CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Euro-Area Crisis: A First Legal Analysis

by

Giuseppe Martinico*

Perspectives on Federalism, Vol. 3, issue 3, 2011

Abstract

What should the European Union do to challenge the Eurozone crisis? Examining the recent debate, one can identify the following options to overcome the EU's institutional crisis:

1. reform of the EU treaties;
2. enhanced cooperation;
3. the conclusion of an international agreement.

In this brief note, I am going to stress both the negative and the positive aspects of these options, trying to read them in light of the constitutional dynamics of the EU.

Key-words

Crisis, Reform of EU Treaties, Enhanced Cooperation, Asymmetry, Lisbon Treaty

"It is common in literature, as well as in the broader political discourse on Europe, to think of the European Union (EU) as a one-way street towards ever-greater integration. Such a viewpoint is well captured in the colloquial "bicycle theory" of European integration, which holds that – —just as a cyclist – —the EU's survival depends on a constantly forward trajectory, with stasis leading to collapse.- The recent, and continuing, sovereign debt crises of several EU states has cast doubt on this accepted wisdom."

M.Turk, "Implications of European Disintegration For International Law", *Columbia Journal of European Law*, 2011, 395 ff., 396.

1. Listing the Alternatives: A Constitutional Appraisal

What should the European Union do to challenge the Eurozone crisis? This is indeed a crucial question and this note does not have the ambition to give a final answer to it. My more modest aim is to develop the institutional options that have been taken into account in the last few months and to explore their impact on the constitutional architecture of the EU.

Examining the recent debate, one can identify the following options to overcome the EU's institutional crisis:

1. reform of the EU treaties;
2. enhanced cooperation;
3. the conclusion of an international agreement.

In this brief note, I am going to stress both the negative and the positive aspects of these options, trying to read them in light of the constitutional dynamics of the EU.

The first option (reform of the EU Treaties) would be the best one, but it also presents some disadvantages: it would be time consuming and it seems to be unworkable now due to the UK veto (although recently the British deputy prime minister Nick Clegg has predicted the UK will eventually drop its veto on EU fiscal reforms[I]).

However, it would be a mistake to discard the possibility of reforming the EU Treaties like some sort of non-option. In fact, the EU institutions might have an interest in

bringing the discipline of Euro-governance back into the Treaties in the near future, and there are several think-tanks that are currently proposing something along these lines.[II].

The revision of the EU Treaties would be "consistent" with the recent rounds of constitutional politics in the EU. The current crisis is in fact the confirmation of what has been called the "the semi-permanent Treaty revision process" (de Witte, 2002) and the unfinished constitutionalisation of the EU (Snyder, 2003)

According to this idea, the semi-permanent revision process of the Treaties would make the attempt to transpose the idea of Constitution to a supranational level very difficult: the Constitution, in fact, should be the fundamental charter, that is, a document characterised by a certain degree of resistance and continuity. Against this background, the European Treaties seem unable to lead social forces: they can only "reflect the historical movements", thus appearing to be mere snapshot constitutions. This is precisely what Besselink argues, writing that "a formal EU 'constitution', if ever realized, would only be a momentary reflection, no more than a snap-shot", hence the comparison with a *Grundgesetz* (Besselink, 2008)[III]. In other words the EU Constitution (partly written and partly not) would limit itself to the "codification" of the constitutional dynamics that emerged through changing circumstances. This trend seemed to be concluded with the coming into force of the Reform Treaty, but now the implications of the Euro sovereign debt crisis seem to need another round of constitutional politics.

Regardless of the possible contents of a new Treaty[IV], this reform would be the next link of this chain of reforms, it would confirm the nature of the EU Treaties as a mere snapshot constitution and would give new blood to the EU constitutional odyssey (Martinico, 2011).

However, Treaty reform is actually just one of the possible solutions to the institutional impasse triggered by the European debt crisis. Potentially, in fact, other solutions could be found, namely represented by the enhanced cooperation and by the conclusion of an international agreement to be understood as external to the wording of the EU Treaties.

