

THE EURO CRISIS, ECONOMIC GOVERNANCE AND DEMOCRACY IN THE EUROPEAN UNION

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Abstract

The recent sovereign debt crisis has raised further concern about democracy in the European Union. The paper aims at considering some aspects of the European economic governance model, which has emerged in response to the sovereign debt crisis, and assessing how such model accords with the principles of democracy recognized by the Treaty of Lisbon. The author believes that the management of rescue measures does not provide for enough involvement of the European Parliament or of national Parliaments and, therefore, rises a democracy principles issue. In fact, the sovereign debt crisis has clearly indicated the need to enhance the democratic legitimacy of European economic governance. Hence, the democratic issue will remain at the centre of the debates on the future of European integration.

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1. Background

The recent sovereign debt crisis, which has put the euro under so much pressure, has raised further concern amongst scholars about democracy in the European Union¹.

The roots of the crisis can be traced back to the unsound fiscal policies of some Member States which forced other Member States and the European Union to adopt a rather hefty programme of financial assistance to countries threatened by insolvency. Democratic concerns have come to the fore in the wake of such

¹See The Editorial, *Debt and Democracy: "United States then, Europe now"?*, in CMLR, 1833 ss.; M. Poiares Maduro, B. De Witte, M. Kumm, *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, in RSCAS, Policy Papers, 2012/08. There are many studies concerning the legal aspects of the euro crisis and the effects it has had at institutional level in Europe. Amongst the most recent, see, K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EIU Working Papers, Law 2012/28, 1 ss.; G.L. Tosato, *L'integrazione europea ai tempi della crisi dell'euro*, in Riv. dir. intern., 2012, 681 ss.; G. Napolitano, *La crisi del debito sovrano e il rafforzamento della governance europea*, in G. Napolitano (ed.), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, (2012) 383 ss.; E. Chiti, A. Mendez, P. Teixeira (ed.), *The European Rescue of the European Union*, (2012); A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance*, in CMLR, 2012, 1613 ss.; H. Overbeek, *Sovereign Debt Crisis in Euroland: Root Causes and Implications for European Integration*, in *The International Spectator*, 2012, 39 ss.; M. Ruffert, *The European Debt Crisis and European Union Law*, in CMLR, 2011, 1777 ss.; P. Athanassiou, *Of Past Measures and Future Plans for Europe Exit from the Sovereign Debt. Crisis: What is Legally Possible (and What is Not)*, in Eur. L. Rev., 2011, 2 ss.; G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, (2012), spec. 114 ss.; G. Pitruzzella, *Chi governa la finanza pubblica in Europa*, in Quad. cost., 2012, 9 ss.; E. Chiti, *Le risposte alla crisi della finanza pubblica e il riequilibrio dei poteri nell'Unione*, in Gior. dir. amm., 2011, 311 ss.; G. della Cananea, *L'ordinamento giuridico dell'Unione europea dopo i nuovi accordi intergovernativi*, in *La Comunità internazionale*, 2012, 3 ss.; G. Peroni, *Il Trattato di Lisbona e la crisi dell'euro: considerazioni critiche*, in Dir. Un. Eur., 2011, 971 ss.; A. Viterbo – R. Cisotta, *La crisi del debito sovrano e gli interventi dell'U.E.: dai primi strumenti finanziari al Fiscal Compact*, in Dir. Un. Eur., 2012, 323 ss. R. Baratta, *Legal Issue of the Fiscal Compact – Searching for a mature democratic governance of the euro*, in Dir. Un. eur., 2012, 647 ss.; L.S. Rossi, *Fiscal Compact e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE*, in Dir. Un. eur., 2012, 293 ss.; L. Besselink, *The Fiscal Compact and the European Constitutions: Europe Speaking German*, in Eur. Const. L. Rev., 2012, 1 ss.; P. Bilancia, *La nuova governance dell'eurozona: alla ricerca del demos*, in F. Angelini – M. Benvenuti, (ed.), *Il diritto costituzionale alla prova della crisi economica*, (2012) 19 ss.

intervention, as seen also in the reactions of wide sectors of public opinion in Europe. An obvious instance are the protests in Greece against the austerity measures imposed by the Government to put into place reform programs which, it is claimed, have been drawn up in an emergency situation and without adequate public debate². Public opinion in better-performing countries also is critical about having to bear the costs of dealing with the results of poor budgetary discipline of other Member States.

The crisis, moreover, has also revealed the weaknesses of the Economic and Monetary Union (EMU) model drawn up at Maastricht, a model based on the distinction between monetary policy, the exclusive competence of the Union and entrusted to the European Central Bank (ECB), fiscal and economic policy, over which each member State still has sovereignty. The reason for the distinction lies in the idea that monetary policy, which must guarantee price stability, should be entrusted to a technical body operating absolutely independently of political influence by representative bodies. Decisions regarding economic and fiscal policies, on the other hand, which have redistributive impact, necessarily require a solid base of democratic legitimacy which only national political process guarantees³. This “asymmetric”⁴ system, which gives monetary policy over to the exclusive competence of the Union but retains member States' sovereignty in matters of economic and budgetary policy, has not succeeded in preventing some States from running into such debt as to pose a threat to the single currency itself. Hence the need to introduce new mechanisms to ensure greater coordination of economic and fiscal policies in the countries of the euro area. Reinforcement of European economic governance clearly requires a corresponding reinforcement of democratic legitimacy in the European Union.

I shall go on to consider some aspects of the European economic governance model which has emerged in response to

² See the recent B. Spinelli, *Se anche Keynes è un estremista*, in *La Repubblica* 6 February 2013, referring to the writing on the walls in Athens: “*Save us no more!*”.

³ See E. Chiti, A. Mendez, P. Teixeira, *The European Rescue of the European Union*, cit. at 1, 397 ss.

⁴ See K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, spec. 43 ss.

the sovereign debt crisis⁵, and to assess how such a model accords with the principles of democracy recognised by the Treaty of Lisbon⁶.

2. *Rescue measures for struggling States*

In October 2009 the Greek government's announcement that its budget deficit was 12.5% of GDP rather than the 3.7% announced by the previous government sparked off an immediate reaction in financial markets resulting in a substantial drop in the value of Greek bonds. The crisis, exacerbated by speculation, soon made it plain that Greece was unable to issue new bonds at an acceptable interest rate.

