CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Eurozone, non-Eurozone and "troubled asymmetries" among national parliaments in the EU. Why and to what extent this is of concern

by

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Perspectives on Federalism, Vol. 6, issue 3, 2014

Abstract

The reform of the economic governance in the EU, as a reaction to the Eurozone crisis, has increased the asymmetries in the Union. Although formally respected, the principle of equality of the Member States before the Treaties has been put under stress. Likewise the position of national institutions concerned by the same Euro-crisis measure can have different implications depending on the Member State. This article deals with the asymmetries amongst the national parliaments arisen in this context. National procedures adopted to deal with the new legal measures reinforce some parliaments while they severely undermine other. The article argues that such an outcome is produced by the combined effects of EU and international measures with national constitutional rules and case law, which can confer more or less significant powers to national parliaments and enhance or disregard existing parliamentary prerogatives. The asymmetries among national parliaments in the new economic governance can impair the democratic legitimacy and the effectiveness of the Euro crisis measures.

Key-words

National parliaments, asymmetries, Eurozone, Fiscal Compact, ESM, rescue packages, principle of equality

1. Equality of Member States, equality of national parliaments in the EU? An assumption to challenge

According to art. 4.2 TEU, "the Union shall respect the equality of Member States before the treaties as well as their national identities". However, to what extent these principles can be considered enforced through some Euro Crisis measures read in conjunction with national constitutional and legislative rules of implementation is not exactly clear. In particular equality of Member States and protection of national identities do not appear to be in a balanced relationship. As soon as the Eurozone crisis advanced, it has appeared that the national dimension has become increasingly important, for legal, economic and political reasons, as shown by opts in and opts out, national bailouts, intergovernmental arrangements more or less *à la carte*, like the Fiscal Compact. This does not mean that the traditional categories of differentiated integration we have known from the beginning of the European integration and enhanced since the 1990s have been superseded; rather they have been more intensively used during the Euro crisis, also in combination with several legal instruments of international law and shaped through national constitutional law.

All of this has challenged the traditional idea of sovereign equality of the EU Member States; an idea that by no means resembles the principle of equality of the States we find in contemporary public international law (art. 2.1 UN Charter). In the EU we just observe a *prima facie* equal treatment (Blanke 2013: 192), for example because of the general rule of qualified majority voting in the Council, after the Treaty of Lisbon, and the principle of degressive proportionality in the composition of the European Parliament. EU Member States have already accepted to give up the principle of equality in some procedures and institutions, as it happens in federal systems. Moreover, the EU and hence its countries bear a certain degree of differentiation in the adoption and implementation of policies (e.g. concerning the Schengen area), perhaps the most notable being the Economic and Monetary Union (EMU). Such an arrangement meets the requirement to treat different situations differently. For example, regarding the reliability and sustainability of national public accounts most new EU Member States are firstly engaged in a convergence process and then are allowed to join the Eurozone. This picture is sustained by the polysemy of the

notion of equality in itself. Even though all Member States are placed on an equal footing before the Treaties from the viewpoint of strict or formal equality, substantive equality among EU countries, which implies a considerable degree of social redistribution and solidarity, is still fairly limited (Maduro 2012: 5 ff). Furthermore, the achievement of final goals of the EU that are put into questions in the current crisis – "the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress" (art. 3.3 TEU) – might in principle justify an unequal treatment among Member States, if the economic situation of some of them can endanger the Union as a whole and the fulfillment of its objectives, as long as and the deviation from equality is temporary.[I]

In the last few years this latter understanding of the principle of equality of EU Member States has become dominant, deeply entrenched and semi-permanent, through a combination of domestic law and some Euro crisis measures, most of which are not formally EU law, although make use of EU institutions and have been considered by the Court of Justice in compliance with EU Treaties;[II] thus they should also respect art. 4.2 TEU and formal equality (Pinelli 2014: 9 ff.). Besides Eurozone and non-Eurozone countries, we can detect for example, Eurozone and non-Eurozone bailout countries; Contracting and non-Contracting parties of the Fiscal Compact, and, among the former, countries that committed to the entire Fiscal Compact or only to selected Titles; among the Eurozone countries as parties of the European Stability Mechanism, those receiving and those granting financial assistance and those which detain the largest share capital of the fund and those that subscribed a minimal share.