The two alternative options listed above would be conducive to asymmetrical solutions and there is nothing strange in this: asymmetry is an option which has been frequently experimented within all the federalising processes (Palermo, 2007; Watts, 2005), especially in those federal or quasi-federal contexts characterised by the coexistence of

different legal and cultural backgrounds (Canada, for instance). One should take this into account before conceiving, for instance, enhanced cooperation as a form of "constitutional evil" conducive to a "disintegrative" multi-speed Europe.

On the contrary, asymmetry might serve as an instrument of constitutional integration as comparative law shows. In fact, flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory: "Federal symmetry refers to the uniformity among member states in the pattern of their relationships within a federal system. 'Asymmetry' in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units" (Watts, 2005). However, asymmetry does not refer to mere differences of geography, demography or resources existing among the components of the federation or to the variety of laws or public policies present in a given territory[V].

Enhanced cooperation belongs to the universe of the asymmetric option: it aims at ensuring, at the same time, unity and diversity. In fact it allows member States to experiment with different forms of integration without "shutting the door" to those other member States. What was established by the Amsterdam Treaty and reformed by the Treaty of Nice can be conceived as a sort of *extrema ratio* to be exploited when the Council realises that the goals of integration cannot be achieved by relying on the Treaties' provisions and following the normal dynamics of the European integration process.

The legal framework is today represented by Article 20 TEU[VI] and Articles 326–334 TFEU: in order to be "activated" it needs a minimum number of participants (nine States) and shall be authorised by the Council and be deliberated according to Article 329 TFEU[VII].

In any case such a cooperation – within the EU – encounters some procedural safeguards: it shall be understood as open to any other member States that could wish to join it at a later date. Moreover, enhanced cooperation shall respect the fundamental principles of the *acquis communautaire* and it may not insist on areas of exclusive competence of the EU.

Moreover, enhanced cooperation could be an option *per se* but it could be also used together with another instrument, namely the *passerelle* clause, governed by Article 48 TEU.

In fact, Article 333 TFUE *expressis verbis* allows for the use of the *passerelle* within enhanced cooperation:

> *"1. 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 in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.*
> *2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.*
> *3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.".*

Exploiting this clause in our case might be problematic, however. First of all, it should be excluded for monetary policy *stricto sensu* conceived, since it is matter of exclusive competence of the EU (and so excluded thanks to the combination of Article 329 TFEU and Article 3 TFEU). The euro is just a part of the monetary policy of the EU since it does not exclude other forms of monetary policy that concern all the member States of the EU as the TFEU seems to acknowledge by distinguishing between provisions specific to member States whose currency is the euro (Article 136 TFEU) and provisions applicable to all the member States of the EU (Articles 119–135 TFEU). However it might be argued that:

1. it is not possible to separate monetary policy from the complex design of the Treaties (due to, among other things, their possible economic impact);
2. hence its discipline may not be altered through decisions taken by majority.

A different discourse might be applied with regard to the possibility of using enhanced cooperation in fiscal matters: from a theoretical point of view, this might be legitimate, but enhanced cooperation in this field would probably have an impact on the common market[VIII]. This point should be evaluated from an economic point of view also, not limiting the discourse to a mere legal level.

This risk is seemingly foreshadowed in the text of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, in the part that calls

for an active use of enhanced cooperation "without undermining the internal market" (Article 10).

The advantages of enhanced cooperation are obvious: it could avoid a time-consuming reform of the Treaties. It could also demonstrate the maturity of the current constitutional architecture of the Treaties, since it is an instrument governed by the current fundamental charter of the EU, without the necessity of finding a solution to the European debt crisis out of the present system.

Finally, enhanced cooperation would not lead to an irreducible "rupture" with the UK or with other member States which could decide to join the enterprise at a later date, whereas such a reunion would be much more complicated in the case of a "pure" international agreement.

Again, this course of action might seem outdated in light of the recent political developments, but if one takes a closer look at the draft of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union it is possible to notice that the use of enhanced cooperation techniques is recurrently advocated therein. Enhanced cooperation still remains a valid option, yet its use is encouraged in a text which is formally out of the Treaties' armoury, and this is why the concerns expressed above might apply nevertheless[IX].