In the face of such a situation, calls for Greece to be left to its own devices came from several quarters. This would have meant default for Greece, departure from the euro and a return to a national currency, with the option in the future to use inflation to balance public spending and support exports⁷. Such a solution, however, would have entailed substantial losses for the banks (above all German and French) who had subscribed to Greek government bonds, with inevitable repercussions also on the stronger economies. Furthermore, Greece's departure would have endangered the whole euro system.

Hence the decision by the Heads of State and of Government of the EU Member States to intervene to help Greece⁸. To this end, a package of intergovernmental measures was assembled, outside the Treaty framework, including a loan facility agreement between Greece and the other euro area States

⁵ On the “governance” in the European Union cfr. P. Bilancia, *The Dynamics of the EU Integration and the Impact on the National Constitutional Law*, 2012, 57 ss., 61 ss.

⁶ For an analysis of the “Provisions regarding democratic principles” which the Lisbon Treaty introduced in Title II of the TEU, and for referenced doctrine and case-law see. F. Donati, *Commento all’art. 9 TUE, Commento all’art. 10 Teu and Commento all’art 11 TUE*, in A. Tizzano (ed.), *Commento al Trattato di Lisbona*, (2013).

⁷ G.L. Tosato, *L’integrazione europea ai tempi della crisi dell’euro*, cit. at 1, 683.

⁸ See A. Viterbo – R. Cisotta, *La crisi della Grecia, l’attacco speculativo all’euro e le risposte dell’Unione europea*, in *Dir. dell’Un. eur.*, 2010, 961 ss.

extending a credit line to Greece in the form of bilateral loans⁹, and an intercreditor agreement between creditor States. A Memorandum of Understanding (MoU) signed by Greece and the Commission as representative of the euro area countries also forms part of the package and sets out the obligations to be met for the loan to be granted. The MoU not only requires cuts in public spending in order to contain the deficit to GDP ratio but actually also sets down the cuts that should be implemented. There is, moreover, an undertaking by Greece to carry out certain structural reforms, in the health sector and the labour market, for instance. The strict conditionality of financial assistance to specific economic and social reforms, will be confirmed in all subsequent rescue measures.

In the meantime the crisis worsened, and spread to other countries (Portugal and Ireland). The EMU system introduced by the Maastricht Treaty, however, includes a number of prohibitions and restrictions limiting the possibility of financial support by the Union and Member States to those Member States facing severe difficulties.

The system aims to guarantee price stability, which is the main objective of Union monetary policy¹⁰ and it was precisely with this aim in mind, laid down by Germany as a condition of entry into the single currency, that a number of rules have been introduced in order to guarantee fiscal discipline by Member States. In particular, Art. 125 of the Treaty on the Functioning of the European Union (TFEU) prohibits the Union and Member States from sharing liability for, or assuming the obligations of, another Member State (no bail-out clause). The provision aims to ensure that Member States remain subject to market rules when raising debt. In this way States would be encouraged to follow sound budget policies, being unable to count on aid from the

⁹ The package provided for a total 110 billion euro of financial assistance, 30 of which contributed by the IMF and 80 by the States of the euro area. Each State has undertaken to share in the loan according to its capital contribution in the ECB. This intervention proved insufficient so much so that in July 2011 a restructuring programme for the Greek debt was drawn up, based on an exchange of government debt bonds in the hands of banks and insurance companies with other instruments at lower rates and longer due dates. This restructuring signified a loss for institutional investors on Greek public debt of around 50%.

¹⁰ See Arts. 119(2) TFEU and 127(1) TFEU.

Union or other member States to bail them out of an insolvent position¹¹.

Art. 123 TFEU prohibits the ECB and other national central banks from granting overdrafts or any other form of credit facility to Union or Member State authorities and bodies governed by public law, and from buying up their own debt instruments from these bodies. Art. 124 TFEU also prohibits any measure which offers the Union or Member States privileged access to financial institutions.

The only form of financial aid provided for by Union legislation is that under Art. 122(2) TFEU, which allows the Council, following a proposal by the Commission, to grant, “under certain conditions” financial assistance to a Member State who should be “in difficulties or [...] seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”.

Under this provision, the Regulation establishing a European Financial Stabilisation Mechanism (EFSM) was adopted in May 2010¹². The creation of the EFSM made it possible for the Council, following a proposal by the Commission, to decide by qualified majority to grant financial assistance to Member States in the form of credit lines and conditional to the undertaking by the beneficiary State to re-establish a sound economic or financial situation. However, such financial assistance as was available to the EFSM for this purpose was limited to available Union budget funds, which at the time were around 60 billion. This sum might seem enormous in absolute terms but was actually totally inadequate considering the size of the financial crisis then obtaining.

The inadequacy of the resources available in Union budget funds persuaded the Heads of State or of Government that in

¹¹ Findings of the Court of Justice, Plenary Session, 27 November 2012, in case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General* para. 136. On the prohibition concerned, see M.L. Tufano, *Il principio del no bail-out nel diritto comunitario*, in *Dir. dell'Un. eur.*, 2002, 505 ss.; J.V. Louis, *The No-Bail Out Clause and Rescue Packages*, in *CMLR*, 2010, 971 ss.

¹² Regulation (UE) n. 407/2010 by the Council of 11 May 2010, which sets up a European mechanism for financial stabilisation. Regarding the legitimacy of recourse to Art. 122 TFEU as the legal basis for setting up the EFSM, see the comments of K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, 25 ss.

order to face the crisis it would be necessary to operate outside the Union's legal framework. Recourse to international law, furthermore, would make it possible to overcome the resistance of some States, in particular the United Kingdom, who were not in favour of using Union resources to help euro area countries in difficulty.

Thus, together with the establishment of the EFSM, government representatives of the 17 euro area countries reached an agreement under which the European Financial Stability Facility (EFSF) was created: a company set up under Luxembourg law in which the euro area States hold an interest and which finances itself on the international markets through bond issues backed by each Member State up to the sum of its capital contribution to the EFSF. The agreement was an international agreement *sui generis* for it allowed the EFSF to begin to operate without the agreement being first ratified by the national Parliaments of the signatory States¹³. A subsequent agreement under international law between the EFSF and the 17 euro area States set out the terms and conditions for financial assistance of up to a total 780 billion Euro. Assistance granted by the EFSF also is strictly conditional: the Commission, representing the Eurogroup countries, and the beneficiary Member are required to sign an MoU which details the spending cuts and structural reforms conditioning the financial assistance package. The EFSF is a temporary measure, running to 30 June 2013¹⁴.

