by bits and pieces) was bad" and Economic Communities were "empty words".[33]

But as a good Weberian he was ready to adapt the theory to the facts, and by 1966 he wrote that the ECSC had established "a *de facto* unity… solid enough to be able to support the beginning of a true and proper economic integration", which "was a fundamental fact for the life of Europe";[34] and a year later he wrote that "European integration represents the process of overcoming the contradictions between the scale of the problems and the size of the nation-states". Thus "the facts of European integration" threaten exclusive national powers, "creating at the same time, through a *de facto* unity, a *de facto* European power", which the federalists can exploit politically.[35] In the same essay he identified the transfer of control of the army, the currency and part of the revenue of the national governments to a European government as crucial elements in the transfer of sovereignty;[36] and in 1971, considering the prospect of direct elections to the European Parliament, he wrote that such a situation could be regarded as "pre-constitutional because where there is direct intervention of the parties and citizens, there is also the tendency towards the formation of a constitutional order".[37] It is interesting, even moving, to observe how, while the British, in their different situation, neglected the idea of the constituent, Albertini was modifying his theory in the light of the facts, that is of the success of the European Community. This led him to make a very important contribution to federalist thought: a synthesis of Spinelli's approach with that of Monnet.

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[33] Mario Albertini, *Four Commonplaces and a Conclusion on the European Summit*, The Federalist, 33 (1991), pp. 156, 157, 158, 161; original version in Il Federalista, 3 (1961).

[34] M. Albertini, *L'integrazione europea, elementi per un inquadramento storico* (1965), *op. cit.*, pp. 249-50.

[35] M. Albertini, *The Strategy of the Struggle for Europe* (1966), *op. cit.*, pp. 62, 64.

[36] *Ibid.*, pp. 60-61.

[37] M. Albertini, *Il Parlamento europeo. Profilo storico, giuridico e politico* (1971), in Id., *Una rivoluzione pacifica, op. cit.*, p. 216.

Towards a Synthesis Between Spinellism and Monnetism.

His ideas on money itself provide another example of this development of his thought. In 1968, he had written that "there is no common market without a common currency, nor common currency without common government, so the point of departure is the common government".[38] But four years later he concluded that monetary union could "push the political forces onto an inclined plane" because, engaging on a project that implies a political power, it can happen that they end up "finding themselves, like it or not, obliged to create one". In the monetary field, steps forward would be possible "of an institutional character, tangible and European, for example in the direction indicated by Triffin", *i.e*. a currency reserve system, which would have been "mistaken" by the political class "for a stage on the way to the creation of a European currency"; and one could therefore foresee "a slippery passage towards a situation that could be called a 'creeping constituent'".[39]

Albertini was "preparing the event", even if not in a way approved by Spinelli, whose project at that time was different and who wrote in his diary that Albertini had reduced the MFE to "foolish followers of Werner", whose report had proposed stages towards economic and monetary union.[40] But the reconciliation between Albertini and Spinelli was no longer far off, thanks to the approach of the direct elections and Spinelli's great project of the Draft Treaty for European Union.

Already in 1973 Albertini, in his analysis of monetary union, identified the direct elections as a decisive point "because it concerns the very source of the formation of a democratic public will".[41] So the elections to the European Parliament would be one of the keys, together with the currency and the army, to the transfer of sovereignty. In 1976, the European Council decided on the elections and Spinelli embarked on his fifth and final "new course".[42] Albertini observed that "the political phase — by definition constituent — of the process of European integration has begun". Thus he had concluded that the Community would be the basis of the European federation, by means of "single constituent acts that reinforce the constitutional degree of the

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[38] M. Albertini, *L'aspetto di potere della programmazione europea* (1968), in Id., *Nazionalismo e Federalismo, op. cit*., p. 262.

[39] M. Albertini, *Il problema monetario...* (1973), *op. cit*., pp. 184, 187, 191.

[40] A. Spinelli, *Diario europeo, III, 1976-1986*, ed. by E. Paolini, Bologna, Il Mulino, 1989, p. 186.

[41] M. Albertini, *Il problema monetario...* (1973), *op. cit*., p. 192.

[42] A. Spinelli, *La goccia e la roccia..., op. cit*., p. 18.

process, making further constituent acts possible and so on", and that "only with an initial form of European state (to be established by an *ad hoc* constituent act) can one launch the process of the formation of the European state, so to speak definitively": *i.e*. it is necessary to accept "the paradox of creating a state in order to create the state". He made the Community's role in this process explicit, in the "gradual construction, by steps according to the degree of union achieved, of a European political and administrative organisation": a process that "one can in theory consider complete only when the initial European state (with sovereignty over money, but not in the field of defence), has been transformed into the definitive European state, with all the powers required to act as a normal federal government".[43]

Thus Albertini's Weberian journey had led him to a fruitful synthesis between Spinellism and Monnetism. This was, in his words, "the idea of exploiting the possibilities of functionalism to achieve constitutionalism", because "European unification is a process of integration… which is closely linked to a process of constructing institutions which, from time to time, become necessary…".[44] So he was ready to explain in theoretical terms Spinelli' s crowning achievement: the European Parliament's Draft Treaty on European Union.

From the Draft Treaty to the Laeken Convention.

Albertini observed that the Draft Treaty was realistic, because it proposed "only the institutional minimum to found the European decisions on the consent of the citizens". "The greatest merit of the Draft" lay in the fact that "it entrusted the European Parliament with a) the legislative power," together (as in the present co-decision procedure) with the Council of Ministers, which, "in this respect, would have a role similar to a federal Senate", and b) "the power deriving from the parliamentary control over the Commission, which would begin to take on the form of a European government". The Draft was "reasonable", because "only when the Union has demonstrated its capacity to function properly will it be possible to have the large majority to give the Union sovereignty in the field of foreign policy and defence as well".[45]

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[43] M. Albertini, *Elezione europea, governo europeo e Stato europeo* (1976), in Id., *Una rivoluzione pacifica, op. cit*., pp. 223, 225, 226.

[44] Mario Albertini, *Europe on the Threshold of Union*, The Federalist, 28 (1986), pp. 25, 27.

[45] *Ibid*., pp. 33-4.

Thus the Draft was, in his earlier words, a proposal for "creating a state in order to create the state".

Spinelli's political genius, manifested in the Draft Treaty, was the cause not only of the reconciliation between him and Albertini, but also of the completion of the development of a most important element in Albertini's political thought: the relationship between the political action and philosophy of Monnet and those of Spinelli. It is tragic that Spinelli died believing that the Draft Treaty had failed because the Single Act was a "dead mouse". Albertini, however, survived until really significant consequences had become evident. In his document published in *L'Unità europea* in December 1990, he was able to affirm that, "barring catastrophes", the power over monetary policy would be transferred to the European level, and that it was therefore necessary to adapt the decision-taking mechanism accordingly, "making the Community function like a federation in the sphere where there is already, in prospect, a European power (the economic and monetary field including its international implications) and like a confederation in the sphere within which there is no such power nor will be for an indefinite period (defence)". Then he referred to the Parliament's "Treaty-constitution" and to a "natural evolution of the institutions (the European Council as collegial president of the community or Union, the Council of Ministers as house of the states, the Commission as government responsible to the European Parliament, the European Parliament as the source of democratic control of the activity of the Union and as holder, together with the Council, of the legislative power)".[46] One can record a significant progress of this "natural evolution" during the nineties. The procedure of qualified majority has become applicable to over 80 per cent of the Council's legislative acts; the Parliament now co-decides with the Council over half of the laws and of the budget; the Commission's responsibility to the Parliament has been resoundingly demonstrated. The Community does not yet function "like a federation in the sphere where there is already a European power", that is mainly in the economic and monetary fields; but the Laeken Convention opens the door to completion of the process of creating it.

The question is no longer whether there can be a document called a constitution, which now appears to be acceptable to the British government as well as others. The crucial question is whether the institutions

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[46] *Moneta europea e unione politica. Un documento del Presidente Albertini in vista del Consiglio europeo di dicembre* (1990), L'Unità europea, n. 202 (dicembre 1990), p. 20.

will be properly federal, completing their evolution foreseen by Albertini, including co-decision and majority voting for all legislative decisions, together with the Commission, like a government within the field of Community competence, being fully responsible to the Parliament.

This federalist struggle has not become less arduous, because the supporters of the intergovernmentalist doctrine include, it seems, not only the British, Danish and Swedish, but also the French and even the Italian governments. It is necessary to persuade the citizens and the political classes, and finally the governments, that an intergovernmental constitution would be both ineffective and undemocratic. Thanks to the life's work of Spinelli and Albertini, together with the contributions of so many others, the MFE is surely ready to confront this challenge, as regards the Italian citizens, political class and, crucially, government.

Albertini and His Place in the History of Federalist Thought.

I hope I have given some indication of the rich, broad, deep and erudite contribution of Mario Albertini to the federalist thought of his age.

Perhaps it has been the subjective choice of a British federalist, to have underlined the particular importance of Albertini's synthesis of the approaches of the two great federalists of the second half of the twentieth century: Jean Monnet and Altiero Spinelli.

In addition to his personal body of work, Albertini contributed to federalist thinking as the founder of the modern Italian school. At the same time, after Spinelli had founded, inspired and guided the MFE with his unique charisma, Albertini constructed and sustained the Movement which was capable of organising the great demonstration of some half a million people in Milan in June 1984 demanding the European Council's support for Spinelli's Draft Treaty and, five years later, of obtaining the assent of 88 per cent of Italian voters in the referendum on a constituent mandate for the European Parliament. How and why was one man able to ensure the achievement of all these different things? Perhaps the impression of a "non-participant observer" could be of interest.

Albertini emphasised in his writings both reason and will.[47] He practised and inspired them both, with the stress on reason for his intellectual work and on will as President of the Movement; and he placed both at the service of his profound faith in federalism as the essential priority for the welfare and the survival of mankind. He ex-

[47] For example, M. Albertini *Towards a World Government*, op. *cit*., p. 7.

pressed this attitude in a way too little known outside the MFE, underlining that people are needed "who make the contradiction between facts and values a personal question", in a context in which "the disparity between what is and what should be is enormous".[48]

Albertini dedicated his own life to the task of resolving this contradiction and had the capacity to persuade others to do the same. He was an inspiring orator and, although his writings were sometimes complicated, was also able to formulate in simple terms inspiring visions, for example that "federation… has created very wise institutions, capable of transmitting to many generations a powerful experience of diversity in unity, of liberty, of peace"; that "only politics, and only in its highest form, can resolve the problems of international relations"; and that the world political vanguard is needed "for the great world task of the construction of peace".[49]

Fundamental to his ability to inspire others was his faith in the value of each one of them, with the belief that each had both the capacity and the responsibility to make his or her own contribution.[50] His ideas on the various contributions of different people and organisations were part of his own contribution to federalist thought. There was room for those who accepted federalism passively and for "occasional", *ad hoc* leaders. But his passion was for the hard core of militants, for whom the contradiction between facts and values was the primordial motive of their work. He had a special message for intellectuals: that it is necessary for them to go "out into the open… to complement politics as the art of the possible — politics in a narrow sense — with politics in a broad sense, that is the art of making possible that which is not yet possible".[51] For them — for you — the emphasis was on will as well as on reason. In May 1956 Spinelli wrote in his diary: "I have mentioned to Albertini the idea of constituting a 'European federalist order.' Is it a good idea?"[52] Spinelli was a great innovator with remarkable power of intuition. Albertini had the qualities to do that: sincerity, integrity, courage, consistency, devotion. It seems to me that he did indeed create a kind of federalist order. His work was a continuous

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[48] M. Albertini, *The Strategy of the Struggle for Europe* (1966), *op. cit.*, p. 72; Id., *Le radici storiche...* (1973), *op. cit.*, p. 136.