2. The Solution Adopted: Back to Intergovernmentalism?

As recalled at the beginning of this note, asymmetry is an institutional solution experienced by many constitutional and even international systems. The EU already knows forms of asymmetry and enhanced cooperation[X] is just one of these, together with the opting-out mechanism (Miles, 2005), and the open method of coordination (Scharpf, 2007).[XI]

Even in international law, asymmetry is well known. A confirmation of this comes from WTO law where, for instance, the blockage of the negotiations of the Doha Round has been partly bypassed thanks to the conclusion of some bilateral and multilateral agreements (i.e. Preferential Trade Agreements)[XII]. These kinds of agreements are permitted by Article XXIV of GATT (the General Agreement on Trade and Tariffs): they could be either "WTO + (plus)" if implying a deepening of obligations on matters

pertaining to the WTO, or "WTO x (extra)" if insisting on matters that do not belong to the WTO (e.g. protection of the environment or foreign investments)[XIII].

To what extent can this model be exported at the EU level? There are some differences that should be taken into account before comparing these models, and these rest in the *openness clause* (i.e. the possibility for the other member States to join the enhanced cooperation) which ensures the sustainability of this form of asymmetry in the EU context (Cantore, 2012). Having said that, can we imagine some "EU +" (or "EU x") agreements as a way to overcome this crisis or to constitutionalise the Euro-group?

What would be the impact of such agreements on the EU institutional architecture? In this sense it might be possible to apply the provision for enhanced cooperation (Article 330 TFUE):

"All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote".

An international law agreement among the member States – and here I come to the last institutional option – could be used in order to produce an effect which might be defined as equivalent if compared with that pursued by enhanced cooperation, but with a minor role played by the supranational actors and with a consequent moving back in terms of supranationalism and return to the logic of international law.

The actor that could be excluded from the possible dynamics of this agreement is the one that has traditionally acted as the European federator (Starr-Deelen-Deelen: 1996): the European Court of Justice. Moreover, from a legal point of view, this agreement should be assessed in light of the principle of loyal cooperation (former Article 10 ECT, now partly substituted by Article 4 EUT). Even the possibility of concluding international agreements by the member States encounters limitations arising from this principle of loyal cooperation like those codified in Article 351 TFEU.

In my view an international agreement aimed at covering a sphere of competence that might not be covered by enhanced cooperation would be inconsistent with the principle of loyal cooperation. This conclusion brings us back to the necessity to assess the compatibility between this agreement and the goals of the EU. The agreement in question

is rich in references to the EU treaties (see Article 2[XIV]) but there are some clauses that are at least ambiguous in this respect like, for instance, Article 8[XV].

The package included in the "Statement by the Euro Area Heads of State or Government" – issued at the end of the European Council held in Brussels on 9 December 2011 – proposed a set of measures designed to face the European debt crisis: a reinforced architecture for the economic and monetary Union, the strengthening of stabilisation tools, the acceleration of the entry into force of the European Stability Mechanism (ESM) treaty, a stronger policy coordination and governance and, above all, the creation of a new fiscal compact[XVI].

Notwithstanding the proposed connections between this agreement and the European Treaties it is difficult to understand how to involve the European institutions in the functioning of this agreement:

> *"I fail to see, though, how the European Commission [can] participate in the monitoring of fiscal stability in this case. Enhanced cooperation (Art. 20 TEU and art. 329 TFEU) seems more appropriate. The problem there is that only the European Commission can propose an enhanced cooperation to the Council, and the European Parliament must also approve it. This can lead to substantial delays of the procedure[XVII]". (Georgiev, 2011).*

The present author shares these doubts.