The EFSM and the EFSF were however perceived by the markets as falling short of a definitive solution to the problems arising from the sovereign debt crisis. Furthermore, doubts were voiced about the compatibility of such instruments with the prohibition set out under Art. 125 TFEU concerning financial assistance. It was also argued that the sovereign debt crisis, having been caused by mistaken economic and fiscal policies on the part of some governments, could not be held to fall under those

¹³ Regarding the reasons which motivated the Heads of State or of Government to use instruments outside the Union framework to deal with the sovereign debt crisis see B. De Witte, *Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy*, in *Governance for the Eurozone. Integration or Disintegration?*, 2012, 139 ss..

¹⁴To date beneficiaries of financial assistance granted by the EFSF have been Ireland, Portugal and Greece.

“exceptional occurrences” beyond the control of a Member State which justify recourse to the measures under Art. 122 (2) TFEU.

In the European Council meeting of 28 and 29 October 2010, the Heads of State or of Government consequently agreed on the need to introduce a permanent crisis resolution mechanism and agreed to move to a revision of the Treaties in that sense. With Decision 2011/199 of 25 March 2011, the European Council made use of the possibility under Art. 48(6) TUE to amend the TFEU by means of a simplified revision procedure¹⁵. By effect of such revision, a third paragraph was added to Art. 136 TFEU which expressly permits Member States whose currency is the euro, to “establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole” provided that “the granting of any required financial assistance under the mechanism [...] be made subject to strict conditionality”¹⁶.

Subsequently, on 2 February 2012, the 17 States of the euro area signed the treaty creating the European Stability Mechanism (ESM), a permanent mechanism of financial support to safeguard the financial stability of the euro area as a whole¹⁷, and which would replace the EFSM and the EFSF¹⁸.

¹⁵ On this point, see B. De Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, in *European Policy Analysis*, 2011, in www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf.

¹⁶ Regarding the legitimacy of the simplified procedure used for the amendment of Art. 136 TFEU, see Court of Justice, Plenary Session, 27 November 2012, in case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, cit. at 11.

¹⁷ The purpose of the ESM is set out under Art. 3 of the Treaty establishing the Mechanism and reads: “The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.”

¹⁸ On institutional and operational aspects of the ESM, see, among others, G. Napolitano, *Il Meccanismo europeo di stabilità e la nuova frontiera costituzionale dell'Unione*, in *Giorn.dir.amm.*, 2012, 461 ss.

The ESM is an international organization under international public law¹⁹, participated by euro area States, having a capital stock of approximately 700bn euro²⁰. Liability of each ESM Member State is limited to the amount of capital it has subscribed to. ESM assistance, granted on the basis of strict conditionality, is reserved to the States who have signed the Fiscal Compact (see para. 6 below), and therefore accepted fiscal discipline and strict supervision by the Commission. Similarly to the EFSF, financial assistance granted by the ESM can take different forms, such as loans²¹, purchase of bonds on the primary or secondary market²², and loans for the recapitalisation of the member's national banks or financial institutions²³.

The ESM is governed by the Board of Governors, composed of the finance ministers of the euro area States, with the participation – as observers – of the President of the ECB and the Commissioner for economic and monetary affairs. The Council has wide powers regarding, among other things, setting up the facility and the choice of financial instrument to assist the States in difficulty²⁴, adopting changes to the share capital and issuing new shares²⁵. The Board of Governors also appoints the Board of Directors and the Managing Director.

Decisions in matters of financial assistance must be taken “by mutual agreement” of the Board of Governors²⁶, except for emergency cases in which resolutions may be passed by a majority of 85%. Control, then, of the ESM remains firmly in the hands of national governments. It will be up to each State, therefore, to guarantee that its representative on the Board of Governors shall operate according to the constituting principles.

There has been much discussion regarding the compatibility of financial assistance measures adopted during the crisis (the aid package for Greece, the EFSM, the EFSF and the

¹⁹ For this definition, see the conclusions of the European Council of 24 March 2011.

²⁰ Capital is subscribed for 80 billion; the rest of the sum can be called up as necessary (see Art. 8 of the ESM Treaty).

²¹ Art. 16 ESM Treaty.

²² Arts. 17 and 18 ESM Treaty.

²³ Art. 15 ESM Treaty.

²⁴ Art. 19 of the ESM Treaty.

²⁵ Arts. 8 and 10 of the ESM Treaty.

²⁶ Art. 5(6) ESM Treaty.

ESM²⁷) with the provisions of the Treaties and in particular with the no bail-out clause in Art. 125 TFEU²⁸. It has been argued convincingly that such provision was made to avoid “moral hazard”, that may occur if a State would be allowed to rely on rescue measures by the Union or other Member States in case of debt crisis. The principle behind Art. 125 of the TFEU is, then, to avoid unsound fiscal policies by Member States and thus to guarantee the stability of the euro area as a whole. A similar scope governs the prohibition of central bank financing (Art. 123 TFEU), privileged access by the public sector to financial institutions (Art. 124 TFEU) and excessive government deficits (Art. 126 TFEU). It may, therefore, be argued that any assistance granted based on a strict conditionality criterion, imposing upon the beneficiary the adoption of a rigorous plan for cuts to public spending and structural reform to reduce deficit and public debt, not only does not contrast with the prohibition under Art. 125 TFEU, but rather contributes to attaining the object of Articles 123-126 TFEU²⁹.

This conclusion has been confirmed by the Court of Justice in the Pringle case³⁰, where it has been clarified that EU law does not preclude the conclusion and ratification of the EMS. The Court’s decision did not, however, address the issue concerning democratic legitimacy of decisions taken in the EMS framework³¹.

²⁷ For an analysis of the various mechanisms of financial assistance aiming to contrast the effects of the sovereign debt crisis, see A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance*, cit. at 1, 1616 ss.

²⁸ In the sense that steps taken to deal with the sovereign debt crisis violate some of the provisions under the TFEU, and in particular the prohibition on financial rescue under Art. 125 TFEU, see M. Ruffert, *The European Debt Crisis and European Union Law*, cit. at 1, 1785 ss. And, in reply, see R. Smits, *The European Debt crisis and European Union Law: Comments and Call for Action*, in *CMLR*, 2012, 827 ss.

²⁹ See, amongst others, K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, 24; A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance* cit. at 1, 1627.

³⁰ Court of Justice, Plenary Session, 27 November 2012, C-370/12, *Pringle v. Irlanda*, cit. at 11.