Are this differentiation and the challenge to the principle of equality of EU Member States coupled by increasing asymmetries among national parliaments? If this is so, what are the effects of these asymmetries on the democratic legitimacy of the reform of the economic governance in the EU? The article tries to answer these questions starting by the assumption that already before the Eurozone crisis "some Member States had [have], of course, more generous democratic arrangements in place through their national constitutional structures" (Leino-Sanberg & Salminen 2013b: 859; De Witte 2009: 34). In particular, depending on the form of government, on the way the system of constitutional review is structured and on the role of courts, the powers of parliaments can be more or less protected or strengthened at domestic level.[III] Because most of the Euro crisis

measures analysed request national mechanisms of implementation, which can or cannot assign decision-making and veto powers to national parliaments, the effective enforcement of some measures can derive from the role recognized by national Constitutions, legislation and case law to domestic legislatures, with some unexpected consequences. Perhaps the German *Bundestag* is the most evident example of a parliament which has gained powers during the Eurozone crisis compared to other national legislatures (Auel & Höing 2014: 1184-1193); powers that can potentially block the functioning of some European-international mechanisms established to cope with the financial instability.

The article shows that asymmetries among national parliaments in the Euro crisis can create concerns for the democratic credentials of the whole European procedures (not just the domestic ones), which result from a combination of national, EU and international law. However, from the point of view of the legitimacy, the most serious situations arise when there is a mismatch between the decision-making, veto, or participatory power recognized to a national parliament, under EU, international or national law, and the degree of involvement of the relevant Member State in the management or implementation of the measure. Proofs of this mismatch are, for instance: the veto power also of non-Eurozone parliaments in the adoption of art. 136 TFEU amendment; the ability of some national parliaments to block decision-making processes of the European Stability Mechanism; the participation of all national parliaments of the EU in the interparliamentary conference established under art. 13 of the Fiscal Compact regardless of the commitment of their national government to implement the treaty provisions. By the same token it appears detrimental for the EU democracy the fact that national parliaments of both Eurozone and non-Eurozone bailout countries, which are subject to strict conditionality, are protected in their prerogatives during the enforcement of financial and assistance programmes insofar as national constitutional law preserves their autonomy. Thus a further asymmetry among national parliaments derives from the weakening and marginalization of legislatures occurred in some Member States under financial assistance, which in turn makes the democratic legitimacy of rescue packages highly questionable as for their adoption and implementation.

The article proceeds as follows: section 2 analyses the asymmetries among national parliaments which arise from the traditional differentiation between Eurozone and non-Eurozone countries; section 3 focuses on non-Eurozone Parliaments as to show how

different are the powers of these legislatures depending on whether their country received financial assistance (3.1) and on their adhesion to the Fiscal Compact (3.2.). Section 4 considers asymmetries among Eurozone Parliaments and, in particular, how the asymmetric powers provided to these legislatures by national constitutional rules, case law and legislation can threaten the functioning of the European Stability Mechanism (4.1.) and to what extent national constitutional law can render the reaction of Parliaments in different Eurozone bailout countries to rescue packages asymmetric (4.2.). Section 5 is devoted to the setting up of the interparliamentary conference under art. 13 of the Fiscal Compact whereby all national parliaments have been considered equal notwithstanding the differentiated position of their Member States. Finally section 6 draws the conclusions on how the asymmetries among national parliaments in the reform of the economic governance have been managed.

2. A traditional asymmetry: Eurozone vs. non-Eurozone parliaments

It has been argued that the European Union (EU) – likewise its predecessor, the European Community – has always had a "Constitution of bits and pieces" (Curtin 1993: 22). However, the creation of the European and Monetary Union (EMU), and in particular of the euro since the Treaty of Maastricht of 1992, has created what has become soon a traditional element of a two-speed Europe besides other areas of multi-speed integration, like the Schengen *aquis*, or, after the Treaty of Lisbon, the two cases of enhanced cooperation on the divorce and the European patent (Cantore 2011: 10 ff.). The divide between Eurozone (19) and non-Eurozone (9) countries, because of the Treaty basis (Title VIII, Chapter 4 TFEU and Protocol n. 14), of EU secondary legislation and of the legal developments following the financial crisis in the EU, has become so deep-rooted that even a permanent differentiation in the composition of EU institutions has been proposed as to provide the Euro area with a proper institutional equipment (Piris 2012: 125 ff.). Although the Eurozone is in principle open to all Member States that meet the convergence criteria and has significantly grown since 2007, it is already acknowledged that some countries, namely the UK, Denmark and Sweden, are very unlikely to exercise the opt in. For these reasons the discourse on the two-speed integration has superseded the

narrative of the multi-speed Europe and has become a dominant feature of the European public and academic debate (Diether Ehlermann 1999: 246-270; Beukers 2013: 7-30).

How does the two-speed integration affect the position and the relationship between Eurozone and non-Eurozone national parliaments? First of all, it is not really clear in the case of Denmark and Sweden to what extent the decision not to join the Euro area was and is supported by parliaments as institutions. In Sweden, for example, the 1994 Treaty of Accession to the EU, whose ratification was authorized by the Parliament, in principle obliges the country to join the euro once the convergence criteria are met. However, as a consequence of a referendum held in 2003, Swedish citizens rejected this option. Also in Denmark the decision was subject to a prior referendum, which defeated the accession to the Eurozone in 2000, while the Parliament and the Government again in 2007 and in 2014 have supported the idea to call new referenda in the view of adopting the euro.[IV] However, given the "will of the people" and the adverse financial situation in the Eurozone, the Swedish and the Danish Parliaments and the Executives have not taken further action in this regard.