[49] M. Albertini, *La federazione* (1963), *op. cit.*, p. 100; Id., *L'integrazione europea* (1965), *op. cit.*, p. 252; Id., *Towards a World Government*, *op. cit.*, p. 8.

[50] M. Albertini, *The Strategy of the Struggle for Europe* (1966), *op. cit.*, p. 59.

[51] M. Albertini, *Il Parlamento europeo* (1971), *op cit.*, p. 204.

[52] A. Spinelli, *Diario europeo*, *I, 1948-1969, op. cit.*, p. 297.

process of construction; and now you, his colleagues and friends, have the responsibility of carrying on this great work without him, not just as a monument of erudition and exceptional commitment, but as a living tradition that you must continue to develop. As for me, although I do not agree with all his ideas, I have such sympathy for his work and conviction of its importance that I am engaged, with the help of the Istituto Altiero Spinelli, on an anthology in English of his writings, in order that these ideas should be better known to a readership that reads, not Italian, but the language that Albertini designated, in the first issue of *Il Federalista* also published in English, as the universal language that is required in the field of politics.[53] I hope that this anthology will not only be useful for federalists who read English but not Italian, but also for a just recognition of the contribution of Albertini in the history of federalist thought.[54]

It gives me great pleasure, in conclusion, to express my admiration and gratitude for the life of Mario Albertini, and for his exemplary devotion to our supreme cause of federalism. In Shakespeare's incomparable words, "he was a man, take him for all in all, (we) shall not look upon his like again".

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[53] M. Albertini, *Towards a World Government, op. cit.*, p. 4.

[54] I have not so far mentioned a living Italian federalist, because it would not be fair to single out any among so many who have done significant things for contemporary federalism. But in this particular context it would be unjust not to mention Roberto Castaldi, who has initiated the idea of the anthology and proposed for it a selection of Albertini's writings (which have also provided a major part of the material on which this essay is based); and I wish to thank him for making many linguistic corrections to my original Italian text for this article. I should also explain that there are some slight differences from that text, where matters that are well known to Italian readers may not be known to readers of this English translation.

Notes

THE PARADOX OF GERMAN POWER

The global economic and financial crisis that began in the United States in 2007-2008 really began to be felt in Europe as from 2010, where it has been reflected, in particular, in the fragility of the monetary union (which faces a very real risk of disintegrating and thus causing the collapse of the process of European unification) and in increasingly marked economic and social imbalances, reflecting territorial differences, between the strong and the weak member states of the Economic and Monetary Union. Essentially, these correspond, respectively, to a core group that is led by Germany and comprises Benelux, Austria and Finland (as well as France in a more intermediate position) and a peripheral group whose main "members" are Italy, Spain, Portugal, Ireland and Greece. This asymmetry, which is clear from the disparities existing in a number of areas (growth rates, unemployment levels, internal imbalances, poverty belts, levels of productivity and of competitiveness, trade and balance-of-payments imbalances, national debts and the related spreads) is the main reason for the precarious state of the euro. It is, moreover, the key factor underlying the recent strengthening of nationalistic currents opposed to European unification and the related emergence of nationalistic ill-feeling between different European countries. The accusations of selfishness levelled at the economically strong countries, which are held to be profiting from the integration process at the expense of the weak countries, are countered with accusations of parasitism and of slack economic and financial discipline directed at the countries in difficulty. In this context, there are widespread concerns over Germany's hegemonic role within the EU, which evokes ghosts of the past when the "German question" was, on two occasions, the crucial element of conflict that led to the outbreak of war on a world scale. In relation to these concerns and the debate

that has developed around them, mention should be made of the book *The Paradox of German Power* (London, Hurst Company, 2014) by Hans Kundnani (research director at the European Council on Foreign Relations and associate fellow at the Institute for German Studies at the University of Birmingham). Through a brief but effective reconstruction of Germany's relationship with Europe from the time of Germany's national unification through to the current crisis of European unification, the author asks essentially whether, and in what terms, it still makes sense to talk of the "German question". In my view, an examination of the essential aspects of Kundnani's treatment of this issue, seeking to bring out its strengths and weaknesses, can contribute to efforts to achieve a proper overview of this question.

As regards the period between national unification and 1945, Kundnani supports the view that Germany played a decisive role in the onset and unfolding of the two World Wars, both of which were, essentially, attempts to impose German hegemony on Europe. Accordingly, there is continuity between them, despite the clear and profound difference between the Wilhelmine regime and the National Socialist regime — the latter being guilty of appalling internal criminal acts and acts of war, typical of a perfect totalitarian system. This quest for hegemony, by Germany, was based on an interweaving of two factors: one structural and the other ideological.

The structural factor was basically the position of "semi-hegemony" that Germany found itself occupying, in Europe, after its unification in 1871: when it became a nation-state, Germany assumed a size and thus a level of power that was excessive, and therefore incompatible with a stable balance of power in Europe, but at the same time insufficient to allow the realisation of a stable and peaceful hegemony. This structural situation naturally prompted the other European powers to form coalitions in order to counterbalance the weight of Germany's power. In turn, these coalitions inevitably began to be feared in Germany — they were dreaded because of the threat of encirclement — and drove it to take measures to protect itself. But these measures were inevitably peceived as a threat by the other powers and therefore had the effect of accelerating the formation of coalitions. This vicious cycle — in itself a classic example of the security dilemma — was accentuated in the 1890s, when Germany embarked on its *Weltpolitik*, in other words its no-holds-barred participation in the imperialism race, without any of the qualms that had held Bismarck back. Germany's aim was to build a large colonial empire, so as to acquire dimensions in line with those of the world's

major powers (Great Britain, Russia and the United States) and thus to obtain the vital space for development that was crucial in order to avoid the decline that represented the destiny of Europe's nation-states. The *Weltpolitik* revolved around the construction of a powerful sea fleet that had to be strong enough to overcome Great Britain's global naval dominance. Since Britain's security depended essentially on its naval supremacy, the Germans' decision forced Westminster not only to strengthen the British navy, but also to side with the Franco-Russian alliance; this thus became the Triple Entente as opposed to the Triple Alliance, whose stable pillars, given the relative weakness and uncertain position of Italy, were Germany and the Austro-Hungarian Empire. Europe thus saw the emergence of a bipolar balance, at which point it became inevitable that there would be a transition from situations of serious conflict between two powers from opposing blocs (as seen between Austria-Hungary and Russia, for example) to a situation of general conflict. Therefore, as regards the origins of the First World War, Kundnani maintains that the decisive factor lies not so much in miscalculations by, or faults on the part of, the protagonists (particularly Germany), as in the presence of a systematic cause, namely Germany's semi-hegemonic position and, as an effect of it, Europe's evolution towards a bipolar order. Precisely in order to move beyond its extremely difficult and unstable semi-hegemonic position, Germany, following the outbreak of the war, pursued a new goal — full hegemony over Europe, in other words, the overcoming of the balance of power that left Germany constantly exposed to the risk of being surrounded and hindered its prospects of becoming a global power.

Following its defeat in 1918, Germany, stripped of colonies, vast territories in Europe and major economic outlets, subjected to extensive arms limitations, and obliged to pay hefty reparations under the terms of the Treaty of Versailles, found its power considerably diminished. Yet, at that same time, in a situation in which peace continued to depend on the balance of power — partly because of the flimsiness of the attempt to replace power politics with the collective system of security based on the League of Nations, which had no power of coercion —, Germany actually found itself, relatively speaking, in a stronger position than before, given that the other empires were collapsing, France had been drained by its huge war effort, and even Great Britain was severely weakened. In this European framework, characterised by a precarious equilibrium and general economic decline, Weimar's Germany set out to recover the sovereignty curtailed by the Treaty of Versailles, to obtain

formal equality with the other powers, and to recover the territories that had been relinquished to Poland. Even though it was clear that revisionism would lead to an even more acute imbalance in the European system than that which had existed before the war, these aims were shared by the vast majority of political forces in Germany, and they were pursued through efforts (always based on diplomatic and peaceful means) to exploit the divergences between the Western powers and the tension between the latter and the Soviet Union. The situation changed as a result of the crisis of 1929, which had disastrous consequences in Europe and especially in Germany, where it drastically limited the prospects of economic development, already weak following the 1918 defeat. This is the setting in which the Nazi Party came to power and succeeded in building a totalitarian state whose foreign policy was not just to obtain a revision of the terms of the Treaty of Versailles, but also to pursue, and by the most brutal means, full hegemony over Europe, in order to definitively overcome Germany's semi-hegemonic status. The war unleashed by Hitler in pursing this design instead ended with the definitive defeat of Germany and, at the same time, the overcoming of the central role of the European system of states, which was absorbed into a global system dominated by the US and USSR.

Having underlined the importance of Germany's semi-hegemonic status as a central, structural factor in its policy that led to the two World Wars, Kundnani also draws attention to the ideological factor, namely nationalism, that increased the objective momentum coming from the structural one. German nationalism, like the nationalism of all great powers, tended to pursue as a priority the national interest and, therefore, in a framework of anarchic international relations, to exploit every opportunity to increase its power and expand its economic influence. This tendency, however, was associated with three characteristics that set Germany apart from the Western European powers, and in particular from Great Britain and France.

The first and most significant of these was its rejection of the liberal democracy that, rooted in the Enlightenment, had established itself in Western Europe and North America. After the failure of the 1848 revolution, there became established, in Prussia — and subsequently in the whole of Germany unified on the basis of the Prussian hegemony —, a political system that, formally, had certain hallmarks of democracy, such as universal suffrage, but in which power was concentrated in the hands of the monarchy and the army (dominated by the large landowning class, the Junkers) — essentially an illiberal, authoritarian

system. In the wake of the Weimar Republic interlude, which had seen an attempt to create a liberal-democratic system, the authoritarian character of the German nation-state became particularly strong with the coming to power of the National Socialism movement, which built a pervasive and efficient totalitarian system and, on this basis, was able, in the absence of obstacles internally, to embark on the second attempt to achieve German hegemony.

The second peculiar characteristic of German nationalism, after the illiberal authoritarian trend just described (generally referred to as *Sonderweg*, meaning a different direction compared with that of the West), was the idea that Germany had a mission. The ruling class of the German nation-state developed the firm belief that the German social-political system was not only different from that of the West, but far superior to it, and therefore that strengthening Germany's power and then pursuing the objective of German hegemony in Europe was also a way of disseminating the fundamental aspects of this system outside Germany. This is an idea that National Socialism exacerbated.

The third peculiarity of German nationalism (albeit looked at in less depth) is its use of social imperialism and Bonapartism, in other words its exploitation of imperialism as a means of overcoming and checking internal tensions generated by the authoritarian, and ultimately totalitarian, political-social system.

Kundnani's view of the profound reasons underlying Germany's attitude and policies, which we have briefly summarised here, is a step in the right direction towards achieving a real understanding of the German question, overcoming the limits inherent in a mere chronicling of events or in misleading simplifications regarding the faults of the German nation. Indeed, the author refers explicitly to the interpretation of the German question developed by Ludwig Dehio (the concept of semi-hegemony in particular), which is by far the most illuminating and, indeed, remains unsurpassed.[1] However, it has to be pointed out that Kundnani omits two fundamental clarifications proposed by the last great representative of the Rankian school.[2]

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[1] The key works by Dehio to which Kundnani refers are: *The precarious balance* (1948), New York, Knopf, 1982; *Germany and World Politics in the Twentieth Century* (1955), London, Chatto-Windus, 1959. He also takes into account an excellent work by an author who can be considered a pupil of Dehio: David P. Calleo, *The German Problem Reconsidered. Germany and the World Order 1971 to The Present*, Cambridge, Cambridge University Press, 1978.

[2] The reader is referred to Sergio Pistone, *Ludwig Dehio*, Naples, Guida, 1977.