3. Final Remarks

Scholars have recently stressed that, despite the intergovernmental nature of this agreement, its conclusion does not imply an alteration of the supranational character of the EU enterprise:

"This is a tempting, but I think, misleading, conclusion. Whereas it would seem that national governments have had the upper-hand in maintaining ownership and control of the process of integration at the expense of the Union's institutions, particularly in the Euro-crisis, it is important to remember that the current political drama unfolding in the crisis is completely unscripted from the EU's viewpoint. To a large extent, there is simply no law available to empower supranational institutions to act when a Eurozone member goes bust and the currency itself is threatened and such legal provision, where it does exist, is by way of an express prohibition of the EU institutions (notably the ECB) taking much of the palliative measures touted in the media (e.g. Art. 123 & 125 TFEU). . As the ECJ never tires of telling us, the EU is a community based on the rule of law which, in

essence, means the principle of conferral, such that unlike in state constitutional systems, Union institutions have no residual power to govern in the public interest given that their powers are "'legalized'" to within an inch of their lives. Even the residual powers clause in the treaties, Article 352 of the TFEU, lacks the requisite flexibility to deal with crisis comparable to the prerogative or emergency powers enjoyed by national administrations… However, even if it seems that the position has inverted from when Weiler was writing in the early 80s, the proposals being put forward for a new Treaty as the last ditch attempt to save the currency, with a rigid implementation of the rules of the currency enforced by inter alia the ECJ , may mark a return to the relevance of supranational law in pushing forward the integration process, promoting the role of the other EU institutions in its wake."[XVIII] (Mac Amhlaigh, 2011).

I do not agree with this conclusion since one of the reasons for amending the Treaties is the fact that the current Treaties have actually shown their inadequacy, as Ruffert pointed out: "From the beginning, the Member States' rescuing activity has been under close legal scrutiny by European legal scholars, and rightly so. There are good reasons to submit that this policy is in breach of important provisions of the TFEU" (Ruffert, 2011: 1785)[XIX].

Should we consider such a return to the intergovernmental method irreversible? What can we do in order to ensure – at least – consistency with the European Treaties? What should we do in order to involve as much as possible the European institutions, starting with the Commission, the European Parliament and the ECJ?

The amendments proposed by the European Parliament went in that direction. In fact, the Parliament proposed integrating the text of the agreement as follows, by adding a provision that would limit the duration of the new treaty. The latest version (the February draft[XX]) of the Treaty reads: "Within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in compliance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union."[XXI].

The agreements (now called "Treaty") reached by the Heads of State and government of the member States may represent a relief mission in order to overcome the current European debt crisis, but the price to be paid could be very high. Much better would be to revise the Treaties, but the logic of the necessity of urgent measures and the opposition of the UK does not seem to permit this kind of intervention.

It has been argued that supranational constitutionalism would play a complementary role in the attempt to protect some goods that are deemed as fundamental by all the levels of the multi-layered constitutional system (Poiares Maduro, 2011)[XXII]. Intergenerational equity and sustainability seem to be two of these goods. The impression one gains from the current scenario, however, is that of an EU which is currently struggling with its own constitutional limits, putting pressure on national institutions and actors (the Greek and Italian cases are emblematic from this point of view): are we sure that this increases EU's legitimacy? Events will tell whether constitutional pluralism will be the best constitutional theory possible for the EU.

---

[*] García Pelayo Fellow, Centro de Estudios Políticos y Constitucionales, Madrid; Researcher, Centre for Studies on Federalism, Turin; Lecturer (on leave), Scuola Superiore Sant'Anna, Pisa; (Former) Max Weber Fellow (2010–2011), European University Institute, Florence. Thanks to Carlo Maria Cantore and Filippo Fontanelli for their comments. Paper presented at the workshop "Facing the Economic Crisis: Nine Questions on the EU", organised at the Centro de Estudios Políticos y Constitucionales, Madrid, on 16 January 2012. Special thanks go to Alberto Alemanno and Allan Tatham for their comments..