Compared to Eurozone parliaments, non-Eurozone legislatures keep wider room for manoeuvre in shaping their economic and fiscal policies. For instance some Regulations that form part of the six-pack and the two-pack do not apply to countries outside the Euro area.[V] As a consequence the parliaments of the latter countries enjoy – alongside with their executives – a higher degree of discretion in the budgetary procedures. Moreover, in the peculiar case of the UK, according to Protocol no. 15 annexed to the Treaty of Lisbon, the general obligation for all Member States to avoid excessive deficits is weakened for this country by the lack of sanctioning powers of the Council and the Commission against it, should the UK Parliament not comply with the recommendations. By the same token, the UK Parliament is also exempted from the incorporation of the additional Medium Term Objective adjustment rules of the six-pack.

Nevertheless, some non-Eurozone parliaments have expressed concerns regarding the domestic implications in their countries of Euro-crisis measures that, in theory, are not applicable in their jurisdictions. An example is given, again, by the UK Parliament which has recently considered EU legislation establishing a Banking Union as triggering considerable spillover effects over non-Eurozone countries (UK House of Lords 2012: 22-24; UK House of Commons Library 2014: 3). In the presence of a EU internal market of

financial services which includes all Member States (and a financial centre like the City of London), it is rather difficult to limit in practice the consequences of purely Eurozone measures dealing with financial institutions and flows just to Eurozone countries. However, under these circumstances, national parliaments outside the Euro area do not retain any control nor information that could enable them to oversee the structuring and functioning of the Banking Union, as this falls outside their remit and that of their governments in the light of a previous choice, like in the UK, or because the Member State at stake does not fulfill the convergence criteria to join the euro (see section 3).

Conversely, there have been also situations in which non-Eurozone parliaments could potentially block the adoption of measures addressed exclusively or primarily to Eurozone Member States. The entry into force of the amendment to art. 136 TFEU is a paramount case.[VI] Art. 136 TFEU is placed under the chapter devoted to "Provisions specific to member states whose currency is the euro" and thus it is clear who are the addressees of the amendment. As is well known, this Treaty change was meant to provide a legal basis in the Treaties for a permanent and collective rescue mechanism amongst Eurozone Member States, under strict conditionality, to preserve the stability of the common currency, the European Stability Mechanism (ESM).[VII] The use of the simplified revision procedure (art. 48.6 TEU), which allows the European Council Decision 2011/199/EU to enter into force subject to national constitutional requirements and hence to avoid cumbersome ratification procedures, involves the unanimity of the Member States. In practice, even if a formal ratification is not requested, a parliamentary deliberation or the approval of parliamentary legislation is always provided by national constitutional law, in spite of the simplified nature of the Treaty change (Denza 2013: 1348). This implied, in turn, that although not directly affected by the amendment of art. 136 TFEU[VIII] a single non-Eurozone Parliament was able to veto the amendment and to prevent or delay its entry into force also for Eurozone countries.

The process of adoption of the Treaty amendment was successfully completed by all EU countries, with some delay in the Czech Republic due to the refusal of the Head of State to sign the Act of approval and not because of parliamentary filibustering. The revision finally entered into force on 1 May 2013 (after that of the ESM Treaty).[IX] This Treaty change could have represented the first occasion to implement section 4 of the UK European Union Act 2011 that foresees the cases in which the use of the simplified

revision procedure not only requests a parliamentary approval, in the form of an Act of Parliament, but also attracts a referendum (Armstrong 2012: 3).[X] The UK Government and Parliament agreed to consider the amendment to Article 136 TFEU as falling outside section 4 since the Decision was explicitly addressed only to Eurozone countries. Consequently the Government laid a statement before the Parliament under section 5 of the European Union Act 2011 as to invoke the exemption and the UK Parliament finally passed the European Union (Approval of Treaty Amendment Decision) Act 2012 in September 2012 (UK House of Common Library 2012: 3). This does not mean that there were no oppositions in the Parliament against the governmental proposal not to hold a referendum because there was not transfer of powers from the UK to the EU. In particular in the Second Chamber Lords tabled amendments – eventually rejected – at the committee stage to the Government Bill for the approval of the Treaty change and concerns were expressed regarding the drawbacks for the UK following the entry into force of new art. 136 TFEU, especially the threat of a marginalization of the country from the single market as a new 'Eurozone alliance' would have dominated the economic policies of the EU (Hancox 2014).