First of all, he does not take into consideration the issue of the link between the position of Prussia, and then Germany, in the system of states and the authoritarian character of the Prussian-German political system. Dehio draws on the theory hinging on the distinction between island states and continental states that was developed by Alexander Hamilton in the eighth of the *Federalist papers*,[3] by the Rankian school[4] and by John Robert Seeley.[5] Island states (key examples being Great Britain and the United States), being in a strategically privileged position in which they are not under threat from powerful neighbours, have historically been characterised by their comparatively peaceful foreign policies and tendency to evolve internally in the direction of liberal, flexible and decentralised political-constitutional and social systems; continental states (such as Prussia-Germany, Austria and to a lesser extent France), on the other hand, have been characterised by comparatively more aggressive and bellicose foreign policies and, as a corollary, by a tendency towards authoritarian centralism internally. This difference is related ultimately to the decisive influence that foreign policy has on domestic policy. In continental states, the need to defend land borders against the threat of attack by land has traditionally necessitated tendentially more aggressive foreign policy lines (with not infrequent recourse to surprise attacks in order to pre-empt adversaries) and therefore led to the creation of huge armies that can be rapidly deployed. Inevitably, therefore, centralised and authoritarian political structures, able to achieve rapid and complete mobilisation of all available energies, be it for defensive or for offensive purposes, have prevailed within such states in order to ensure the survival of the state itself. All these considerations apply far less to island states, given that their strategic location allows them to rely primarily on the military navy for their defence, and thus avoid the cost, in economic but especially political and social terms, of creating the huge land armies typical of continental states and the related centralised bureaucracies that, in the life of a state, necessitate a strengthening of the dimension of authority at the expense of that of freedom. In the light of

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[3] Cf. Alexander Hamilton, John Jay, James Madison, *The Federalist,* New York, McLean, 1788.

[4] The reader is referred to: Sergio Pistone, *F. Meinecke e la crisi dello Stato nazionale tedesco*, Turin, Giappichelli, 1969, Sergio Pistone (editor), *Politica di potenza e imperialismo. L'analisi dell'imperialismo alla luce della dottrina della ragion di Stato*, Milan, Franco Angeli, 1973.

[5] Cf. John Robert Seeley, *The Expansion of England* (1883), Cambridge, Cambridge University Press, 2010. See also Luigi V. Majocchi, *John Robert Seeley*, The Federalist, 31, n. 2 (1989), pp.159-188.

these considerations, Prussia-Germany, surrounded by powerful neighbours and obsessed with the real prospect of war on several fronts, would seem to be the continental state *par excellence*. And it is therefore understandable that in this state, compared with Europe's other major powers, liberal-democratic trends had comparatively less chance of becoming established.

Naturally, this does not justify in the slightest its totalitarian-authoritarian tendencies and the crimes it perpetrated, both internally and internationally, but it does serve to clarify the objective situation that undoubtedly helped these to prevail over the liberal-democratic trends that were also present in the Prussian-German experience. If one fails to take into account the powerful conditioning arising from Germany's position in the system of states (and the "supremacy of foreign policy"), one cannot gain an adequate understanding of the German question, and thus risks falling for the lame national character theory, which basically expounds the absurd notion of an inherent wickedness of the German nation.[6]

The other fundamental clarification offered by Dehio, and neglected by Kundnani, is the notion of the historical crisis of Europe's nation-states as the constant theme running through the period of the two World Wars. It is not an alternative to the theory of semi-hegemony, but rather complements the latter, significantly strengthening its explanatory power. Kundnani, talking about Wilhelmine imperialism, explains that this, in a period in which industrial development was paving the way for global domination by states having continental dimensions, was justified by the need to expand the influence of the German state, and thus economy. However, although this argument is presented essentially as an ideological justification of imperialism, Dehio points out that it was actually a response to the real problem of the historical crisis of the European nation-states, whose size left them structurally obsolete in the late Industrial Revolution period that required states of continental dimensions. This situation presented a drastic choice: either

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[6] Here it is worth recalling a consideration by Alan I.P. Taylor in *The Origins of the Second World War,* London, Hamish Hamilton, 1961. He remarked that if a phenomenon of nature had resulted in the formation of a vast sea between the Germans and French, the German character would not have been predominantly militaristic, and that if (and this is a more readily conceivable hypothesis) the Germans had been able to exterminate their neighbours the Slavs, rather as the Anglo-Saxons in North America exterminated the Indians, the Germans would, just like the Americans, subsequently have become promoters of fraternal love and international reconciliation.

peaceful unification of Europe along federal lines (a concept that, with difficulty, began to emerge in political and cultural debate in the late nineteenth century), or the creation of larger states through imperialistic means. Precisely because none of the ruling classes in Europe were yet showing any inclination towards the first of these choices, the latter prevailed and logically led to the development of European hegemonic designs by Europe's strongest nation-state, which started from a semi-hegemonic position.

The German drive for hegemony which manifested itself through the two World Wars can be seen as the continuation of a series of hegemonic attempts that, throughout modern history, have been mounted by Europe's strongest continental states when these reached the height of their power – first Spain, then France and finally Germany. The new element in Germany's case was the fact that its hegemonic attempt was an imperialistic response (through the "sword of Satan" as Einaudi put it) to the historical crisis of the European nation-states, whose decline coincided with the weakening of the nation-state model and with the opening of a new phase of history, characterised by the drive for peaceful unification of Europe (through the "sword of God").[7] The fact that Kundnani does not adequately grasp this important aspect of the German question in the period from Germany's national unification to its collapse in 1945 detracts from the explanatory power of his analysis and prevents him from reaching a satisfactory understanding of the problem of European unification. At this point, we come to his interpretation of the evolution of Germany after 1945, whose essential aspects I will now outline.

This evolution can be divided into two phases that, according to the author, present significant differences: the first coinciding with the period from 1945 to the reunification of Germany in 1990, and the second with the period from reunification to Europe's financial and economic crisis of 2010-2014. The main thread running through the first phase was the overcoming, in West Germany, of two of the characteristics of German nationalism discussed earlier.

First of all, with the historical decline of German power — the decline in power was a phenomenon that spared none of the European na-

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[7] Cf. Luigi Einaudi, *La guerra e l'unità europea*, edited by Giovanni Vigo, Bologna, Il Mulino, 1986. For general remarks on the theory of historical crisis of nation-states developed by the federalist school (with which Dehio converges), see Mario Albertini, *Il federalismo*, Bologna, Il Mulino, 1993.

tion-states, not even those that had formally emerged victorious from the Second World War —, which was accompanied by the emergence of a stable hegemony of the United States over Western Europe, Germany's expansionary approach came to an end and, with it, its tendency to use military power as a decisive instrument for guaranteeing security and economic development. These ends were instead pursued through the country's inclusion as a stable part of the US-led Atlantic community and its involvement in the process of European integration, which were now regarded as the irreplaceable foundations for achieving national reunification. The use of West German military forces — these were re-formed after the failure of the EDC project, even though Germany's rearmament was subject to strict restrictions and, importantly, set firmly within the framework of NATO – was allowed, under the German Constitution, only in Europe and only for the defence of the Atlantic community (restrictions that would be overcome in the late 1990s). Basically, the model that West Germany tended to pursue was that of a "civil power", an expression that indicates not only commercial as opposed to military power, but also a state whose foreign policy is aimed primarily at overcoming policies based on power (security based essentially on national military might), *i.e.* at realising a multilateral monopoly on the use of force similar to the monopoly on the use of force existing within the domestic setting, or put another way, peace in the Kantian sense.[8]

The other fundamental aspect of German nationalism that was dramatically overcome in the experience of the Bonn Republic, through its inclusion in the Atlantic community and participation in the process of European integration, was *Sonderweg*, meaning opposition to Western liberal-democratic values. Here, we refer to what Heinrich August Winkler called the long road West, which ended with the reunification of Germany.[9] West Germany became, as also shown by its federal structure and social market economy system, one of the world's most advanced liberal-democratic states. Alongside the Westernisation of Germany (*Westbindung*), as the background to its Europeanisation (the choice to work towards a "European Germany" as opposed to a "German Europe"), there emerged, in Germany, increasingly systematic,

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[8] The author refers in particular to Hans Maull, *Germany and Japan. The New Civilian Powers*, Foreign Affairs, Winter 1990-1991.

[9] The key work referred to is that of Heinrich August Winkler, *Germany: The Long Road West*, 2 volumes, Oxford, Oxford University Press, 2007.

firm and widespread condemnation of its authoritarian and, even more, its totalitarian past, together with acknowledgement of its terrible crimes. West Germany, driven by a strong sense of historical guilt, is the country that has done more than any other to face up to its past. Indeed, it progressively founded its identity on absolute condemnation of the crimes committed by nationalism, especially in its final, totalitarian phase. There in fact exists a term that is used to refer to a German sense of identity based on horror over Auschwitz (*Auschwitz Identität*).

Whereas the German question seemed to be superseded in the experience of the Bonn Republic (the end of which, upon German national reunification, has even been considered, in line with Winkler, the German equivalent of Francis Fukuyama's idea of the "end of history"), in the period following the events of 1989-1990, which resulted in a geopolitical change as dramatic as that of 1871, the situation changed significantly. The nature of Germany's more recent evolution, *i.e.* in the new international framework — we are referring to its evolution in the period between German reunification and 2014 —, indeed led to a progressive return of the German question, particularly in the years of Europe's economic and financial crisis which began in 2010.

The main aspect to note is that in recent decades there has emerged the, once again, a situation of German semi-hegemony, even though this differs, in various ways, from the semi-hegemony of Germany in the period before 1945; in other words, it is not geopolitical — the European governments have definitively lost their role as great powers —, but rather geoeconomic. Basically, in today's integrated Europe, Germany has become too large economically to remain on par with its partners, on whom it therefore tends to impose its views on the governance of the European economy and the best way to tackle the crisis. Yet, at the same time, it is too small to act as a complete hegemonic power, with all the costs that this would entail. In other words, a profound imbalance has been created between Germany and its partners, yet Germany refuses to take on the task of boosting their economies, an objective that could be accomplished through the introduction of measures to reduce trade surpluses, allow a moderate increase in inflation, and allow Germany to act as consumer of last resort, as well as measures to create a system of solidarity including forms of debt pooling and the launch of a Marshall Plan in favour of Europe's indebted economies. On the contrary, this approach is systematically rejected and all that is offered in its place is monotonous insistence on austerity, an approach that, instead, makes it harder for the peripheral coun-

tries to return to growth, exacerbates the gap that separates them from Germany, and can only deepen the crisis. The most general and worrying effect of German policy in the context of European integration is the presence of a growing instability across Europe. This is manifested both in a re-emergence of nationalism and in the formation, once again, of coalitions seeking to reduce Germany's predominance. Obviously, we are no longer talking about diplomatic and military coalitions implying the prospect of conflicts — these are now inconceivable given that the European nation-states have definitively ceased to be autonomous powers —, but we are nevertheless seeing a growing instability that represents a serious threat to European integration.