³¹ In the sense that the Pringle decision has not resolved doubts regarding compatibility of ESM with democratic principles, see, for example, J. Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, in German L. J., Vol. 14,

As a matter of fact, the adoption of an inter-governmental approach normally affects democracy, and especially in exceptional circumstances requiring emergency action, parliamentary chambers at national level may only ratify choices already substantially decided elsewhere³². The debate, as we know, was particularly heated in Germany, in view of the fact that the German Constitutional Court has always held that the principle of democracy enshrined by fundamental law sets out that fundamental choices in fiscal matters should remain under the control of the people's representative body³³. The Constitutional Court, however, held that the ESM, involving limited financial liability for Germany to the sum of its subscribed share, freely approved by the Bundestag, is compatible with the principle of democracy guaranteed by the fundamental Law³⁴.

3. European Central Bank interventions

In view of the seriousness of the sovereign debt crisis, the ECB also has played an important role in supporting those States most seriously hit by the crisis by buying public debt bonds on the secondary market.

Once the extent and seriousness of the crisis had emerged, the ECB Governing Council in its meeting of 14 May 2010 approved the Securities Market Program (SMP), a program for the purchase on secondary markets of euro area government bonds.

2012, 185 ss.; P. Augustijn Van Malleghem, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, in German L. J., Vol. 14, 2012, 164-165. See also V. Borger, *The ESM and the European Court's Predicament in Pringle*, in German L. J., 2013, 113 ss.;

³² See Editorial, *Debt and Democracy: "United States then, Europe now"?*, cit. at 1, 1837.

³³ See the decision of 7 September regarding aid to Greece.

³⁴ See BVergG, decision of 12 September 2012, cit. On the decision, see, among others, F. Pedrini, *Le "cautele" di Karlsruhe in ordine al Fondo "salva Stati" (commento alla sentenza del Tribunale costituzionale del 12 settembre 2012)*, in *Quad. cost.*, 2012, 894 ss.; G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, cit. at 1, 124 ss. (and other citations therein); K. Schneider, *Yes, But ... One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, in German L. J., 2013, 53 ss.; M. Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, in German L. J., 2013, 21 ss.

As a result of this decision, the ECB purchased bonds of troubled States of the euro area on the secondary markets for a sum of around 210 billion euro.

According to the ECB, these operations do not violate the prohibition of central bank financing of public expenditures under Art. 123 of the TFEU, which bans only operations on the primary market. The purchase of debt instruments bonds targeted by speculators, from this view, would be carried out to “safeguard an appropriate monetary policy transmission and the singleness of the monetary policy”, which might be hindered by an excessive disequilibrium in interest rates among Member States. However, it appear obvious that the main objectives of this kind of measures is to assist crisis states and to promote stability in the euro area³⁵.

In the meeting on 6 September 2012, the ECB Governing Council decided nonetheless to replace the SMP with Outright Monetary Transactions (OMT), a mechanism which allows an unlimited purchase on the secondary market of sovereign debt instruments of euro area States. The ECB has underlined that the OMT will make it possible to “address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors about the reversibility of the euro” and specified that as such operations aim to counter “risks to price stability over the medium term” they are “strictly within [the ECB's primary] mandate”³⁶.

Activating OMT is subordinate to the Member State adhering to an EFSF/ESM programme as well as committing to structural reforms to restore financial stability. By this means a strong link is formed between ESM interventions, aimed at guaranteeing assistance to States in difficulties and those of the ECB aimed at guaranteeing appropriate monetary policy transmission.

The ECB's intervention looks hardly compatible with the model drawn at Maastricht which guarantees that the ECB (and

³⁵ Scholars have expressed doubts concerning the compatibility of this type of intervention by the ECB with Union law, and in particular with prohibitions set out under Arts. 123 and 125 of the TFEU. See considerations by Ruffert, *The European Debt Crisis and European Union Law*, cit. at 1, 1787-8. See, also, K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 28-29.

³⁶ See BCE, *Bollettino Settembre 2012*, 5, 11.

national central banks) have a completely independent position. In this model, monetary policy not only requires no democratic legitimacy but, rather, must be entrusted to an independent technical body abstracted from the pressures and conditionings of representative bodies.

The crisis situation casts doubts on this model. With the SMP and ODT, in actual fact, the border line between operations of purely monetary policy aiming to guarantee price stability and measures of financial assistance has become rather hazy. The crisis situation, it has been noted, reflects a trend towards the “politicisation” of monetary policy³⁷, as confirmed by the circumstance that the ECB, together with the IMF, has been actively involved, albeit in a consulting capacity, in the drawing up of all the rescue plans for States in critical situations (the aid package for Greece, and the EFSM, EFSF and ESM). At present under discussion is a proposal for regulation attributing to the ECB powers of vigilance over the banking system. Heads of State or of Government agreed at the euro summit of 29 June 2012 that, once the central regulatory mechanism of banks is put into place, the ESM would be able to directly recapitalise banks. This further confirms the complementary nature of actions by the ESM and the ECB.

The powers of the ECB have, therefore, undergone a significant transformation, allowing it in actual fact to operate as lender of last resort also for Member States³⁸ in order to contribute to their rescue and maintain the stability of the euro area as a whole³⁹. It would appear difficult, therefore, to justify the subtraction of this type of action by the ECB from any form of democratic control⁴⁰.

³⁷ See K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 38.

³⁸ See P. De Grauwe *The European Central Bank: Lender of Last Resort in the Government Bond Markets?*, in *Governance of the Eurozone. Integration or Disintegration?* (2012) 17 ss.

³⁹ See K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 17.

⁴⁰ See Editorial, *Debt and Democracy: “United States then, Europe now”?*, cit. at 1, 1837 ss.

4. *The Eurobond Debate*

The financial support measures granted to crisis States has not removed the difficulty encountered by some States to find funding at reasonable rates in the financial markets. The persistent difference between national bond interest rates clearly creates competitive disadvantages for the weaker States who are forced to bear greater financing burdens just when they are committed to harsh austerity policies to balance their budgets. From here springs the debate over the feasibility of introducing “Eurobonds” or, as the Commission calls them in its Green Paper, “Stability Bonds”⁴¹.

Issuing common European national debt bonds, considered “at par in importance with the introduction of the single currency”⁴², would enable Member States to obtain financing at a uniform rate. The elimination of spreads in sovereign debt instrument prices could help reduce economic and competitive strains which the weaker countries are forced to face, and would substantially reduce the risk of a new European sovereign debt crisis.

The guarantee offered by States pooling their borrowings could be without joint liability, in the sense that each State would guarantee bond subscribers only for its quota of revenue flows. A second option would be to have eurobonds with joint liability, in the sense that each EU member would be fully liable for the entire issuance independently of its own part of revenues.