[I] "British deputy PM: EU veto is 'temporary'", 10 January 2012, http://euobserver.com/19/114817

[II] For instance see the "Appeal to European Leaders for the Euro and the European stability and development" launched by the Centre for Studies on Federalism, http://csfederalismo.it/index.php/en/component/content/article/17-convegni/2317-appello-ai-leader-europei-per-un-euro-e-uneuropa-della-stabilita-e-dello-sviluppo

[III] In fact, according to Besselink (Besselink, 2008), the notion of Constitution itself as applied to the EU results in an ambiguous picture, with that of a fundamental law (*Grundgesetz* rather than *Verfassung*) being more suitable. This seems to imply a sceptical approach to the issue of the European Constitution's formalisation, conceived as a real constitutional moment. The author himself reached this conclusion after having distinguished between two categories of constitution: revolutionary and evolutionary. "These revolutionary constitutions tend to have a blueprint character, wishing to invent the design for a future which is different from the past ... Old fashioned historic constitutions are, to the contrary, evolutionary in character". When observing evolutionary/historical constitutions, one realises that "Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself." (Besselink, 2008).

[IV] See the proposals made by Andrew Duff (ALDE, UK) http://www.europolitics.info/pdf/gratuit_en/304954-en.pdf

[V] The word asymmetry has acquired a variety of meanings: when talking about asymmetries one can distinguish between financial and constitutional asymmetry, or between *de jure* and *de facto* asymmetry. *De jure* asymmetry "refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, *de facto* asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and as Tarlton noted is typical of relations within virtually all federations" (Watts, 2005).

[VI] Art. 20 TEU: 1. Member States which wish 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, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the

Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.
2. 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, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union..
3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union..
4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union".

[VII] "1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.
Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.
2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.
Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously".

[VIII] See the editorial in the last issue of *Common Market Law Review* (1/2012), 1 ff., at page 12

[IX] See the Preamble of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("NOTING, in particular, the wish of the Contracting Parties to make more active use 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, without undermining the internal market, as well as to make full recourse to measures specific to the Member States whose currency is the euro pursuant to Article 136 of the Treaty on the Functioning of the European Union, and to a procedure for the ex ante discussion and coordination among the Contracting Parties whose currency is the euro of all major economic policy reforms planned by them, with a view to benchmarking best practices") and its Article 10 ("In accordance with the requirements of the European Union Treaties, 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 smooth functioning of the euro area, without undermining the internal market").

[X] See the recent decision in the fields of divorce and unitary patent. On this, see Beneyto (2009) and Cantore (2012). See in general, de Burca - Scott (2000). From a slightly different perspective, see Bauböck (2001).

[XI] "Le Canada et l'Union européenne peuvent ainsi être vus comme des espace politiques où, plus inintentionnellement qu'intentionnellement, une nouvelle forme d'organisation des pouvoirs publics et de la société internationale est en train d'être inventée. Y émergent en effet des formes similaires de fédéralisme multinational asymétrique mêlant supranationalisme et intergouvernementalisme, fédéralisme fondé non plus sur une hiérarchie de pouvoir entre l'État fédéral et les entités fédérées, mais sur une hiérarchie de valeur entre ordres de gouvernement égaux et en compétition pour l'allégeance des citoyens." (Theret, 2002). Theret

also points out the differences between the two processes: "Au Canada, un État-nation, le Québec, cherche à se constituer. L'État-nation est sans doute également en gestation chez les nations autochtones qui revendiquent leur reconnaissance institutionnelle et son émergence remet en cause un ordre politique fédéral constitué à l'origine sur un mode centralisateur. La question de la reconnaissance du caractère multinational de la fédération y est ainsi de plus en plus souvent posée. Dans l'UE, où l'État-nation est le point de départ, c'est l'inverse : le palier fédéral en devenir cherche à se faire une place en réorganisant l'ordre politique régional sans pour autant pouvoir en dépasser le caractère multinational. On peut alors considérer que, sauf accident de parcours, l'UE et le Canada se dirigent tous deux vers une reformulation similaire des principes du fédéralisme, reformulation par laquelle un compromis stable serait trouvé entre supranationalisme et intergouvernementalisme" (Ibidem).