According to Kundnani's depiction of the situation, the emergence of a German semi-hegemony within the framework of European integration, which has disturbing implications, goes hand in hand with the resurgence of nationalistic tendencies in Germany. While Germany's historically established choice of liberal democracy is certainly not in question and there is no suggestion of geopolitical aspirations on Germany's part, there are, nevertheless, certain rather worrying developments to be noted. To begin with, some key political figures (we may cite, in particular, Egon Bahr, Helmut Schmidt and Gerhard Schröder) and intellectuals are insisting on a return to normality, by which they mean that Germany should feel free to pursue its own national interests and sovereignty without allowing itself to be conditioned, in this endeavour, by the uncomfortable shadow of Auschwitz. Also significant is the fact that German economic and social policy is repeatedly presented as by far the most valid model (*Modell Deutschland*), which should thus be imitated by the other European partners — a model that Germany, taking advantage of its dominant economic position, is effectively seeking to impose. Basically, what we are seeing is a revival, albeit in new and certainly less coercive forms, of the idea (already seen in the period that ended in 1945) of a German mission. There have also been signs of cracks in Germany's relations with the rest of the West, which are worth examining here. These include, in particular: its lack of support for the 2003 occupation of (and subsequent regime change in) Iraq; its failure to participate in the intervention in Libya in 2011; and its stance towards Russia over the crisis in Ukraine, which in some ways recalls its policy of swinging between East and West, which was a characteristic of the interwar years and subsequently resurfaced in some aspects of the *Ostpolitik* pioneered by Egon Bahr. Its harsh criticism of Anglo-Saxon neoliberal theories and practices and, in this

framework, of economic growth driven by unbridled debt may also be considered a weakening of the *Westbindung*.

Having examined the essential aspects of Kundnani's view of Germany's evolution between 1945 and the present day, I feel that it contains a number of very interesting points and observations, but it is also necessary to note its limits, which make the author's effort to clarify the re-emergence of the German question since Germany's reunification rather unsatisfactory.

First of all there emerges a fault in his treatment of a perceived loosening of Germany's bond with the West. The clearly unacceptable aspect of his argument is the fact that he mingles a concept of Westernisation understood as constant adherence to liberal-democratic values — values rooted in the Enlightenment (of which Kant was one of the most lucid figures) and whose first practical applications were seen in Western countries (particularly Anglo-Saxon countries and France) — with the idea that a bond with the West equates with systematic alignment with US policies. The United States, supported by its global hegemonic position, has undoubtedly played a hugely valuable role on the world stage, especially in the fight against totalitarianism and in the peace process, the democratisation and integration of Europe, and to some extent the phenomenon of decolonisation. But it must also be said that since the end of the Cold War it has also made choices that were far from constructive; these include, in particular, the international adventurism of the administration of Bush junior and also its policy towards post-Soviet Russia — choices related to a desire to build a world order based more on US hegemony than on a pluripolar system of cooperation. German resistance to these choices stemmed from common sense, not from a distancing from the West. And the same can be said of its criticism of neoliberalism, which can only weaken the liberal-democratic system, unlike the social market economy model which is an indispensable factor in its consolidation.

Having said that, Kundnani's main shortcoming is his failure to properly set the German question (as this has emerged since Germany's reunification) in the context of the process of European integration. He is basically right to underline that the relationship between Germany and the rest of Europe is characterised by Germany's semi-hegemonic position — a position that, resulting in a serious imbalance between it and its partners, means that it tends to impose its own vision on how to overcome the economic crisis and therefore its own economic policy direction. But unless it is tied in with the issue of the

incompleteness of European integration, this argument is not sufficiently explanatory.

The point is that European integration — understood as the response to the historical crisis of Europe's nation-states that, in phase in which they were great powers, was the root cause of Germany's hegemonic imperialism — constituted the framework that ultimately proved decisive in overcoming the German question that arose in the period 1871-1945. There is no doubt the sharp decline in the power of the nation-states and the subsequent American hegemony that eradicated power relations between the European states, paving the way for their lasting and peaceful cooperation, were hugely important factors too. But European integration, whose initiation was favoured by the Marshall Plan that made the provision of vital aid subject to the overcoming of entrenched national positions, was the really crucial factor as it constituted a means of remedying the problem of the economic insignificance of the nation-states. In short, it allowed the European states to continue their economic development, and thus make up some ground on the United States, through the peaceful construction of a continent-wide economic system rather than through an imperialistic quest to obtain vital space. The advent of economic (and therefore social) progress, no longer impeded by national protectionism, together with the overcoming of the logic of power politics — war between European states had become practically impossible — was the decisive factor in the general democratic progress in Europe, which, in Germany's case, corresponded to its Westernisation, *i.e.* its overcoming of entrenched authoritarian tendencies.

On the other hand, the process of European integration, given that it has not yet culminated in full federalisation, is still incomplete and this is the root cause of the imbalance between the strong countries and the weak ones and, in particular, between Germany and its partners. Indeed, this imbalance is a result of the failure to make the transition from an essentially negative form of economic integration (namely the elimination of obstacles to the free movement of goods, persons, services and capital, of which the monetary union is an essential aspect as it eliminates the protectionism related to exchange rate fluctuations) to positive economic integration (that is, strong policies favouring economic, social and territorial cohesion, capable of addressing the imbalances inevitably created when the market is inadequately governed). It was inevitable that pushing ahead with the economic integration of countries having marked growth, productivity and efficiency differentials, yet without introducing any structural solidarity — in Europe, with the so-

called structural funds, this concept is now present in a barely embryonic form —, would produce, albeit in a framework of overall growth of the European economy, the serious imbalances that we are so familiar with and that are the source of the fragility of the euro and the spread of nationalist tendencies. If this is clear, it should also be clear that positive economic integration, and therefore organic solidarity between strong and weak countries, demands a supranational institutional system that is efficient (this implies the elimination, without trace, of national rights of veto) and democratically legitimised (the supranational institutions must be based on the consensus of the European citizens gathered simultaneously in the strong and the weak countries).[10]

All this points to a federal choice in the full sense, which is, therefore, the condition that will make it possible to save European integration and, at the same time, the framework in which the issue, fraught with dangers, of the relationship between Germany and its European partners is superseded. After all, the emergence of a real prospect of harmonious development for all the European countries would inevitably lay to rest the concerns over Germany's economically dominant position. Moreover, upon the transition from a prevalently confederal system (that of the current EU) to a federal one the political problems linked to demographic size would be relativised (it is not Germany's fault that it has the largest population of all the EU countries), since decisions would, without exception, be taken by a majority, albeit with the application of the weighting systems typical of federal voting mechanisms. It should also be pointed out that creating a fully federal Europe, which would obviously have a common foreign, security and defence policy, would also mean introducing, in addition to economic and social solidarity, organic solidarity between the EU member states on issues of security. This would put an end to opportunistic behaviours whereby some countries are more consumers than producers of security; this is a widespread phenomenon within the EU and also concerns Germany.

If it all comes down to a question of creating a European federation, the real difficulty lies in the national governments' intrinsic resistance to the idea of transferring sovereignty to a supranational level, despite the fact that they are obliged, by the historical condition of powerlessness in which the nation-states find themselves, to pursue a policy of European

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[10] Cf. Sergio Pistone, *The Debate in Germany on Democracy and European Unification: a comparison of the positions of Habermas and Streeck*, The Federalist, 55, (2013), p. 126.

integration. In this context, it has to be noted that Germany, among the major European states, is the one most open to an unambiguously federal choice. It certainly tends to resist a system of organic solidarity to be implemented within an intergovernmental setting, *i.e.* outside the framework of a true federal system founded on democratic decisions taken by majority vote. And this is understandable because in the intergovernmental system the national leaders, whose unanimous agreement is necessary in order to create a European economic policy providing for solidarity of the strongest with the weakest, are accountable to the national and not the European electorate (think of what would happen were economic policies at national level to be decided by a council of presidents of regions deciding unanimously!). Although Germany's political leaders are, in fact, opposed to a "transfer union", at the same time they hold the view that any transfer of resources should be be linked to the transfer of competences, meaning the creation of a federal system. If anything, the real issue needing to be resolved is that of the recalcitrant stance of France, Germany's most important European partner, in the face of the need for a clear federal choice. Indeed, France, despite insisting on solidarity on the economic and social level, and also on that of security, is still dominated by a sort of antifederalist sovereignism. This problem might be seen as the "French question".

In conclusion, Kundnani, by taking as his key of interpretation the question of Germany's semi-hegemony (a condition that re-emerged following its national reunification), opens up a line of reasoning on the German question that is far superior to that associated with notions such as "the return of the fourth *Reich*" or the idea that "the Germans will never change", whose subtext, never explicitly stated, is the fabricated notion of the German nation's demonic soul. However, his systematic analysis, which draws on Dehio, is incomplete because he fails to consider Dehio's fundamental teachings on the way in which a state's position within the system of states impacts on its internal evolution, on the historical crisis of the European nation-states, and on European integration which, to the extent that is brought to fulfillment, constitutes the framework for overcoming power relations and therefore imbalances of power. For this reason, in Kundnani's analysis, the German question is not clarified satisfactorily and ultimately not seen to have a solution, with the result that his book is pervaded with a sense of resigned pessimism over both Germany and the future of Europe.

Sergio Pistone

FEDERALIST THOUGHT IN FRIEDRICH VON HAYEK

Many free-market conservatives like to make frequent reference to the liberal authors of the past in order to strengthen the basis of their own arguments. One of the authors most often quoted is undoubtedly Friedrich von Hayek, who tends to be cited in order to back up criticism, or rather rejection, of the idea of a federal Europe. Generally speaking, this position is accompanied by criticism of the European civil service, which is accused of being bureaucratic and excessively large. However, those who hold these views often end up depicting despotic scenarios, in which the freedom, democracy and civil rights of European citizens are undermined by a tyrannical Soviet-style government. In so doing, however, these thinkers equate these values with defence of national sovereignty, consistently both with the idea that these principles can be defended only at national level, and with a mistaken interpretation of the Hayekian principle of "methodological individualism" in international relations, which, in the way they interpret it, basically becomes "methodological nationalism". This error of interpretation derives from the opinion that individuals do not constitute subjects of international law, and thus from the failure to make them the focus of reflection.

Instead, von Hayek focused very much on the individual, and in all his intellectual output he took great care to emphasise this aspect of his thought. In the decades between the two World Wars, and subsequently in the period leading up to the start of the Cold War, he elaborated his own theory of international relations, which was completely at odds with that of the thinkers and liberal politicians of the nineteenth century, who in his view had failed to understand and address the political and economic tensions that had led to the two World Wars. In particular, he believed that their main intellectual shortcomings had been their failure to draw a clear distinction between nationalism and political liberalism, and the fact that they had forgotten the universal dimension of liberal thought.

In working out this stance, von Hayek was led to elaborate a theory of international federalism; however, over the years this theory has been obscured by other, more widely analysed and more extensive, aspects of his philosophical output and, as a result, has tended to be ignored by many free-market conservatives.

Friedrich von Hayek expounded his internationalist theory in his es-

say "The Economic Conditions of Interstate Federalism", in chapter XII of his collection of writings *Individualism and Economic Order*, and in "The Prospects of International Order", a chapter of his book *The Road to Serfdom*. Some elements that allow us to view von Hayek as a supporter of European unity can also be found in his book *Denationalisation of Money*, even though the federalist issue did not emerge clearly in this work; this latter book may actually be regarded as von Hayek's contribution to the debate on the introduction of a single European currency that unfolded in the 1970s and 1980s.

What distinguished the international order presented by von Hayek was, essentially, the fact that it was based on the objective of limiting state intervention in the economy and preventing distortions of free trade and competition deriving from public action. He thus supported the idea of creating a supranational government, seeing it as a way of limiting the power of the nation-states, and believed that it should be an authority organised according to strict federal principles.

"The Economic Conditions of Interstate Federalism".

This essay was first published in 1939, in the scientific journal *New Commonwealth Quarter*; it was subsequently included, as the last chapter, in *Individualism and Economic Order*. It illustrates the need to get rid of economic barriers between states in order to achieve the objective of founding a federation: an "interstate federation that would do away with the impediments as to the movement of men, goods and capital between the states and would render possible the creation of common rules of law, a uniform monetary system, and common control of communications".[1]

While von Hayek recognised that the main objectives of federalism are internal peace between the federation's member states and harmonious relations between the states and the federal authority, he nevertheless believed that a simple political union would not be sufficient to ensure an enduring federation, and therefore that an economic union should also be created, together with a common foreign and defence policy.