The introduction of the stability bond backed up by proportional guarantees would not require an amendment to the Treaties. It would in fact be a mechanism under certain aspects similar to that already tried and tested with the EFSM and the ESM, considered compatible with the no bail-out clause under Art. 125 TFEU. The advantages of this type of common bond issue would however be limited, because the guarantee offered by the countries with lower ratings would end up limiting the creditworthiness of this type of stability bond, involving therefore necessarily higher financing costs for the countries participating in the common issuance.

⁴¹ Commission Green Paper on the Feasibility of Introducing Stability Bonds, Brussels, 23 November 2011, COM(2011) 818.

⁴² See European Parliament Resolution of 16 January 2013 on the feasibility of introducing Stability Bonds (2012/2028(INI))

Creditworthiness of the stability bond would be greatly increased if backed by a joint guarantee on the part of all the States taking part in the joint issue. The substitution (in whole or in part) of national bond issues with this type of stability bond would thus enable all States benefiting from the joint issue to enjoy more favourable rates for their debt financing, independently of the condition of their respective national finances. However, this could trigger a moral hazard, in the sense that crisis countries might be induced to rely on the stability bonds and consider not necessary to tighten their fiscal policy discipline; to this respect, the greater the proportion of national bonds substituted, the greater the tendency towards more lenient policies might be.

In order, then, to introduce stability bonds backed by joint guarantees on the part of the issuing States, an amendment to Art. 125 TFEU would not be enough; at present this Article prohibits sharing of liability for government debt by the Union and Member States⁴³. The need to prevent or in any case limit the moral hazard, in actual fact, would require a further amendment to the treaties to allow tighter coordination between economic and fiscal policies of euro area States. But a further step towards economic and financial integration requires parallel reinforcement of the democratic legitimacy of the EMU.

It must also be remembered that, according to the German Federal Constitutional Court, the persisting European Union democratic deficit requires that the decisions on revenue and expenditure of the public sector remains in the hands of the Bundestag. From this springs the prohibition on accepting the setting up of a permanent mechanism “which could involve the undertaking of commitments arising through the free decisions of other Member States, particularly if they present consequences whose effects are difficult to calculate”. According to the Constitutional Court, as elected representatives of the people, the members of the national parliament must remain in control of

⁴³ In the sense that Art. 125 TFEU prohibits issue of eurobonds guaranteed jointly by issuing States, see Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance*, cit. at 1, 1631.

fundamental budget policy decisions, in an intergovernmental governance as well⁴⁴.

The principles established by the German Constitutional Court undoubtedly strictly limit the possibility of introducing stability bonds with joint liability, in the absence of a case by case prior authorization by the Bundestag. Only a strengthening of the democratic legitimacy of the Union could contribute to overcoming such limits.

5. Coordination of economic and fiscal policies in the EMU model prior to the crisis

The decision to introduce the euro was based on the conviction that the co-existence of a plurality of national monetary policies hindered the correct functioning of the single market. The attempts to introduce exchange-rate stabilisation mechanisms, such as, for example, the European Monetary System, had proved insufficient to avoid market distortions arising from fluctuations in national currency values. Hence the move to monetary union to protect the single market from exchange rate variations thereby guaranteeing those conditions of stability necessary to encourage the circulation of factors of production⁴⁵.

The authors of the Maastricht treaty were, however, well aware of the fact that while money is a prerogative of a sovereign State, Europe is not a federal State and in particular Member States would not be willing to cede control of their economic policy. Furthermore they well knew that economic policy decisions have redistributive consequences and impact on social

⁴⁴ See the decision by the BVerfG of 7 September 2011 regarding aid to Greece and the decision of 12 September 2012 regarding the ESM. See M. Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal treaty of 12 September 2012*, cit. at 35, 21 ss.; S.K. Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, in German L. J., Vol. 14, 1 ss.; K. Schneider, *Yes, But ... One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, cit. at 35, 53 ss.

⁴⁵ On the issues which led to the introduction of the single currency, see G.L. Tosato – R. Basso, *L'unione economica e monetaria*, 2007, 14 ss.

service provision. For this reason they require democratic legitimacy which only national parliaments can guarantee⁴⁶.

To guarantee that the EMU held together, notwithstanding the weaknesses of a model based on the separation of monetary and economic policy, rigid criteria of sound public finance and price stability were imposed to Member States for admission to the euro area.⁴⁷ Moreover, Member States have been encouraged to maintain fiscal discipline. To this end, together with the prohibitions on financial bail-out⁴⁸, public-spending funding by central banks⁴⁹ and privileged access to financial institutions by the public sector⁵⁰, a general prohibition of excessive deficit was laid down, by imposing a limit on government deficit and debt with respect to gross domestic product⁵¹.

The Treaties furthermore impose on the Member States the obligation to coordinate their respective economic policies and entrust to the Union the task of promoting this coordination⁵². The EMU system drawn up at Maastricht introduced a procedure in this regard requiring the adoption by the Council, on the basis of conclusions by the European Council, of a recommendation which sets out broad guidelines for the economic policies of the Member States and the Union. The recommendation is not legally binding, essentially representing a soft law instrument targeted at encouraging Member States to follow a sound and prudent budgetary policy. The Council is required to inform the European Parliament regarding the recommendation⁵³.

Preventive measures were also introduced to supervise the development of the economic policies of the Member States and

⁴⁶ See the comments by K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 9.

⁴⁷ See Art. 140 TFEU, which requires a series of parameters to be met regarding price stability, public finance sustainability, limited fluctuation of exchange rates and long-term interest-rate levels, detailed in an appropriate Protocol annexed to the Treaties.

⁴⁸ Art. 125 TFEU.

⁴⁹ Art. 123(1) TFEU.

⁵⁰ Art. 124 TFEU.

⁵¹ Art. 126(1) and (2) TFEU. Protocol on the procedure for excessive deficit indicates that government deficit and debt cannot exceed, respectively, 3% and 60% of gross domestic product.

⁵² See Arts. 2(3) and 5(1) TFEU.

⁵³ See Art. 121(2) TFEU.

also adjustment measures in the event that a Member State should find itself with an excessive public deficit.