[XII] "We always use bilateral free trade agreements to move things beyond WTO standards. By definition, a bilateral trade agreement is 'WTO plus'. Whether it is about investment, intellectual property rights, tariff structure, or trade instrument, in each bilateral free trade agreement we have the 'WTO plus' provision." (Pascal Lamy, *Jakarta Post*, 9 September 2004).

[XIII] On the content of these agreements, see Horn, Mavroidis and Sapir (2009)

[XIV] "1. This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

2. The provisions of this Treaty shall apply insofar as they are compatible with the Treaties on which the Union is founded and with European Union law. They shall not encroach upon the competences of the Union to act in the area of the economic union".

[XV] See the first version of the agreement: "Any Contracting Party which considers that another Contracting Party has failed to comply with Article 3(2) may bring the matter before the Court of Justice of the European Union. The judgment of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court. The implementation of the rules put in place by the Contracting Parties to comply with Article 3(2) will be subject to the review of the national Courts of the Contracting Parties". The new version states: "1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that a Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more of the Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court.

2. If, on the basis of its own assessment or of an assessment by the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union".

[XVI] "4. We commit to establishing a new fiscal rule, containing the following elements:

• General government budgets shall be balanced or in surplus; this principle shall be deemed respected if, as a rule, the annual structural deficit does not exceed 0.5% of nominal GDP.

• Such a rule will also be introduced in Member States' national legal systems at constitutional or equivalent level. The rule will contain an automatic correction mechanism that shall be triggered in the event of deviation. It will be defined by each Member State on the basis of principles proposed by the Commission.

We recognise the jurisdiction of the Court of Justice to verify the transposition of this rule at national level.
• Member States shall converge towards their specific reference level, according to a calendar proposed by the Commission.
• Member States in Excessive Deficit Procedure shall submit to the Commission and the Council for endorsement, an economic partnership programme detailing the necessary structural reforms to ensure an effectively durable correction of excessive deficits. The implementation of the programme, and the yearly budgetary plans consistent with it, will be monitored by the Commission and the Council.
• A mechanism will be put in place for the ex ante reporting by Member States of their national debt issuance plans." , http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf

[XVII] Georgiev, 2011.

[XVIII] Mac Amhlaigh, 2011.

[XIX] "To begin with, Article 125(1) TFEU is rather explicit: 'The Union shall not be liable for or assume the commitments of central Governments . . . of any Member State. . . A Member State shall not be liable for or assume the commitments of central Governments . . . of another Member State, …' In the present legal situation, a bailout by the Union (first sentence) or by one or more Member States (second sentence) is forbidden. As a result, the decision of the Eurogroup of 2 May 2010 concerning Greece, the establishment of the EFSF, the extension of both in 2011 and the Eurogroup's support for Ireland and Portugal are in breach of European Union law" (Ruffert, 2011: 1785).

[XX] http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/12/2&format=HTML&aged=0&language=EN&guiLanguage=en

[XXI] The previous version of this agreement read: "The Contracting Parties agree to bring the provisions of this Agreement as rapidly as possible within the framework of EU Law.
2. With a view to ensuring democratic accountability, the Contracting Parties, within 5 years of the entry into force of this Agreement, shall propose the amendment of the EU treaties in accordance with Article 48 TEU to integrate this Agreement and in particular its Article 13.
3. This agreement shall remain in force for 7 years from its entry into force".

[XXII] "First, European constitutionalism promotes inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes. By committing to European integration, EU states accept to mutually open their democracies to the citizens of other Member States. This amounts to an extension of the logic of inclusion inherent in constitutionalism. Second, European constitutionalism allows national democracies to collectively regain control over transnational processes that evade their individual control. While in the former case we could talk of outbounded democratic externalities (States impacting on out-of-state interests) in the latter we can refer to inbounded democratic externalities (out-of-state decisions and processes affecting domestic interests). Third, European constitutionalism can also constitute a form of self-imposed external constitutional discipline on national democracies. There are many instances where domestic political malfunctions can be better corrected by external constraints. These may force national political processes to rationalise national policies that have, for example, become locked in into certain path-dependences or captured by a certain composition of interests. In many such instances, EU law's discipline rationalises and, often, reignites a more informed and genuinely open deliberation in the national political process." (Poiares Maduro, 2011).