The federal system, as conceived by von Hayek, helps to prevent national governments from intervening in the economy, and in particular from introducing protectionist policies that distort free trade and competition. Realising that a central government in a multi-ethnic and

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[1] F. von Hayek, *Individualism and Economic Order*, Chicago, Chicago University Press, 1948, p. 255.

multinational federation would find it more difficult to launch, plan and support economic policies, due to issues of heterogeneity and lack of internal cohesion, von Hayek considered the creation of a federal system a way of restricting, on a constitutional basis, recourse to the economic policy measures typical of nation-states. This is not to say that heterogeneity does not also exist at national level, for example between different regions, between urban and rural areas or between social classes, producers and economic sectors, but the fact is that national governments, thanks to the "myth of nation", are ultimately able to generate consensus on such measures and overcome any kind of opposition to public intervention.

The conclusion reached by von Hayek was that, in a federation "certain economic powers, which are now generally wielded by the national states, could be exercised neither by the federation nor by the individual states"[2] and he realised that this opened the way for "less state".

He was thus led to declare that "the abrogation of national sovereignties and the creation of an effective international order of law is a necessary complement and the logical consummation of the liberal program",[3] or as Lionel Robbins put it, "There must be neither alliance nor complete unification; neither *Staatenbund,* nor *Einheitsstaat*, but *Bundesstaat*".[4] Furthermore, in von Hayek's view the liberals' support for nationalism, between the end of nineteenth century and the dawn of the First World War, constituted their greatest political and intellectual mistake. In Hayekian thought, liberalism and nationalism are completely incompatible and it is fundamental to prevent them from being combined. Liberalism serves man understood as an individual, whereas nationalism sets out to subordinate the individual to a supposed collective interest.

The Austrian philosopher thus created a new vision of federalism, which has been defined "functional",[5] in the sense that it is not meant to be an end in itself, and is not defined in positive terms, but is, rather, conceived as a means of curbing the powers and action of nation-states. From this perspective, supranational coercion is essential in order to defend and strengthen the freedom of individuals.

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[2] *Ibidem*, p. 266.
[3] *Ibidem*, p. 269.
[4] *Ibidem*, p. 270.
[5] F. Masini, *Designing the institutions of international liberalism: some contributions from the interwar period*, Constitutional Political Economy, 23. n. 1 (2012), pp. 45-65.

Federalist elements in The Road to Serfdom.

The last chapter of *The Road to Serfdom* is entitled, and focuses on, "The Prospects of International Order".

This chapter may be regarded a continuation or expansion of "The Economic Conditions of Interstate Federalism". In it, von Hayek stresses, from the outset, that supranational institutions could provide a solution to the need both to limit the power of the national governments, and to return powers to individual citizens and political units at subnational level. The system he proposes thus integrates a top-down and a bottom-up approach: on the one hand, the national governments are restricted from above, thanks to supranational federalism, and on the other, their action is limited from below, as a result of the return of power and competences to individuals and local communities. These two processes must advance in parallel and both are parts of a federalist and liberal vision of inter- and intra-national relations.

Hayek devotes the first pages of the chapter to the crucial topic of his liberal position, that is to say his criticism of economic interventionism and of the proposal that the federal government should have industrial policy powers. He also strongly attacks the very idea of national solidarity: "[t]here is little hope of international order or lasting peace so long as every country is free to employ whatever measures it thinks desirable in its own immediate interest, however damaging they may be to others. Many kinds of economic planning are indeed practicable only if the planning authority can effectively shut out all extraneous influences: the result of such planning is inevitably the piling up of restrictions on the movements of men and goods".[6] Hayek is also harshly critical of the *New Deal* approach, and of the idea of economic planning at federal level, even if this is implemented through a democratic procedure, because, in his opinion, it would give numerous privileges to minorities at the expense of others and because the federal government of a heterogeneous state would end up having to use a greater degree of coercion than that which is required by more homogeneous or smaller states in order to carry out economic policy programmes. The "international government" should be guaranteed narrow and limited powers, sufficient to achieve its aims, whereas the role of national bureaucracies should be weakened in favour of the underlying units and centres of power, which should once again assume responsibility for their own needs and tasks.

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[6] F. von Hayek, *The Road to Serfdom,* London, Routledge Classics, 1944, 2006 Edition, pp. 225-244.

By this, von Hayek does not mean that the international government should be weak and at the mercy of its member or federated states, but rather the opposite, that it must be strong. "While for its task of enforcing the common law the super-national authority must be very powerful, its constitution must at the same time be so designed that it prevents the international as well as the national authorities from becoming tyrannical." What is needed, therefore, is a very even balance of power.

The federalism described in *The Road to Serfdom* is federalism conceived in global rather than European terms. According to von Hayek's analysis, it should succeed in realising the liberal principle at every level, from that of the individual to supranational level. This, as far as he is concerned, is the most genuine definition of federalism: it is not in itself an ideology, but the application of a purely liberal system whose only possible dimension is global and in which, therefore, "reasons of state" and nationalism can no longer be used as excuses.

For this reason, an "international authority which effectively limits the powers of state over the individual will be one of the best safeguards of peace. The international Rule of Law must become a safeguard as much against the tyranny of the state over the individual as against the tyranny of the new super-state over the national communities. Neither an omnipotent super-state, nor a loose association of "free nations", but a community of nations of free men must be our goal".

Federalist thought in von Hayek after the Second World War.

Friedrich von Hayek remained a committed federalist after the Second World War. He was a longstanding member of *Europa Union-Deutschland* and remained a supporter of the process of European integration. He regarded the European Community as a suitable ambit for trying out a new form of economic governance. Accordingly, he believed that the European Community should be prevented from evolving into a kind of centralised nation-state, and called for a new form of federation able to prevent national governments from interfering with economy and free trade. On this basis, von Hayek opposed the idea of a single currency, not because he was opposed to the European project, but because he did not accept the idea that the state, whatever form it might take, should have a monopoly on the currency. "Though I strongly sympathise with the desire to complete the economic unification of Western Europe by completely freeing the flow of money between them, I have grave doubts about doing so by creating a new European

currency managed by any sort of supra-national authority".[7] Instead, he proposed that Europe should have a free banking system in which private, local, national and continental/multinational currencies could compete with each other and be freely exchanged. He believed that European unification should advance not through the transfer of monopolies from national to European level, but through their total destruction; von Hayek did not like the idea of a single monetary authority as he thought it "highly unlikely, even in the most favourable circumstances, that it would be administered better than the present national currencies".[8]

Therefore, we can assume that if von Hayek were alive today, he would not approve of the European Central Bank and the role it is playing, but would very probably approve far less of all the proposals to return to the old national currencies, and to everything that is related to the idea of "monetary sovereignty".

The fact that von Hayek's works and studies on federalism dried up after the Second World War seems to suggest that, as the international situation stabilised around the US-Soviet duopoly and the European national governments embraced Jean Monnet's functionalist approach, he gradually abandoned his federalist ideas. Nevertheless, von Hayek remained a strong supporter of the European integration process, although its slow pace led him to pursue his ideas through a more nation-based approach, according to which economic freedom and the reduction of the functions of government became political objectives to be achieved primarily at national level.

As he gradually became detached from the process of European integration, von Hayek progressively espoused a position more in line with Mises than with Robbins. Nevertheless, von Hayek, like Robbins, remained of the opinion that a form of international federalism could exist only between countries with a capitalist economy and a liberal ideology. These are elements that might be seen to explain the way in which his ideas evolved, from those set out in "The Economic Conditions of Interstate Federalism" and *The Road to Serfdom* to the rather more sceptical proposals contained in *Denationalisation of Money*.

Anyway, it can be said that during the post-war period von Hayek set aside the idea of top-down restriction of the actions of states. He

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[7] F. von Hayek, *Denationalisation of Money – The Argument Refined*, 3rd Edition, London, The Institute of Economic Affairs, 1990, p. 24.

[8] *Ibidem*.

never explicitly turned his back on this idea; it was simply that the unfolding of history led him to appreciate more the value of a bottom-up approach, or in any case, one based on the action of political forces at national or local level.

Whether or not one shares his ideas, examining federalism as interpreted in the work of von Hayek is interesting not only as an intellectual exercise, but also as a reminder of the liberal ideas underlying federalist theories, ideas that are also typical of the British federalist school during the inter-war period: restriction of the role of government and a growing acknowledgement of individuals as independent units. Furthermore, it should always be borne in mind that von Hayek's ultimate objective was the elimination of the kind of economic tensions, present during the period in which he wrote the first two works discussed herein, that were cause of the two World Wars.

If we look at international law today, and consider how it has evolved since the Second World War, both globally and at European level, we can see that the international institutions now effectively play a role similar to the one von Hayek had in mind. The supremacy of the states in the international community has been progressively reduced, and various agreements and new practices of international law have tended, and are tending, to lead to the emergence of the individual as a subject of international law. In the same way, in Europe, the Union (previously the Community) often plays a role that is more "negative" than "positive". In other words, it is tending to limit member states' interventions liable to distort the economy, but at the same time lacks a true capacity for economic and industrial policy making. However desirable or undesirable this may be argued to be, the fact is that, voluntarily or involuntarily, Europe has adopted an "Austrian approach" to integration, and this is destined to co-exist for many years with new approaches of the positive type.

The other element that makes it valuable to study federalist thought in von Hayek is his belief in the principle that every political goal of universal significance, be it liberal or socialist or social-Christian, has its own *raison d'être* only if it is achieved at supranational level.

Francesco Violi

Thrty Years Ago

Towards a New Model of Federal Democracy*

FRANCESCO ROSSOLILLO

Democracy and its Future.

The institutional aspects of federalism are related in many interesting ways to crucial aspects of the more general theory and practice of democracy.

From the second half of the eighteenth century onwards, the history of democratic experience has been marked by an essential tension. On the one hand, what gave that complex of ideas, patterns of behaviour and institutions that habitually go by the name "democracy" the capacity to take hold in Europe and, outside Europe, in the English-speaking world, was its original conjunction with the ideal of people's sovereignty, *i.e*. the affirmation of the general will, the identification between rulers and ruled.

Alas, the implementation of that ideal has never, since that time, gone beyond a few sporadic commencements. Indeed, even classical theoreticians of democracy, such as Rousseau, or Jefferson, clearly perceived that making reality conform to an ideal was only conceivable in a small state, *i.e*. in an authentic community, in which the identification between rulers and ruled might in fact be achieved by a daily and intense participation of the citizens in managing the community's affairs.

Yet, historically, the small state, as a political form, was already doomed in Rousseau's days. In most cases it disappeared in the following century because of the emergence of the nation-states and the

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* This essay was first published in *The Federalist*, 27 (1985), p. 90.

power struggles which intervened between them. Only in particular historical circumstances did this process not take place, where, for example, the minimal strategic significance of some *Zwergstaaten* kept the greater states' appetites at bay. But is was certainly not in such neglected corners, forgotten by history, that Rousseau's ideal had a chance to be fulfilled. Depending on their powerful neighbours for their security, welfare and communications, deprived of any possibility of deciding their own destiny, they were no longer places in which a large and active consensus could take shape: the consensus which develops only when people are faced with decisive options, those which act as a framework for all the other options and, if taken autonomously, support their autonomy. The small states' democracy was thus inevitably reduced to the exercise of purely ceremonial practices.

On the other hand, with the enlargement of the state's territorial sphere, it became utterly impossible to introduce institutions of direct democracy on a national scale. We must recall, to be sure, that the historical experience of democracy, as it developed within the nation-state, was a great phase in mankind's progress towards emancipation. As a consequence of the democratic revolution, an unprecedented widening of the social horizon, within which political elites were recruited, took place. Institutions and patterns of behaviour which guarantee their replacement took hold in legal systems and in customs. Democracy was thus a great agent of social progress and guarantor of pluralism.