In the first of these categories is the “multilateral surveillance” provided for under Art. 121 TFEU. In this regard, the Commission and the Council may issue warnings or recommendations (not legally binding) to the Member States whose economic policies are not in line with the broad guidelines set by the Council or which risk jeopardising the proper functioning of the EMU⁵⁴. The European Parliament is simply informed of the results of this multilateral surveillance⁵⁵. The Stability and Growth Pact⁵⁶ has tried to strengthen this preventive control procedure. Here, Regulation (EC) No. 1466/97 laid down the obligation of the States to deliver to the Council and the Commission medium-term programmes for meeting deficit and public debt criteria set under European Union law. The Council may recommend that the State concerned modify such programmes where they are deemed inadequate, and in any case it monitors activation, assisted by the Commission and the Social and Economic Committee. In those cases where the programme is found to be inadequately implemented, the Council may issue a recommendation (again, not legally binding) to the State concerned inviting it to adopt adequate adjustment measures.

Should the preventive arm not reach the hoped-for results, the corrective measures set out under Art. 126 TFEU are supposed to take over. The Council, following a proposal by the Commission and considering submissions by the State concerned, may establish that there is an excessive deficit and, again upon proposal by the Commission, adopt a recommendation addressed to the State that they bring an end to the situation within a certain time period. Should this recommendation produce no effect, the

⁵⁴ See Art. 121(3) and (4) TFEU.

⁵⁵ See Art. 121(5) TFEU.

⁵⁶ The SGP consisted initially of Council Resolution of 17 June 1997, and of two Council Regulations of 7 July 1997: Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, and Council Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. As is known, the SGP was reformed in 2005 allowing for greater tolerance for countries going over the 3% threshold ratio of debt to GDP (France and Germany at that time) but who had put into place public spending restructuring.

Council may adopt the measures deemed necessary for reducing the deficit and, in the event, also adopt further measures among which specific sanctions, including a non-interest bearing deposit until the deficit should be adjusted, or appropriate fines. The European Parliament is not involved in this procedure, being merely informed of the Council decisions⁵⁷. Regulation (EC) No. 1467/97, adopted as part of the stability and growth pact, later introduced a series of measures to speed up and clarify the implementation of the excessive deficit procedure. In concrete terms, however, the excessive deficit procedure has actually been started up several times, addressed at one time or another to most of the Member States, but it has never closed with the application of sanctions.

The principles of economic constitution defined in the Maastricht Treaty, then, retain Member State's sovereignty in economic and fiscal policy, with a duty of coordination in the framework of a mutual surveillance procedure and subject to corrective measures that can be imposed within the excessive deficit procedure. This model has not been modified by successive amendments to the Treaties. The Lisbon Treaty limited itself to introducing an article dedicated to the countries of the euro area which allows the Council to adopt specific measures to strengthen coordination and surveillance of budget discipline and to set out appropriate guidelines for economic policy⁵⁸, and also to formalise the constitution of the Eurogroup, that is, only members of the Council representing States whose currency is the euro⁵⁹.

In the absence of an effective power of European economic governance, no major issue of democratic legitimacy arises: choices of economic policy lie in the hands of the Member States and are legitimised by their respective national parliaments. In this prospect, the absence of effective role by the European Parliament in the definition of the economic policy guidelines for Member States triggers no major democratic problem either. Nor does the failure to have the European Parliament take a part in the excessive deficit procedure appear to harm democratic principles,

⁵⁷ Art. 126(7) TFEU.

⁵⁸ Art. 136 TFEU.

⁵⁹ Art. 138 TFEU.

as it is a procedure which aims essentially to guarantee fulfilment of obligations already provided for by Treaties.

It is nonetheless clear that a transformation of this model which would grant to Union bodies effective guideline and coordinating powers, such as would void or in any case drastically limit the choices of national parliaments in deciding their own economic policy would require that action by the bodies of the European Union be supported by a strong democratic legitimacy base, which the Treaties have not yet guaranteed.

6. The strengthening of the economic governance of the European Union

The sovereign debt crisis has revealed the weaknesses of the EMU model defined in the Maastricht Treaty as reinforced with the Stability and Growth Pact. In fact, the guideline, coordinating and surveillance instruments provided for have proved too weak and have not prevented unsound budgetary policies by certain Member States, threatening the entire euro system. Alongside interventions of financial assistance, aimed at dealing with the sovereign debt crisis in the immediate term, provision was made for a strengthening of the powers of the Union in matters of coordination of economic and fiscal policy of Member States, to avoid in the future sovereign debt crisis in the euro area. Similarly to what happened for financial assistance measures, Member States have made use of both European Union law and of agreements under public international law.

In the first category is the “six pack”, a package of five regulations and one directive aimed at improving coordination of Member States' economic policies and tightening the excessive deficit procedures⁶⁰. The main objective of the six pack is to

⁶⁰ Six pack includes: Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement and budgetary surveillance in the euro area; Regulation (EU) no. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) no. 1466/97 on the strengthening of the surveillance of budgetary positions and surveillance and coordination of economic policies; Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the

strengthen “multilateral surveillance” and the procedure for excessive deficit provided for under Arts. 121 and 126 TFEU and finalised with the Stability and Growth Pact. In particular, the reform reinforced the conditions which would trigger the excessive deficit procedure⁶¹, reduced the time periods for the procedure and toughened the sanctions. In addition, the reform reduced the risk that sanctions could be blocked by a Council decision⁶², through the introduction of a “reverse qualified majority” voting procedure: if previously sanctions were decided by the Council by qualified majority, it is now up to the Commission to set the sanctions which the Council can block only by a qualified majority vote. Furthermore, Regulation (EU) No. 1174/2011 introduced a new procedure for the prevention and correction of macroeconomic imbalances, understood as the negative trends of the economy of a single State which could risk spreading to the whole EMU. Such a procedure is based on a preventive-corrective set of measures where the Commission and the Council work together to issue recommendations and adjustment plans to the Member State concerned with the possibility of applying financial sanctions up to 0.1% of GDP. Finally, Directive 2011/85/UE introduced further limitations to the fiscal independence of a Member State, in order to guarantee that parameters and objectives set under European Union law will be met.

The reinforcement of European economic governance clearly poses a question of democratic legitimacy⁶³. In this regard, Regulation (EU) No. 1175/2011, which modifies Council Regulation no. 1444/97/CE on the strengthening of the

prevention and correction of macroeconomic imbalances; Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) no. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Council Directive 2011/85/UE of 8 November 2011 on requirements for budgetary frameworks of the Member States.

⁶¹ Following the reform, in fact, for the procedure under ex Art. 126 TFEU to be triggered it is now enough to have excessive public debt, even if the budget is within the parameters.