References

- Bauböck, Rainer, 2001, "United in Misunderstanding? Asymmetry in Multinational Federations", ICE Working Paper series, no. 26, http://www.eif.oeaw.ac.at/downloads/workingpapers/IWE-Papers/WP26.pdf
- Beneyto, Jeronimo Maillo (ed.), 2009, "Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation", http://www.ceuediciones.es/documents/ebookceuediciones1.pdf
- Cantore, Carlo Maria, 2011, "We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU", Perspectives, on Federalism, Vol. 3, Issue 3, 2011, E-1-21.

- de Burca, Grainne- Scott, Joanne (eds.), 2000, *Constitutional Change in the European Union*, Hart, Oxford
- de Witte, Bruno, 2002, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process", in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law*, Hart, Oxford, 39–57.
- Dion, Stéphane, 1999, "Notes for an Address by the President of the Privy Council and Minister of Intergovernmental Affairs", Mexico City, Mexico.
- Editorial Comments, 2012, *Common Market Law Review*, 1 ff,
- Georgiev, Vihar, 2011, "What's Behind the New Eurozone Fiscal Stability Union?", http://eulaw.wordpress.com/2011/12/09/whats-behind-the-new-eurozone-fiscal-stability-union/
- Horn, Henrik, Mavroidis, Petros and Sapir, André, 2009, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreement", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411066
- Mac Amhlaigh, Cormac, 2011, "The Dual Character of Supra-nationalism and the Euro-Crisis", http://eutopialaw.com/2011/12/07/the-dual-character-of-supra-nationalism-and-the-euro-crisis/#more-814
- Martinico, Giuseppe, 2011, "Constitutional Failure or Constitutional Odyssey? What Can We Learn From Comparative Law?", *Perspectives on Federalism*, E-51–77.Miles Lee, 2005, "Introduction: Euro outsiders and the politics of asymmetry", *Journal of European Integration,* 73 ff
- Palermo, Francesco, 2007, "Divided We Stand. L'asimmetria negli ordinamenti composti", A. Torre, L. Volpe, G.C. Feroni, E. Ceccherini, A. Rinella, M. Carducci, C. Casonato and T. Frosini (eds), *Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all'Europa)*, Giappichelli, Torino, 149–170.
- Poiares, Maduro Miguel, "The Three Claims of Constitutional Pluralism", 2011, http://cosmopolis.wzb.eu/content/program/conkey_Maduro_Three-Claims-of-Pluralism.pdf
- Ruffert, Matthias, 2011, " The European debt crisis and European Union law", *Common Market Law Review*, 1777–1805.
- Russell, Peter, 1992, *Constitutional Odyssey: Can Canadians Become a Sovereign People*? 1st edn, University of Toronto Press, Toronto.
- Scharpf, Fritz, 2007, "The European Social Model: Coping with the challenges of diversity", http://ideas.repec.org/p/zbw/mpifgw/028.html
- Snyder, Francis, 2003, "The Unfinished Constitution of the European Union: Principles, Processes and Culture" in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge University Press, Cambridge, 55–73.
- Starr-Deelen, Donna – Deelen, Bart, 1996, "The European Court of Justice as a. Federator", *Publius*, 81-97
- Tarlton, Charles D., 1965, "Symmetry and Asymmetry as Elements of Federalism", *Journal of Politics*, 861–874.
- Theret, Bruno, 2002, *L'Union sociale canadienne dans le miroir des politiques sociales de l'Union européenne*, http://www.irpp.org/fr/pm/archive/pmvol3no9f.pdf
- Turk, Matthew 2011, "Implications of European Disintegration for International Law", *Columbia Journal of European Law*, 395 ff.
- Watts, Roland L., 2005, "A Comparative Perspective on Asymmetry in Federations", www.iigr.ca/pdf/publications/359_A_Comparative_Perspectiv.pdf