Problems with the approval of art. 136 TFEU amendment were raised also in another non-Eurozone Member State by a parliamentary group, who challenged *ex post* the compliance of the Ratification Act with art. 48.6 TEU and with art. 90 of the Polish Constitution, because of the national procedure followed in spite of the content of the Treaty amendment. In particular, the parliamentary opposition contended that Decision 2011/199/EU extended EU competences and especially the jurisdiction of the Court of Justice and the Court of Auditors. By contrast, art. 48.6 expressly forbids any Treaty change entailing an increase of the EU competences to be carried out through simplified revision procedures. Furthermore, should such an extension occur the ratification of the competence conferral beyond the State authority, according to Polish constitutional law (art. 90 Polish Const.), must be approved in each Chamber by two thirds majority or by a national referendum, whereas the challenged Ratification Act was passed pursuant to art. 89 of the Constitution, i.e. by simple majority in both Chambers (Granat 2014). The Polish Constitutional Court held that "the addition of Paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union" and also relied on the *Pringle* case law of the Court of Justice to support this statement.[XI] Indeed, although the suit by the

parliamentary group was filed before the judgment in *Pringle* was delivered, the Polish Constitutional Court solved the case only months after, on 26 June 2013. In this case it is clear that the timing – after the Treaty amendment entered into force on 1 May 2013 – and the outcome of the Polish Court's decision prevented any potential clash with the use of the simplified revision procedure and with the completion of the process of approval of the Treaty change.[XII] Anyway the challenge of unconstitutionality of the parliamentary opposition could also have resulted in a different outcome, with the effect that a parliamentary group and hence a court of a non-Eurozone country would have threatened a veto to art. 136.3 TFEU amendment. The case of Poland reveals that even if the majority of the Parliament supported the adoption of the measure, it is the power of a Constitutional Court, suited by a parliamentary opposition, by citizens or other authorities, to review the compliance of such decision with the Constitution, which can make the difference and can detect, for example, that the ratification procedure followed violates the rights of the Parliament.

Nevertheless the Polish Parliament and authorities in general, although Poland is not a Eurozone Member, were understandably very engaged in the Treaty revision procedure as this country is committed to the convergence process towards the euro and in a few years, once joined the single currency, Decision 2011/199/EU, can also affect Poland's participation in the monetary union. By contrast, a similar commitment is lacking on the part of the UK Parliament, which indeed debated on the approval of art. 136 TFEU amendment not as if one day the UK could have been concerned as a Eurozone Member by its entry into force, but rather in terms of the present negative implications for the UK economy as a non-Eurozone country.

3. Differentiation among non-Eurozone parliaments

Non-Eurozone parliaments stand on very different positions vis-à-vis the monetary union as a consequence of the commitment the Government takes in order to adhere to the convergence criteria. In spite of the fact that non-Eurozone countries are labeled all together as "Member States with a derogation" (art. 139 TFEU) their status is highly asymmetric. Denmark and the UK do have a "permanent" opt out – revocable at any time upon initiative of the Member State concerned – recognized in the Treaties, whereas

Sweden enjoys it *de facto* since 2003. The remaining 6 Member States,[XIII] as Lithuania joined the Eurozone on 1 January 2015, are willing to become part of the euro area, but are presently coping with a temporary and compulsory opt out deriving from the lack of compliance with the conditions imposed by art. 140 TFEU and protocol n. 13. In contrast with the UK, Denmark and Sweden, their non-Eurozone status does not depend on a voluntary choice of the national Parliament and Government, but is rather imposed by the EU.

Two main cases of differentiation among non-Eurozone parliaments occurred in the last few years appear as particularly significant. The first refers to the strict conditionality some of these parliaments, in Hungary, Latvia and Romania, were subject as an effect of the financial assistance, and in particular balance of payments assistance, received from the EU and from the International Monetary Fund (IFM) and the World Bank already in 2008. The second case, instead, arises from the signature and ratification of the Fiscal Compact.

3.1. Non-Eurozone parliaments in Member States receiving financial assistance

While benefiting from financial assistance, the role of the Hungarian, Latvian and Romanian Parliaments was severely undermined, as they were not informed by their executives during the negotiations nor were allowed to authorize the ratification of memoranda of understanding (MoU). Parliaments were just involved *ex post* for the implementation of the measures agreed by the executives in exchange for the assistance (Dojcsák 2014; Rasnača 2014; Viță 2014).