⁶² As happened, for example, under the procedure for excessive deficit commenced in 2002 and 2003 against Germany and France.

⁶³ Point 9 of the preamble to Regulation (EU) No. 1174/2011, acknowledges that “strengthening economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments.”

surveillance of budgetary positions and coordination of economic policies, introduced what it termed an “Economic Dialogue”. By this procedure, the competent parliamentary committee may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss the measures adopted for the coordination of the Member States' economic policies. The participation of the European Parliament in the choices of economic governance offered by the “economic dialogue” would, therefore, still seem to be insufficient⁶⁴.

Finally, in November 2011, the Commission put forward the proposal for the so-called “two pack”, a new package made up of two regulations aimed at further reinforcing the tools of economic and budgetary surveillance and adjustment of excessive deficits for the euro area countries⁶⁵. The proposal, still to be approved, obliges the euro area States to submit to the Commission and to the Council by 15 October each year, the budget proposal for the following year. The Commission assesses the budget proposal against the obligations deriving from European Union law and the recommendations of the Council. The Member States in serious financial difficulties will be subjected to a tougher monitoring than that provided for under Art. 126 TFEU in the framework of excessive deficit procedure.

Both the “Euro Pact Plus”⁶⁶ and the Treaty on Stability, Coordination and Governance in the Economic and Monetary

⁶⁴ See C. Fasone, *The Struggle of the European Parliament to Participate in the New Economic Governance*, *EUI Working Papers*, RSCAS 2012/45, 11 ss.

⁶⁵ See COM(2011)819 final, “Proposal for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area” and COM(2011) 821 final, on “common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.”

⁶⁶ The euro plus pact, an agreement of a political nature without any immediate legal effect, was signed by the euro area States along with Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania. The pact is open for participation by other Member States as stated in the annex to the European Council Conclusions of 24 and 25 March 2011 (EUCO 10/1/11 REV 1).

Union, commonly known as “Fiscal Compact”,⁶⁷ are agreements under international public law.

The Fiscal Compact, signed on 2nd March 2012 by 25 out of 27 Member States⁶⁸, largely confirms the rules laid down in the six pack⁶⁹. It aims to strengthen financial stability in the euro area through greater coordination of the economic and fiscal policies of the Member States⁷⁰ and is closely linked to the ESM in the sense that only those States who have underwritten the Fiscal Compact can benefit from the assistance thereunder.

Although the Fiscal Compact is an inter-governmental agreement outside the EU legal framework, the contracting parties agreed that the substance of the Fiscal Compact should be incorporated in the legal framework of the European Union within five years at most. In any case the Fiscal Compact must be interpreted and applied in conformity with European Union law

⁶⁷ On the Fiscal Compact, see, among others, R. Baratta, *Legal Issue of the Fiscal Compact – Searching for a mature democratic governance of the euro*, cit. at 1, 647 ss.; L.S. Rossi, *Fiscal Compact e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell’integrazione differenziata nell’UE*, cit. at 1, 293 ss.; L. Besselink, *The Fiscal Compact and the European Constitutions: Europe Speaking German*, cit. at 1, 1 ss.

⁶⁸ On the events which led the Heads of State or of Government to proceed with an international treaty rather than via an amendment to the primary law of the European Union, see editorial *Some thoughts concerning the Draft Treaty on a Reinforced Economic Union*, in *CMLR*, 2012, 1 ss., which shows how the decision to go ahead with the Fiscal Compact was in great measure due to the need to get over the UK veto on strengthening budgetary discipline in the Member States through amendment of the Treaties. Regarding the content of the Fiscal Compact see contributions in G. Bonvicini – F. Brugnoli (ed.), *Il Fiscal Compact*, (2012).

⁶⁹ According to S. Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics?*, in *Eur. Const. L. Rev.*, 2012, 404 ss., none of the provisions of the Fiscal Compact would be necessary from a legal point of view insofar as they are already provided for in European Union Law (in particular, the “six pack”) or could easily be provided for by acts of European Union Law. Rather, according to this author, the Fiscal Compact is of import politically, easing for those States participating in the EMS and the EFSF approval from their respective Parliaments. Scholars have raised several doubts regarding the legitimacy of the Fiscal Compact (see for all P. Craig, *The Stability, Coordination and Governance Treaty: Principles, Politics and Pragmatism*, *ELR*, 2012, 231 ss.) settled however by the Court of Justice in the above-referenced Pringle decision.

⁷⁰ See Art.1 of the Fiscal Compact.

and does not limit the competency of the Union in questions of economic and monetary policy⁷¹.

The most significant aspect of the Fiscal Compact is the “balanced budgetary position” rule⁷², which the contracting parties are obliged to enter into national law preferably at a constitutional level⁷³. This rule imposes certain limits to the annual structural balance of general government and to the debt/GDP ratio. Should these limits be exceeded, provision is made for an automatically triggered correction mechanism to come into effect which includes the obligation of the party concerned to implement the necessary measures to correct the deviations. The Fiscal Compact sets out that such a mechanism shall “fully respect the prerogatives of national Parliaments”. Notwithstanding this (somewhat vague) provision, the fact is that it is the Commission who defines the principles regarding the nature, size and time-

⁷¹ See Art. 2 of the Fiscal Compact.

⁷² See Art. 3 of the Fiscal Compact. For an analysis of the institutional aspects deriving from the balanced budget rule as governed by the Fiscal Compact, see F. Fabbrini, *The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism* (May 1, 2012), in <http://dx.doi.org/10.2139/ssrn.2096227>. The author shows how the obligation on Member States to adopt such a rule entails a strong centralisation in the make-up of European economic governance, far greater than that found in the federal make-up of the US where the federal government does not have the power to influence budgetary processes in the States. The author highlights the paradox which sees Member States on the one hand systematically dismissing an invitation to create a federal structure for the EMU, arguing that this would violate their sovereignty in economic and budgetary policies, and on the other hand setting up a system of European economic governance which impacts on State sovereignty to a far greater extent than would be allowed in a federal state.