Representation, in the nation-state, nevertheless fails to fill the gap dividing rules and ruled, as it mostly ends up by restricting the citizens' participation in politics exclusively to the rite of voting, thus giving the idea of popular sovereignty the appearance of a deception. It was in this way that, during the French Revolution, Rousseau's conception was used, paradoxically, as a weapon belonging to the rhetorical arsenal of centralising Jacobinism. And it was in this way that, throughout the history of European nations, every kind of abuse was perpetrated by majorities against minorities.

This process has gone so far that today the "classical" theory of democracy is no longer considered as "scientific" and tends to be substituted by a more "realistic" approach which, in Schumpeter's wake, defines democracy as a set of rules regulating the struggle for power.[1]

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[1] Cfr. Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, London, Allen & Unwin, 5th ed., 1976, pp. 250 ff.. For a recent and very interesting series of comparisons between the "classical" and "competitive" theories of democracy, see Graeme Duncan, Ed., *Democratic Theory and Practice*, Cambridge, Cambridge University Press, 1983.

But the truth is that, although *today* democracy is *also* this, it is, in a perspective transcending the present, much more than this. The ideal of democracy would not have shaken Europe so profoundly in the 19th century, nor would it still be one of the deepest motivations of the active sections of the peoples of the earth who are fighting to free themselves from oppression, if the essence of its message were not the promise that power will one day disappear thanks to the affirmation of popular sovereignty.

If it is true that men make their history by themselves, however large the scope to be attributed to self-deception in human conduct may be, it does not seem justifiable to maintain that the key-words expressing their profoundest aspirations during the great phases of advancement of the process of human emancipation were and are pure nonsense, without any counterpart in reality, or at least in that potential reality identified by Kant in human *dispositions*, bound to occur in the progress of history.

This means that the history of democracy is not yet over, that the idea of democracy has not yet externalized all its features and that the *programme* of this future development is contained in germ in Rousseau's theory of popular sovereignty.

If, then, the problem of reconciling the idea of popular sovereignty with the need to have large territorial areas ruled through the institutions of democracy has not yet been solved, this does not mean that this problem will not be solved in the future, as would happen if it were a pseudo-problem, posed in wrong terms on the basis of a false definition of democracy.

Rousseau himself glimpsed the path to be followed. In the *Social Contract* he wrote that a "confederation" is the instrument "for joining the external power of a great people with the simple rule and the good order of a small state".[2] But for Rousseau, who expressed his intuition in 1762, a "confederation" could be nothing but an association between sovereign states with purely defensive aims. Hence, for him, the problem of having the association as such ruled by the principles of democracy did not even exist. He remarked, moreover, that this was "a thoroughly new matter, whose principles have still to be established". In actual fact, subsequent historical developments have shown that confederations, *i.e.* defensive unions of sovereign states, have a short

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[2] Jean-Jacques Rousseau, *Du Contrat Social,* in Id., *Œuvres Complètes*, Paris, Gallimard, vol. III, 1959 ff., p. 431 and note on the same page.

life and are bound to dissolve, or to be consolidated into federations or unitary states.[3]

The problem was posed in concrete terms for the first time with the beginning of the American federal experience. In this case, we are no longer confronted by a single order of governments united in an association for common defence, but by two orders of government each of which, according to Wheare's definition, in its own sphere, is independent and co-ordinate.[4]

The problem of democratic rule for large areas is posed in new terms precisely by the two inter-related elements of independence and co-ordination. Through them we can envisage an institutional structure where independent local governments are allowed to experiment with advanced forms of self-government, with no interference from central government, but where, at the same time, thanks to the co-ordination existing between the two levels of government, both the way the political will is formed at the regional level and the content of the decisions taken at the same level can somehow be *transferred* to the general level.

In the federal experiences which have taken place in history until now, such a transfer has occurred only within very restricted confines. In a system founded on two tiers of government only (the Nation and the states), the regional level, which *ex hypothesi* enjoys independence, is too large to be a suitable seat for democratic self-government. Furthermore, co-ordination between the two tiers occurs only through the devices and mechanisms of bicameralism at the central level and by means of the settlement of disputes about the division of powers by the judiciary. This is generally insufficient to ensure authentic continuity between regional and general levels in the process of formation of political will.

The path to be followed when attempting to transform the ideal of popular sovereignty into a reality within increasingly large territorial spheres must be one which no historical constitution has ever followed before: the federal principle must be drawn up in such a way that the element of independence reaches down to spheres of self-government sufficiently restricted in size to be appropriate frameworks for authentically communitarian and participatory experiences. At the same time,

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[3] Cfr. on this point Murray Forsyth, *Unions of States. The Theory and Practice of Confederation*, Leicester, Leicester University Press, 1981.

[4] Kenneth C. Wheare, *On Federal Government*, Oxford, Oxford University Press, 4th ed., 1973, p. 10.

the element of co-ordination must be reinforced by the introduction of institutional devices making it possible to link the formation of the political will at all levels and channelling it into a unique upward process in which the contents of the general will, as they emerge at the levels where they express themselves spontaneously, are transferred to the upper territorial tiers.

In this respect, it seems to me that some suggestions bringing real theoretical advancements along the path we are pursuing can be put forward on the basis of the model of post-industrial federalism which has been debated for some time within federalist culture, the main features of which were indicated in an essay published in a recent issue of this journal.[5] The main requirement, imposed by the trends emerging in post-industrial society, to which this model tries to provide an answer, is that of *multi-tier planning*. This is a kind of comprehensive policy which is not limited to the economic sphere only, but is both economic and territorial. Furthermore, it is not worked out and enforced bureaucratically from the centre, but is implemented democratically thanks to the co-operation of various territorial agencies, each capable of taking initiatives and with the power to decide with reference to the problems whose territorial scope is equal to theirs. Multi-tier planning, in its turn, requires federal institutions to be duly implemented. But the federal institutions in question must have characteristics which clearly distinguish them from the classical model, as their specific function is precisely that i) of diffusing the element of independence, which must also become a feature of territorial spheres small enough to be a convenient frame for real community life and ii) of reinforcing the element of co-ordination, so as to render the institutional system in its entirety capable of taking decisions that, without prejudicing the independence of each of the levels of government of which it is made up, voice that one general will which manifests itself most genuinely within the communities forming the base of the system.

The Epistemological Status of Models.

It is perhaps helpful, before going any further, to state as clearly as possible what is the epistemological status of a model, in the meaning in which I use this term.

It is not a concept describing an existing state of affairs. Rather it is

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[5] Francesco Rossolillo, *Federalism in a Post-Industrial Society*, The Federalist, 24 (1984), pp. 120 ff..

designed to depict an *ideal*, a state of affairs not as it is, but as it should be. Now, an ideal is most certainly of no theoretical interest if it only mirrors someone's subjective preferences. Indeed, the theoretical usefulness of models depends on the philosophy of history underlying them, and, in particular, on the relationship which the individual thinking about history has vis-à-vis his object. To illustrate two opposing attitudes of the interpreter vis-à-vis the historical process, let me contrast my concept of model with Max Weber's *ideal type*. Both concepts have common features, as the *ideal type* does not wish to reproduce reality as it is, but deliberately alters it by choosing certain specific points of view, and selects only those aspects of reality which fit into these points of view, connecting them up to each other in order to obtain a coherent picture of the process, institution or situation under scrutiny.

Max Weber believed that the decision to privilege one or other point of view depends exclusively on the historian's or the social scientist's values, which, in their turn, are largely arbitrary and have no link with those which, consciously or unconsciously, influenced the behaviour of the agents in the situation to which the ideal type refers. That is why the purpose of ideal types is only to provide the historian or the social scientist with a conceptual grid designed to interpret the inextricable muddle of historical events by forcing upon them an interpretation which, albeit arbitrary, provides him with the only possible instrument for introducing a certain order into processes which would otherwise exhibit none.[6]

My use of the model as a conceptual tool, on the contrary, assumes, as I intimated before, a different philosophical stand. The values influencing the definition of the concepts to be used for interpreting history are not construed as being the result of an arbitrary choice of the interpreter but are taken over by the interpreter from a historical reality to which the observer himself belongs, and which is relied by a continuous thread to the situation to which the concept refers.

This means that the selection of the features to be abstracted from – or added to – reality by the interpreter to build a coherent picture is determined by values which were already – consciously or unconsciously – shared by the agents of the process or the situation to be interpreted. Thus, historical interpretation must be seen as a *dialogue* be-

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[6] Cfr. Max Weber, *Die Objektivität sozialwissenschaftlicher und sozialpolitischer Erkenntnis*, in Id., *Gesammelte Aufsätze zur Wissenschaftslehre*, Tübingen, J.C.B. Mohr (Paul Siebeck), 3. Auflage 1968, p. 191.

tween the agents of the process or the situation to be analysed and the interpreter. And this dialogue is made possible by the existence of a code common to both, *i.e.* by a *continuity of sense*.

Now, as history is a process that develops in time, the idea of continuity of sense implies progress and advance. Indeed, sense is dialectical: the context receives its meaning from its constituent parts, but the meaning of the parts is not complete until the context is made explicit. This means that each part of a discourse is all the more determinate, the more advanced the discourse is. On the other hand, each part of the discourse contributes to giving the context its meaning inasmuch as it has the capacity to *anticipate* the meaning of the whole.

The same considerations can be applied to history. If we concede that history has a sense — *i.e.* that it is like a discourse —, we must draw the conclusion that those who come after can understand the sense of any event of the past better than the agents themselves could, because they have a wider context at hand. But the event is a link in a significant chain, not merely a brute fact, to which a meaning should only be *given* by the interpreter: it is a message, with a sense of its own, launched by the agents to the interpreter.

Let us go back to our concept of model. If history is like a discourse, the meaning of any historical process, event or situation is bound to grow in richness and precision with the passage of time, reaching full maturity in the ideal moment of the completion of history. But, at the same time, all that really occurs in history contains in germ, and hence anticipates, the whole of future development. It already possesses, more or less implicitly, the sense that the further succession of events will unfold in its full explicitness. This is why it makes sense for the political philosopher to scrutinize ideas and institutions surfacing in history with a view to discovering the hidden implications they have and the determinations they must take on in order to reveal their full meaning. This is not mere amusement. If there is progress in history, the features implicitly contained in any idea, process or institution are bound to become real afterwards. Drawing up models, therefore, means trying to forecast the future behaviour of men, and, at the same time, means shaping conceptual tools which help to assess the shortcomings of our present situation and speed up the march towards a better world.

My aim in this essay is to make a contribution, with this end in mind, to clarifying the implications of the concept of democracy, and to try to see the institutional consequences of the full development of

Rousseau's idea of popular sovereignty in a world increasingly freed by the scientific and technological revolution from the constraints of class antagonism and *raison d'Etat*.

The fundamental features distinguishing the model of post-industrial federalism which is taking shape in our debate from the classical model are essentially the following:
i) the multi-tier nature of federal government, starting at the neighbourhood level, and working up through a whole series of intermediate tiers, to the world level;
ii) the establishment of federal bicameralism at every level, the only obvious exception being the lowest one;
iii) the introduction of the "cascade" electoral system. This is designed to regulate the temporal sequence of the elections for the legislative bodies of the various tiers very rigorously: elections start from the lowest tier, thereby ensuring the most truthful transmission of the general will from local communities, where it naturally takes shape, to those tiers which, due to their growing size, are increasingly remote from the original source. In this way rational co-ordination among the various tiers of federal planning is guaranteed.[7]

On the basis of this model it is possible to formulate a number of suggestions presenting some element of novelty. It must not be forgotten in this respect that these suggestions are elaborations of a model which is projected into an ideal stage of the historical process in which, thanks to the full accomplishment of the scientific and technological revolution at the world level, the political, economic and social conditions of the complete realisation[8] of democracy are taken for granted. The problem is, then, merely to spell out some of its institutional implications. Thus, many of the suggestions put forward below take for

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[7] This proposal was first put forward by Mario Albertini in his *Discorso ai giovani federalisti*, Il Federalista, 20 (1978), pp. 51 ff.. The rationale behind the proposal is the creation of a mechanism which, thanks to a fixed series of elections at different levels in rapid succession, forces parties and candidates to organise their electoral campaign and draw up their manifestos in the light of the trends emerging from lower-level electoral debates. The adoption of this type of method would have the natural result of providing considerable continuity in selecting the political class, because the latter would be forced to define their leanings and persuasions in the light of the requirements of multi-tier planning and would be compelled to indicate the most effective syntheses of the solutions regarding which popular consensus has been expressed at lower levels, rather than trusting their fortunes, as usually happens today, to the support of sectoral interest groups.