In particular Latvia, which later on became a Eurozone country on 1 January 2014, from December 2008 to 2012 received financial assistance from several sources: the IFM, the World Bank, the EU through an *ad hoc* balance-of-payments assistance programme negotiated with the European Commission,[XIV] bilateral loans from Sweden, Denmark and Estonia, Czech Republic, Poland, Norway – none of them a Eurozone country at that time – and Finland. Although the financial assistance instruments have not been directly challenged before the Constitutional Court, "case No. 2009-43-01 to some extent can be seen as an indirect challenge", although the case arose from pension cuts requested in order to obtain assistance (Rasnača 2014: VIII.8). Relying on the cardinal principle of separation of powers the Latvian Constitutional Court said that general decisions on receiving international loans and the conditions to met are to be agreed by the Parliament.

The executive can be delegated to take specific actions and the implementation, but within the framework set by the legislature whereas in the case at stake the Parliament was not even given the opportunity to authorize the Cabinet of Ministers to start the negotiations with the international lenders. However, the Court added that regarding pension cuts, no specific requirement was ordered by the international obligations contracted, which only asked for a general reduction of the national budget.

In turn the conditions posed by international lenders could not be invoked as a justification for the reduction of pensions since this was a deliberate choice of the Parliament and Government, who did not take into account other less restrictive means for the people in order to limit the budget. The cuts were thus considered in violation of the principle of proportionality and declared unconstitutional. In spite of the general acknowledgment of the parliamentary role when negotiating international financial assistance programmes in the name of the separation of powers, the Latvian Constitutional Court sanctioned the action of a Parliament which arguably could be seen to enjoy discretion in the adoption of fiscal and structural measures. The pressure to which the Parliament was subject, at the risk of not receiving further installments, left a very modest room for manouvre. Not only had the Parliament been already marginalized, but the Court contributed to weaken its position further.

3.2. Non-Eurozone parliaments and the Fiscal Compact

The Fiscal Compact (FC), i.e. the Treaty on Stability, Coordination and Governance in the EMU, an international agreement agreed outside the framework of EU Law, but intended to be incorporated into it in five year time (art. 16 FC), entered into force on 1 January 2013 and was signed by 25 of the current 28 Member States, the UK, the Czech Republic and Croatia deciding not to become Contracting Parties.[XV] Actually the option for the negotiation of an intergovernmental agreement rather than an amendment to EU Treaties was chosen when the UK declared it would have never signed such an amendment aiming to strengthening the coordination and the control over national economic and fiscal policies and to introduce, preferably at constitutional level, the balanced budget clause into domestic legal systems.

No other legal instrument of the Euro crisis has triggered a wider range of different legal status and domestic responses than the Fiscal Compact. This is patent not just for the

traditional divide between Eurozone and non-Eurozone countries, but also within the Eurozone "club" (section 5) and even more so among the States outside the Euro area.

While the UK has firmly confirmed its refusal to sign such an agreement, the new Czech Government on 24 March 2014 committed itself to become a new contracting party. However, such a decision requested a parliamentary approval, which has not be given yet, and also it remains unclear which Titles of the Fiscal Compact will bind Czech Republic. As well known, ratifying non-Eurozone countries are automatically bound only by Title V of the Fiscal Compact, on the participation in the Euro-Summit – open to all contracting parties following the claims in particular of Poland against a first version of the agreement which excluded Member States outside the Euro area –, unless they attach a declaration to the instrument of ratification stating they want to be bound by the fiscal provisions (Title III) and by the enhanced economic coordination provisions (Title IV). Interestingly the (previous) Czech Government, although it did not sign the Fiscal Compact already in 2012, it tabled a set of constitutional amendments in Parliament which would have implemented most of the six-pack and of the Fiscal Compact provisions (Dumbrovsky 2014: III.2). Nonetheless since then the Parliament has refused to endorse these constitutional amendments, since this would result in a serious limitation of parliamentary autonomy in fiscal matters, for example concerning the adoption of compulsory measures whenever the public debt reaches the threshold of 45-60% of the gross domestic product ("debt-brake"). Thus it appears there is an opposition on the part of the Czech Parliament to accept further constraints.

Some non-Eurozone countries, like Denmark and Romania, declared themselves to be bound by the Fiscal Compact in its entirety, whereas Bulgaria committed itself to respect the whole treaty except for Title IV on economic policy coordination and convergence, which requests, for example, to discuss *ex ante* with the other contracting parties all major national economic reforms (art. 11). This implies for the Danish, the Romanian and – slightly less – for the Bulgarian Parliaments to be subject to a series of new boundaries in the budgetary cycle and in economic reforms which would have not been imposed upon them otherwise, as their countries are not part of the Eurozone. Perhaps more striking is the case of Lithuania, which had formally agreed to comply only with Title V of the Fiscal Compact, but passed a constitutional amendment to introduce, among other things, the balanced budget rule to be effective from 1 January 2015, i.e. when the country has joined

the Eurozone.[XVI] Hence the Parliament of Lithuania is already prepared to cope with constitutional fiscal constraints as soon as the status of the country changes vis-à-vis the EMU, although such a constitutionalization is not compulsory based on the Fiscal Compact.