⁷³ According to C. Pinelli, *La dimensione internazionale della crisi finanziaria*, in <http://www.gruppodipisa.it/wp-content/uploads/2012/09/Pinelli.pdf>, 7,, “insofar as it impacts on the monopoly of the Member States over the power to decide constitutional matters on their national territory”, the Fiscal Compact raises serious issues of contrast with the respect for Member States' “national identities, inherent in their fundamental structures, political and constitutional” (Art. 4 (2) TUE). For an analysis of Constitutional Law No. 1 of 2012, which introduced the balanced budget into our body of laws and on the compatibility of this with the fundamental principles of the Constitution, see M. Luciani, *Costituzione, bilancio, diritti e doveri dei cittadini*, in http://www.astrid-online.it/rassegna/06-02-2013/Luciani_Varenna-2012.pdf. For a stiff criticism of the Fiscal Compact, from the point of view that it would alter the principles of equality among Member States, see F. Bilancia, *Note critiche sul c.d. “pareggio di bilancio”*, in Riv. telem. giur. Assoc. it. costit., n. 2/2012, 4.

frames of the corrective actions to be adopted without the participation of the European Parliament or of the national Parliaments⁷⁴. The role entrusted to the European Parliament is therefore marginal.⁷⁵ Considered from this aspect, the Fiscal Compact would appear to accentuate the democratic deficit issue.⁷⁶

The State which is subject to an excessive deficit procedure shall put in place an economic and fiscal partnership programme which should include a detailed description of the structural reforms to be addressed and implemented for an effective and lasting fixing of its excessive deficit. The Fiscal Compact sets out that the content and format of such programmes “shall be defined in European Union law”⁷⁷, most likely in a decision by the Council as provided under Art. 126(9) TFEU.

The contracting States have undertaken to work together to develop a policy which strengthens the proper functioning of the EMU and economic growth through enhanced convergence and competitiveness⁷⁸. Furthermore, the contracting States are required to take account of best practices benchmarks when planning economic policy reform⁷⁹.

Provision is made for Heads of State or of Government to meet informally at least twice a year with the President of the European Commission. The President of the ECB will also be invited to take part (Euro Summit meetings), to discuss matters relating to the governance of the euro area and of its rules as well as the strategic orientations of economic policy required to increase convergence in the euro area⁸⁰. Whilst the ECB President may take part in the Euro Summits, the President of the European Parliament can take part only upon invitation.

⁷⁴ Art. 3(2) of the Fiscal Compact entrusts to the European Commission the definition of “common principles [...] concerning in particular the nature, size and time-frame of the corrective action to be undertaken.”

⁷⁵ See L.S. Rossi, *Fiscal Compact e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE*, cit. at 1, 301.

⁷⁶ R. Baratta, *Legal Issue of the Fiscal Compact – Searching for a mature democratic governance of the euro*, cit. at 1, 675.

⁷⁷ Art. 5(1) of the Fiscal Compact.

⁷⁸ Art. 9 of the Fiscal Compact.

⁷⁹ Art. 11 of the Fiscal Compact.

⁸⁰ Art. 12 of the Fiscal Compact.

National Parliaments and the European Parliament are required to define the organisation and promotion of a conference of representatives of the relevant committees in order to discuss fiscal policies and other matters pertaining to the euro area⁸¹. It is to be hoped that on such occasion the sensitive issue of democratic legitimacy of European economic governance will be addressed. Economic and fiscal policy, which determines redistributive effects, do in fact require strong democratic legitimacy. If Member States retain sovereignty in this area, as provided by the Maastricht EMU model, democratic legitimacy can be granted at national level. If, on the other hand, this model is superseded by means of a progressive reinforcement of European economic governance, it must be ensured that this governance itself shall have sufficient democratic legitimacy.

7. Closing Remarks

The sovereign debt crisis which recently hit the euro area confirms the structural weakness of the EMU model adopted with the Treaty of Maastricht. This model is based on the principle of Europeanised monetary policy and Member States fiscal sovereignty, save (weak) preventive and corrective measures to avoid excessive deficit. This model has not prevented sovereign debt crisis that have threatened the whole euro system.

A substantial financial assistance rescue plan composed by a number of different instruments (bilateral loan agreements, EFSM, EFSF, ESM) has been implemented. This plan, which has been cleared by various constitutional courts⁸² and the European Court of Justice⁸³, has prevented the default of those States more exposed to financial speculation and so also the collapse of the euro area itself. However, democracy principles remain at issue. The management of rescue measures, in fact, does not provide for enough involvement of the European Parliament or of national

⁸¹ Art. 13 of the Fiscal Compact.

⁸² See decisions of the Supreme Court of Estonia of 12 July 2010 on the ESM (no. 3-4-1-6-12), by the Conseil constitutionnel of 9 August 2012 on the Fiscal Compact (decision no. 2012-653 DC), by the Bundesverfassungsgericht of 12 September 2012 on the ESM and on the Fiscal Compact (BVerfG, 2 BvR 1390/12).

⁸³ See Decision in the Pringle case C-370/12, cit. at 11.

Parliaments. It is entrusted principally to institutions which operate either according to the inter-governmental method such as the EMS, or from a position of total independence of democratically representative bodies, such as the ECB. The use of public funds necessary for this type of intervention and the definition of terms and conditions for the financial assistance, including structural reforms impacting on social rights⁸⁴, have been agreed substantially in places that lie on the outskirts of representative democracy circuits

Alongside the measures of financial assistance, European economic governance has been strengthened by tightening preventive and corrective measures aimed at coordinating economic and fiscal policy and avoiding excessive deficit in Member States. The redistributive effects of economic and fiscal policy choices, however, require a democratic legitimacy which can no longer be provided by national parliaments, as previously occurred in the Maastricht EMU model.

In its meeting on 13/14 December 2012, the European Council agreed on a roadmap for the completion of the EMU⁸⁵ based on a deeper integration and reinforced solidarity. The conclusions of the European Council indicate that with the strengthening of euro area governance the general objective remain to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented. But no concrete indications were provided as to how to actually ensure that the European economic and fiscal governance should be exercised with due respect for democratic principles. The problem moreover is complicated by a “democratic asymmetry” which springs from the fact that there is no exact overlap between the people of the euro area and those represented at the European Parliament. Democracy on the one hand demands that all those concerned be given a chance to participate through their

⁸⁴ See comments by G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, cit. at 1, spec. 145 ss.

⁸⁵ Conclusions of the European Council of 13/14 December 2012, EUCO 205/12, which incorporate the proposals contained in the two papers drawn up by the President of the European Council, in close cooperation with the Presidents of the European Commission, the Eurogroup and the European Central Bank, presented on 26 June 2012 and 2 October 2012 respectively.

representatives and, on the other, hand, requires that those not concerned be left without voice⁸⁶.

The sovereign debt crisis has clearly indicated the need to enhance the democratic legitimacy of European economic governance. The democratic issue will therefore remain at the centre of the debates on the future of European integration.

⁸⁶ See K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, 46.