[8] See Mario Albertini, note 11 of the essay *Peace Culture and War Culture*, The Federalist, 26 (1984), pp. 26 ff..

granted a situation in which the purport of the *roles* imposed upon the citizens by the economic and productive system tends to fade away, organized interests as such lose a considerable part of their political relevance and the behaviour of the citizen-elector gains a higher degree of freedom, needing only appropriate institutions to be turned into action. It thus follows that many of the suggestions in this paper might not be suited to a transitional situation like that in which we are at present (the electoral method suggested, for instance, has nothing to do with the *Geyerhahn* method, that the federalists, on a different occasion, pointed out as being the most suitable for the European Parliament's elections).[9]

It has to be noticed, moreover, that the suggestions contained in this paper are only partial ones, and hence could be felt as being out of tune with the general nature of the statements constituting the paper's point of departure. Nonetheless, it seemed important to me to try to show that research in this direction makes sense, and deserves to be pursued, especially in times like ours, when awareness of the source of the original inspiration of the idea of democracy seems to be growing fainter and fainter under the impact, on the one hand, of the general acceptance of the charismatic nature of power and, on the other, of the increasing diffusion of reductive interpretations worked out by certain brands of political and sociological thought.[10] The issues with respect to which the post-industrial federalist model allows us to make some institutional remarks relevant to our main theme include: i) the composition of the legislative bodies at the different levels; ii) the constituencies for elections to the Lower Chambers iii) the electoral system for Lower Cham-

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[9] Cfr. Movimento federalista europeo, *Il sistema elettorale per la seconda elezione europea. Proposte tecniche*, Il Federalista, 22 (1980), pp. 85 ff.. To illustrate the difference between the two perspectives (transitional and model) from a more general standpoint, reference can be made to the two great typologies identified by Arend Lijphard (*Democracies. Democratic Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, Yale, Yale University Press, 1984), namely majority democracy and consensus democracy. Clearly, the current practice of majority democracy (of the British type) would seem to be more appropriate to the requirements of transition, whereas the model is the purest expression of consensus democracy (where the process of decision-making occurs through a basis of consensus which is much greater than a simple majority and which may even mean unanimous agreement).

[10] Examples of reductionism, albeit at undisputed levels of scientific seriousness, may be seen for example in Robert A. Dahl's identification (*i.e.* in *Dilemmas of Pluralist Democracy*, Yale, Yale University Press, 1952) between democracy and "polyarchy" (*i.e.* pluralism of power centres) or in the conception of democracy as a legitimising procedure put forward by Niklas Luhmann, in *Legitimation durch Verfahren*, Frankfurt a.M., Suhrkamp, 1983.

bers; iv) representation in the Upper Chambers; v) timing and mode of elections to the Upper Chambers; vi) the presidential role and power to dissolve Chambers.

Number of Members in Legislative Bodies.

Legislative bodies of nation-states, and particularly Lower Chambers (the House of Commons, *Assemblée Nationale, Bundestag, Camera dei Deputati*) are traditionally made up of a large number of deputies (several hundreds). This is for three main reasons.
i) In the nation-states the bulk of the legislative work is done by national Parliaments and a large number of representatives is needed because Parliaments have to be subdivided into many commissions.
ii) The absence of intermediate levels of government with any real autonomy means that the interests of individual localities have to be represented directly at the national level. The more representatives there are, the better this can be achieved.
iii) Politics is practised mainly at the national level. The national Parliament is, therefore, the place where the political class is formed and expresses itself. Drastically reducing the number of representatives would *ipso facto* mean mutilating the political class in an unacceptable way.

On the other hand, the large number of elected parliamentary representatives seriously hampers any sound development of democratic life. The most momentous of the ensuing inconveniences is the difficulty legislative work has in producing anything which can be identified with the general will. Parliament is flooded with a huge mass of local and sectoral demands, which can easily be voiced precisely because the low quorum required for electing a representative leaves plenty of room for action by organized interest groups within each single constituency. And this is one of the most important causes of the corporative degeneration of democracy.

In a multi-tier federal structure, national Parliaments of current proportions would not be needed. A multi-tier federal structure makes the division of legislative work among the representative bodies of the various levels entirely possible. It thus considerably reduces the number of tasks each level is called upon to undertake. But, at the same time, when it expresses itself, the political class need no longer rely on a single institution (or at least one clearly privileged over the others), but has at its disposal a whole series of bodies, each fully independent within its own sphere, to plan and follow its *cursus honorum*. Finally, multi-tier planning eliminates the need to have local interests directly

represented at the highest level. The synthesis of the problems perceived and the solutions proposed at the lowest levels is created step by step as co-ordination progresses upwards in territorial spheres of an increasing size.

We can draw the conclusion from this that the various legislative bodies at the different levels of our federal state model (and particularly at the higher ones) ought to be made up of a much smaller number of members than is the case now. At the national, continental and world levels, this number ought not to exceed a hundred.

The advantages that a small number of representatives would entail are worth recalling: i) greater prestige attached to the representative's role; ii) more rigorous political class selection, at least at the highest levels, which is an indispensable prerequisite for correctly carrying out a function which, in a complex framework like the federal one, is destined to become increasingly difficult and delicate; iii) political debates and legislative work become more rational and matter-of-fact (provided, however, the representatives are assisted by efficient technical services); iv) a steady decline in the role played by local and sectoral conditioning.

Constituencies for the Election of Lower Chambers.

As indicated in the preceding section, the unitary nation-state has to reconcile two irreconcilable elements: firstly, the need for centralisation, based on the dogma of the nation "one and indivisible", and, secondly, the irrepressible persistence of a great number of infinitely diversified local realities. The institutional device used to "solve" this consists in directly representing local realities within the national Parliament. This result is also achieved, as seen in the preceding section, by establishing a high number of representatives in legislative bodies, and by creating small constituencies (although their size varies according to the electoral system adopted). The result is that the representative is closely tied to his constituency, in which his political fortunes are at stake, and often makes the constituency's interests prevail over the country's.

We should not forget, besides, that, until a short time ago, it would have been impossible to organize elections in any other way, since transport and communications were not sufficiently developed to make an electoral campaign a practical possibility over very extended areas.

Both these constraints disappear in the post-industrial federal state model. Representing local communities' interests directly at the centre

is no longer necessary or justified since, firstly, local communities' problems are tackled directly by autonomous levels of self-government in the territorial sphere in which they occur and, secondly, they must be coordinated with one another within larger territorial spheres. The "cascade" electoral system ensures a link between the different levels of the debate on the main orientations of multi-tier planning. Besides, at every level, in federal bicameralism the Upper Chamber has the institutional function of representing the interests of the distinct territorial spheres of which each level is made up. The specific task of Lower Chambers at every level is to take legislative decisions which identify and express the general interest of the whole of the territorial sphere over which they have jurisdiction.

This is the reason why it seems right to argue that parliamentary representatives should be elected at all levels in single constituencies (regional, national, continental and world-wide) so that they are not compelled by the very logic of their election to set the interest of a portion of the territory before that of the whole.

The logistic reasons which made it impossible until a few decades ago to generalize the adoption of single constituencies in very extended territorial spheres now no longer hold true: progress in transport and mass media (especially television) is changing the nature of electoral campaigning. It is a trend which presents significant and positive aspects. We should not overlook the fact that only personalities with a considerable political stature are able to stand at elections in which, due to the institution of the single constituency and to the limited number of representatives to be elected at every level, they are compelled, through the mass media, to come "face to face" with huge numbers of electors, in order to obtain their vote. This is a solid guarantee against the election of the excessive number of yes-men, lobby-representatives, party-bureaucrats, etc. who crowd national parliaments today.

The argument asserting the democratic value of direct dialogue between candidates and electors – which is already weak when applied to an election for a level of government covering a large area, due to the law of numbers – becomes even less convincing in the context of our federal state model, in which local interests are specifically shaped and voiced at city-neighbourhood, district and regional level, *i.e.* where direct contact between candidates and electors is still possible. At higher levels, only guidelines giving the basic framework of coordination of the options taken at the lower levels are defined. As to these general guidelines, the general will is correctly expressed, rather than through

personal contact between candidate and elector (which can be achieved in any case only at the cost of splitting the general will into a number of conflicting particular wills), by an electoral mechanism capable of directing the attention of candidates towards the problems of the whole rather than towards those of a single part. (We should not forget, moreover, that the specific function of the "cascade" elections is to avoid abstract antithesis between the interest of the whole and the interest of the parts, and to give a concrete form to the general interest taken as a synthesis of the interests of the parts).

A final point relates to the previously mentioned need to maintain a constant link between the sections of the political class operating at higher and lower levels. Since it is at lower levels that needs are actually perceived and general will casts its roots, it might be thought that small constituencies would strengthen this link, whereas a single large constituency would weaken it. But the reverse is true. The enlargement of the state's size in the course of history, from the Greek city-state to the great continental states of our time, bears witness to the growing interdependence of the problems politics is called upon to settle, though such problems keep on surfacing in the form of needs felt and expressed in the daily life of local communities. This implies that the task of the higher levels of self-government is to create the conditions of compatibility necessary to tackle lower level problems successfully. And this goal can be attained only if the political class at the higher levels feels responsible to the electorate of the whole territory within which the synthesis must be effected. If this were not so, *i.e.* if representatives acted as interpreters of the interests of only a fraction of that territory, compromise would usurp synthesis, the logic of power would arise and the problem of pursuing the general interest would recede into the background.

The List System and Preferences.

Introducing a single constituency at every level for Lower Chamber elections inevitably leads to the list system and raises the question of preferences.

No further discussion is required as regards the list system, since objections to it are the same as those already discussed when dealing with single constituencies.

The problem of preferences, however, still remains. They are widely, and not unjustifiedly, held to be a serious source of corruption in the political system, which tends to become increasingly corporative,

where preferences are used. But the penalty for getting rid of preferences without abolishing the list ballot is that parties impose candidates chosen by the party apparatus on the electorate. This is rightly felt by people as a violation of the spirit of the democratic game.

What in actual fact turns preferences into a degenerative factor in political life, fostering clienteles and cliques and making corporative interests overshadow the general will, is the fact that they are optional: it is no secret that the majority of electors do not, in fact, indicate any preferences, thus favouring the strategy of organized interest groups, who get their candidates elected with the votes of a relatively small number of electors.

The solution is to make preferences compulsory, by stipulating that a vote is valid only when it indicates a minimum number of candidates on the list.

Combined with the single constituency, which in all cases compels parties to endorse distinguished candidates, potentially capable of attracting a large number of votes in all geographical and sociological sectors of the constituency, this mechanism would give a decisive contribution to eradicating patronage.

Representation within Upper Chambers.

The function of Upper Chambers in federal states is to represent the interests of the member states in the federation's Parliament. Their traditional make-up has usually been historically dictated by the circumstances in which the United states of America were created. At that time, the problem was resistance from the smaller states, who were afraid, that, if the principle of proportional representation, applied in both federal Chambers, had turned them into insignificant minorities, as compared with the larger states, then giving up their sovereignty would mean losing any possibility of asserting their position.