By contrast, other countries, like Sweden and Poland, also for reasons linked to the preservation of parliamentary powers and "fiscal sovereignty", although signed the Fiscal Compact, they remain bound just to Title V. Especially the Swedish Government has repeated on several occasions, in particular during parliamentary debates, that Sweden is not legally bound by any Fiscal Compact's provision; a statement that can raise doubts about its legal consistency, given the signature and the ratification of the treaty. The Government presented the Swedish adhesion to the Fiscal Compact as a mere strategic and political move in order to protect the influence of the country in the EU (Södersten 2014: IX.1). It appears, however, that the rhetoric used by the Swedish Government with the *Riksdag* (the Parliament) about the lack of legal implications on national fiscal policy was instrumental to obtain – as it happened – the approval of the Fiscal Compact by a simple majority in the legislature, against the opposition of many parliamentary groups which tried to defy the government proposal to ratify the treaty. MPs claimed, for example, that the signature and the ratification of the Fiscal Compact created legal consequences for Sweden in terms of austerity policies and a threat also came from the fact that the country does not have a formal and permanent derogation from EMU (Södersten 2014: IX.3).

The legal consequences of the ratification of the Fiscal Compact, even if Poland, like Sweden, bound itself only to Title V, were very clear to many Polish MPs both in the Lower (*Sejm*) and in the Upper Chamber (*Senat*). First of all on 31 January 2012 – before the Fiscal Compact was signed – a group of deputies from the *Sejm* called on the Parliament to schedule a referendum on the ratification of the treaty, but there was no follow up of this proposal. Secondly, once the bill authorizing the ratification of the Fiscal Compact was presented by the Government, claiming that the conditions for the approval by two thirds majority of each Chamber were not met – likewise the amendment to art. 136 TFEU (section 2), a group of deputies, followed one month later by a group of senators, challenged the validity of the Fiscal Compact and of the Ratification Bill before the Constitutional Court (joint cases K 11/13 and K 12/13). Most claims of alleged violation of the Constitution dealt with the illegal transfer of powers from the Parliament to the

European Commission and the EU in general, with the limitation of the scope of parliamentary decisions, for instance regarding the "golden rule" in view of the prospective accession to the Eurozone, and of the role of national courts compared to the Court of Justice of the EU.

While the case is still pending before the Polish Constitutional Court for the decision on the merits, it is worth highlighting how different is the approach taken by the two countries, Poland and Sweden, in particular by their Parliaments, on the domestic legal implications of the Fiscal Compact, even if the commitment is formally the same. The avenues granted by the Polish Constitution to parliamentary minorities to challenge the validity of treaties, bills, and acts before the Constitutional Court, like in the case of art. 136 TFEU amendment, allows to engage in a more careful reflection on the implications of Euro-crisis measures on parliamentary powers and autonomy in non-Eurozone countries (yet).

4. Differentiation among Eurozone parliaments

4.1. The Treaty on the European Stability Mechanism and the national constraints posed by Parliaments and Courts

The ESM is an international financial institution (art. 1 ESM Treaty), a permanent rescue fund financed by all Eurozone countries according to their own capacities and based on the intergovernmental agreement signed on 2 February 2012 and entered into force on 27 September 2012.[XVII] Although it is not part of EU law and besides its main decision-making bodies, the Board of Governors and the Board of Directors, the ESM resorts for its functioning also to EU institutions, like the Commission and the ECB, and, in the event of disputes, to the Court of Justice.

The ESM can give rise to significant asymmetries among Eurozone parliaments; directly and indirectly, although the ESM Treaty does not provide any involvement for national parliaments.[XVIII] A first source of asymmetry is defined by the derogation to the unanimity rule for the decisions of the Board of Governors and the Board of Directors, where each Eurozone country has one representative. "An emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance (…) would threaten the

economic and financial sustainability of the euro area" (art. 4.4 ESM Treaty). On these occasions decisions are taken by a qualified majority of 85% of the votes cast as every Eurozone country is given a weighted vote depending on the share capital they have in the fund, which derives from how much they contribute to it.[XIX] As observed, when the emergency procedure is followed, "only the three largest Euro States – Germany, France and Italy – retain their veto power" (Tuori & Tuori 2014: 197), in contrast with the usual unanimity rule applied. Indeed, the share capital for the other countries is minimal, about ten times smaller (except for Spain), compared to that of Germany, France and Italy. Whether the parliaments of these three states are able to bind the action of their representatives in the ESM for this purpose will be examined shortly; first of all it is worth recalling the reaction of parliaments and courts in the other Eurozone countries to this first asymmetry introduced as a derogation.