This led to the introduction, in the American Senate, of the principle of equal representation, whereby the smaller states were allotted much more power than they would have obtained from a population count.

In our model of post-industrial federalism, equal representation should be substantially confirmed (albeit with certain adjustments and with the proviso that it has to be applied at all levels). The paramount government function in a post-industrial federalist model is multi-tier planning, whose main goal is to achieve and maintain a balanced territorial setting. To achieve both these objectives, those regions in a fed-

eration which, at the time when the federation is set up, are peripheries, threatened with depopulation and underdevelopment, must be placed in such a position as to make their voices heard with the same strength as the rich, densely-populated, well-serviced central regions of the same size. In a system heavily characterized by polarization between centre and periphery, because of the greater numerical, and hence political, strength of the privileged areas, proportional representation within both Chambers would tend to reinforce polarization and would thus jeopardize the main objective of multi-tier planning.

More generally, proportional representation within the Upper Chamber is a straightforward negation of the basic nature of federalism as such. What distinguishes federal planning from centralized planning is precisely the former's capacity to channel resources towards underprivileged regions reversing their spontaneous tendency to flow towards the centre, thanks to the greater political power they command in a federal institutional setting. On the contrary, the logic underlying the defence of the interests of the economically hegemonic regions is the same that would spontaneously prevail within a unitary state. This is the reason why attributing political weight to the different territorial spheres corresponding to levels of self-government proportional to their population would mean reproducing the very same imbalance within the federal state that the federal solution was designed to overcome.

This does not mean that only peripheral and underdeveloped regions would benefit from this institutional mechanism. Indeed, territorial imbalances bring damage to both rich and poor regions alike. Rich regions have to put up with congestion, pollution, a tremendous increase in property values, exceedingly high service costs, and the like. This means only that, as the spontaneous logic of territorial polarization is to be self-sustaining, even against the medium-term interests of the richer regions, it can be countered only by giving greater political clout to the weaker poles.

The principle of equal representation within Upper Chambers is valid in the post-industrial model of federalism, however, provided that the territories for a particular level of government are of a comparable size. If, for historical reasons, this does not happen, and some of the territories with the same level of government are both limited in size, and yet very rich and densely populated (like Belgium, the Netherlands and Luxemburg in Europe) equal representation would bring about consequences diametrically opposite to the ones expected. It would further strengthen already strong regions. In such cases, the principle of equal representation

would need to be attenuated by adopting weighted representation mechanisms, like those currently applied within the European Parliament. Yet, even in these cases, at least in a first phase, the arguments heeded by the American Founding Fathers are still valid: thus small states must always be allowed a certain degree of over-representation to guarantee their independence and to recompense the sovereignty they are called upon to abandon. We cannot conclude the section on equal representation within federal Upper Houses without touching on the problem of its seeming to contradict the principle of *one man one vote*, which is commonly considered one of the basic principles of democracy.

Indeed, the institutions of representative democracy carry out two most important and sharply distinguished functions: as *government* and as *guarantor*. The latter was paramount in the first phase of the history of democratic institutions, when the task of Parliament tended to coincide with the defence of the subjects' rights against the arbitrary power of monarchy.

Parliament's increasing power over the centuries radically changed this, as the executive became an expression of Parliament. The latter has thus become an eminently governmental institution, with the result that its function as a guarantor has tended to become obliterated. This drift went far enough to raise the problem of protecting the rights of the citizens against the arbitrary rule of majorities, around which the debate between liberals and democrats in the 19th century centered.

Federal bicameralism makes it possible to recuperate the function of representation as a guarantor. The latter is carried out by protecting the rights and interests of the lower tiers of self-government against possible encroachments by majorities in the higher tiers (thus complementing the role of the judiciary, which in addition has the task of protecting individuals' rights against any arbitrary interference by political power). This function is allotted to the Upper Houses. All this implies a division of labour among the Chambers, reflecting the diverse interests each of them represents. Lower Chambers initiate the legislative process, shape and control the executive with democratic procedures. The Upper Chambers' tasks are to safeguard the specific interests of the lower tiers of government and guarantee their rights, laid down in the constitution.

In support of this we may recall that our federal model does not provide for bicameralism to be established at the lowest level, namely the neighbourhood. Though political representation is preserved at this level, the orientations of self-government emerge spontaneously from the day-to-day debate among the citizens, *i.e.* among the very people who

directly bear the consequences of those decisions they take part in making. At this level (the one which comes closer than any other to achieving Rousseau's ideal of an identification between rulers and ruled) the distinction between the two functions of representation is abolished (as self-government is achieved in this case in the full sense of the word). Yet the same distinction surfaces again at the immediately higher level (the municipality, or district) and finds its expression in bicameralism.

All this highlights the reasons underlying the different mechanisms through which representation takes shape in both Chambers: the principle *one man one vote* must be scrupulously applied within representative institutions with governmental powers (as the principle of majority rule is the very essence of democracy in this particular capacity). On the other hand, in those institutions functioning as guarantors (whose task is to secure respect of the insuperable limits of a government's action) the principle of equality must be applied with reference to the levels of self-government whose spheres of independence ought to be protected, and only within each of them does the principle of *one man one vote* reacquire its cogency.

Timing of Elections for Upper Chambers and Attendant Electoral Methods.

In the USA the evolution of the Senate's structure and function has been such as to eliminate the Upper Chamber's specific role as a place where federal policies are rediscussed in the light of member states' interests. The Senate has become a kind of duplicate of the House of Representatives. American bicameralism has thus lost its federal character, since senators and representatives are elected in the same way, which both weakens the Senators' links with their states and preserves the Representatives' links with their constituencies.

In our model, the essential difference between the two Chambers is already guaranteed by the single constituency device for electing Lower Chambers at each level. But a further guarantee could well be provided by an election calendar designed to focus the public's attention on the specific nature of the problems emerging at every level and their connection with what emerges in the electoral campaigns of the lower levels. Hence, making the election of an Upper Chamber and the Lower Chamber at the level immediately below it coincide, so that campaigning in both elections is on the same issues, seems the best way of ensuring that members of the Upper Chambers are sensitive to the specific problems of the territorial levels they represent.

The arguments for a single constituency in Lower Chamber elections hold true, *mutatis mutandis*, for Upper Chamber elections, the only difference being that the latter are bound to be held in as many single constituencies as there are territorial spheres to be represented at the higher level. For example, continental-level Upper Chamber elections will beheld on the basis of national single constituencies, national-level Upper Chamber elections on the basis of regional single constituencies, and so on.

Finally, as regards the electoral system in the strict sense of the word, it seems that the single transferable vote is to be recommended both because of the small number of representatives to be elected at each level for the higher one and because of the greater flexibility political alignments will presumably acquire in the post-industrial era, in a multi-tier federal structure.

The Presidential Role and the Dissolution of Parliament.

As regards the Presidential Role at the different levels and the power to dissolve the Chambers, let me first of all recall a conclusion reached in my previous essay, which I took for granted in the foregoing section: that, if we ideally locate ourselves in a historical perspective where the division of society into antagonistic classes and of mankind into exclusive nations has been overcome and where multi-tier planning basically becomes the only government function, then it is not hard to see that the relationships between the legislative and executive can only be patterned on a parliamentary model, *i.e.* a model where the cabinet needs the confidence of Parliament, or of one of Parliament's Chambers, to get into office, and Parliament, or one of its branches, has the power to dismiss the cabinet at any moment by a vote of non-confidence.

One of the corollaries of a parliamentary system, in the constitutional tradition of western democracies, is the existence of an institution with a presidential role (Head of state) and with the power, among others, to dissolve Parliament (or at least the Lower Chamber) when it fails to produce a government majority.

What form of institution with a presidential role is compatible with our model? Could such an institution be empowered to dissolve Parliament, or one of its branches?

As regards the first question, in a multi-tier federal system, the problem not only concerns the general level, but regional levels as well. There is no way to escape this conclusion because the independence of

all levels of government is an essential feature of all federal structures.

As to the nature of such an institution, a number of interesting ideas are to be found in the Draft Treaty of the European Parliament (which on this point as with other points, owes much to the ideas put forward by the UEF).[11] In the case of the European Union, the strongly differentiated nature of all aspects of European society and persistent national loyalties (which are by no means incompatible with a strong consensus for the idea of European political unification, as it exists in European public opinion) has imposed the adoption of a corporate solution as to the Community's Presidency. The presidential function has thus been attributed, in the Draft Treaty, to the European Council. In a world perspective, where the disappearance of any non-juridical external constraint will tend to weaken any spontaneous drift towards centralisation, it seems legitimate to maintain that the solution indicated for the European Union should be extended to all levels. The only exception would be lowest level, whose homogeneity requires a different solution. The presidential function would thus be attributed, for each level of government, to a corporate body made up of the heads of the executives of the level immediately below.

As regards the second question, the problem is to see whether, at each level of government, the corporate presidency should be empowered to dissolve the Lower Chamber, should the latter fail to produce a majority supporting the cabinet (the same problem does not arise with the Upper Chamber which, *ex hypothesi* has no power to control the executive).

In actual fact, the corporate Presidency's power to dissolve the Lower Chamber is incompatible with the essential function of "cascade" elections: to secure organic and permanent links among the different tiers of governments, which thus enables the general will to reach levels of government which are not so closely in touch with the real needs of the citizens. (The "cascade" system selects the political class in such a way that candidates are compelled to express their options and their programmes on the basis of those spelt out at the lower levels of government; so that, once the political will is formed, the greatest co-ordination among the different tiers of global planning can be achieved. For this to be realised, it is essential that the timing of elections at the various levels should be both rigidly fixed and unalter-

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[11] Union of European Federalists, *Proposals for the Solution of the Institutional Crisis of the Community*, February 1982.

able, which would not be the case if the Lower Chamber of a single level of government were dissolvable).

Clearly relationships between the legislature (the Lower Chamber in particular) and the executive must be established in our model in such a way as to make it possible for the system to function without the need to resort to dissolution.

Before suggesting the possible institutional remedies, let me recall that, in a world-wide multi-tier federal government, any transitory institutional *impasse* affecting one level alone would be much less momentous than in a nation-state. Indeed, in the latter, a government crisis brings about a total, or almost total, paralysis of the decision-making process in the public sphere, including the crucial field of foreign policy. But in a multi-tier federal scheme, the crisis would only affect one of the many levels of government, and thus a limited sector of public life; and, even if it did affect the world level, it would be no more critical for this, as, once deprived of the power to run foreign policy (and its current monopoly in the field of monetary policy) the world level of government would have no greater effect at all on citizens' lives than the smaller territorial spheres, inasmuch as it would not have the power to take decisions immediately affecting their day-to-day interests.

This does not of course mean we must not try to find institutional mechanisms capable of reducing the chances of a cabinet crisis at any level to a minimum and of ensuring, should it prove impossible to avoid a crisis, that it can be managed in the most effective and least traumatic way.

The most appropriate remedy for an institutional *impasse* would seem to be the *constructive vote of non-confidence*, introduced after the Second World War into the Fundamental Law of the Federal Republic of Germany. This device, however, cannot avoid the *impasse* arising either when a Chamber fails to produce a majority to support a cabinet, just after its election, or when the cabinet itself resigns.

In these cases it seems legitimate to state that the responsibility for running the executive power during a crisis should belong to the corporate Presidency, complemented with further representatives of the cabinets of the immediately lower order, assisting the respective heads of government. The corporate Presidency would appear to be the sole body satisfying both the requirement for democratic legitimacy (even though this legitimacy is expressed at another level) and the requirement of establishing a structural link with the decisions of lower order levels of government.

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