A very significant position was taken by the Finnish Parliament, through its Constitutional Law Committee, already during the negotiations for the ESM Treaty in 2011. At that time the emergency procedure and the derogation to the unanimity rule was deemed to apply, according to a first version of the Treaty, not just to decisions granting financial assistance, but also to those dealing with the liability of the contracting parties like calls for authorized unpaid capital (Tuori & Tuori 2014: 198). In December 2011, the Constitutional Law Committee was asked to decide on the constitutionality of the ESM Treaty, as signed on 11 July 2011 (1st version). The Committee considered that, because of the scope of the provisions on the emergency procedure, the ESM Treaty as it stood and the national law on its incorporation had to be passed by the Finnish Parliament by qualified majority rather than by simple majority, i.e. with the same majority requested for the ratification of the EU accession Treaty given the transfer of fiscal and budgetary powers from the Parliament deriving from the Treaty at stake.[XX]

Lacking a Constitutional Court in Finland, the main body entitled to review the compliance of bills, Treaties and EU-related measures with the Constitution, also upon Parliament's request, is precisely the Constitutional Law Committee, a parliamentary body composed of MPs, according to a proportional representation of political groups in the *plenum*, and supported by constitutional law experts, usually academics (Leino-Sandberg & Salminen 2013a: 453). The Opinion of this Committee on the initial version of the ESM Treaty pushed the Finnish Government to ask for a revision of the contested provisions as

to limit the scope of the emergency procedure and, indeed, the revised version of the ESM, finally signed in February 2012, does not refer to the liability of Member States so that the potential encroachment with the Finnish Constitution was removed. The constitutional issue about the impairment of parliamentary powers which arose from the original extension of the emergency procedure to Member States' liability was the following: given that the Finnish share of the authorized stock capital of the ESM amounts to more than one fourth of the national budget, the inability of Finland and of the national parliament to control and even veto such financial flow, because of the derogation of the unanimity rule, would have violated the budgetary powers of the Parliament, granted by the Constitution, as well as national sovereignty (Tuori & Tuori 2014: 197).

In the new Opinion of the Constitutional Law Committee on the final version of the ESM Treaty, the Committee considered the constitutional problem overcome since all major decisions concerning the management of the fund do allow the Finnish Government to exercise a veto power.[XXI] Furthermore, in the Committee's view, parliamentary powers are protected by the application of art. 96 Fin. Const., which subjects the action of the Finnish representative – in this case, within the Board of Governors – to the previous authorization and mandate of the Grand Committee, another parliamentary standing committee competent for the EU affairs.[XXII]

In the case of Finland, the role played by the Parliament in the definition of the procedures of the ESM Treaty and in redressing the problem of the asymmetries among States and Parliaments has been noteworthy. Because of the Finnish Constitution, the Opinions of the Constitutional Law Committee, its powers, and the possibility to have a say on the constitutionality of the ESM Treaty, contributed to shape the content of the Treaty itself.[XXIII]

A similar problem about the asymmetry triggered by the emergency procedure under the ESM was raised also in Estonia, since this country subscribed 0.186 % of the ESM fund. Hence its Parliament has remained unable to control or veto any new guarantee of financial assistance decided by the Board of Governors at least by 85% majority under the conditions laid down by art. 4.4. of the ESM Treaty. The Supreme Court of Estonia was asked by the Chancellor of Justice to decide whether the vote by qualified majority under the ESM as to what concerns the lack of national parliamentary control on the procedure was unconstitutional. In contrast with Finland, it has to be noted that the Supreme Court

of Estonia was involved only after the final version of the ESM was finally signed by the Eurozone countries, in 2012.

In a highly controversial judgment – 10 of 19 justices, as the Court sat *en banc*, submitted five dissenting opinions on different points raised by the case – the Supreme Court found the principle of a democratic state subject to the rule of law and, in particular, the financial competence of the Estonian Parliament (*Riigikogu*) protected by the Constitution (arts. 65, 115.1, 121.4) violated as well as the financial sovereignty of Estonia (art. 1 Const.).[XXIV] According to the majority of the Court, both parliamentary prerogatives and state sovereignty were restricted by the derogation of art. 4.4 of the ESM Treaty as their discretion was constrained. Nevertheless the Court subjected these infringements to the proportionality test and, in turn, the constitutionality of the ESM was upheld. The Court considered that art. 4.4 ESM pursued a legitimate aim, to safeguard the financial stability of the euro area, including Estonia. Moreover, the fulfillment of this objective, which in theory would cause an interference with constitutional parliamentary prerogatives is justified by the need to protect, through financial stability, other "substantial constitutional values (§ 208)" like the protection of fundamental rights and freedoms enshrined in the Preamble and in art. 14 of the Constitution of Estonia. The Court concluded that, based on the proportionality test accomplished, the ratification of the ESM Treaty did not cause a "serious" interference with the Constitution (Ginter 2013: 335-354). However, "ratification of an international agreement may give rise to a need to amend other acts which are related to carrying out the international agreement" – the Court added –, which implies the possibility to regulate the right of the *Riigikogu* in a manner as to strengthen its control over the representative of Estonia sitting in the Board of Governors, even if he has not veto power on the application of art. 4.4 of the ESM Treaty. As an example, the Court mentioned the opportunity to give the European Union Affairs Committee of the *Riigikogu* the power to confer a binding mandate upon the Estonian representative;[XXV] an option that was taken into account later on when the Act on Ratification and Implementation of the ESM Treaty was adopted.

Compared to the Opinion of the Finnish Constitutional Law Committee, the Supreme Court of Estonia, perhaps also because of the timing of the judgment, was not able to redress the problem of the asymmetric powers of Eurozone parliaments under the ESM emergency procedure and, by using the proportionality test, found a way to claim a

limitation of parliamentary prerogatives without preventing the ESM Treaty ratification. The solution – the Court found – lied in enhancing parliamentary powers at domestic level in order to control the functioning of the ESM properly.

Although the ESM Treaty was adjudicated also before other Courts in the Eurozone,[XXVI] the problem of the asymmetric powers of national parliaments, in particular in the use of the emergency procedure, did not form part of further decisions. Even in the *Pringle* saga, although initiated by a member of the Irish Parliament, Mr. Thomas Pringle, the issue of the parliamentary powers went almost disregarded. It was not raised by the Supreme Court of Ireland in the request for a preliminary ruling and thus the Court of Justice did not take it into consideration.[XXVII] Mr Pringle in his challenge before the Irish High Court and in the appeal before the Supreme Court questioned the so-called "transfer of powers claim", but from a national constitutional law perspective, namely the fact that the ESM Act, implementing the ESM Treaty, could entail an unconstitutional delegation of legislative authority from the Parliament to the Government.[XXVIII] The Supreme Court did not deal with this problem, not considered urgent for the ratification of the Treaty as it affected the internal implementation of the ESM, once the ratification has been completed.

Here a second asymmetry among Eurozone Parliaments arises regarding the ESM, besides the first – just analyzed – deriving from the share capital of each country in the fund and the obvious asymmetry concerning debtor and creditor countries (see section 4.2). The second important asymmetry concerns the implications of national constitutional law on the functioning of the ESM and, especially, how the constitutional prerogatives of some Eurozone parliaments might block the decision-making in the Board of Governors by forcing their representatives in the Board to exercise a veto.

Some legislatures, like the Belgian, the Irish, the Italian and the Spanish Parliaments, for example, under national law do not retain any deliberative powers in the "ordinary" application of the ESM Treaty as to what concerns decisions to grant financial assistance and the disbursement of tranches, as the assistance to bailout countries is granted by installment.[XXIX] Although these Parliaments have been provided with the power to scrutinize and oversee the action of their Governments as well as the right to obtain information for what concerns the management of the ESM, they are not able to bind their representatives within the governing bodies of the ESM nor their prior authorization is requested before the representative takes a commitment.

Other legislatures, instead, "taking advantage" of the unanimity rule usually applied in the ESM, can veto a decision of its governing body, regardless of the share capital subscribed. Although allowed by the ESM Treaty, this is quite an extreme provision, since one single parliament is able to block the functioning of a solidarity fund like the ESM is. While Germany is also the largest contributor to the fund,[XXX] by far the German *Bundestag* is granted the most extensive veto power by national law compared to other Parliaments (Höing 2013: 255-280; Pinelli 2014: 9). This is so because of a peculiar combination of constitutional case law and legislation enacted to implement it.

The German Constitutional Court was suited by several complaints of *Die Linke*, a far-left parliamentary group, through the *Organstreit* procedure, as well as by individual complaints,[XXXI] which ended up in different cases. In a series of judgments, from 7 September 2011, on the financial aid for Greece, till the latest decision of 18 March 2014, when the Court delivered its final decision in the main proceedings on the ESM Treaty and the Fiscal Compact, the German Constitutional Court has requested an incremental strengthening of the rights of the *Bundestag* in the management of the ESM.[XXXII] Based on a peculiar reading of art. 38 GG, on the right of the German citizens to elect their representatives in the *Bundestag*, in conjunction with art. 20 GG (the democratic principle) and art. 79.3 GG (the eternity clause), developed since the Lisbon case,[XXXIII] the German Court considers that the participation of Germany in a permanent rescue mechanism cannot impair the overall budgetary responsibility of the *Bundestag* towards the people (*ex multis*, Wendel 2014: 263-284). Hence, the information right of the *Bundestag* "against" the Government, the transparency of the parliamentary procedures and the decision-making powers of this Chamber have been enhanced through constitutional case law and subsequent legislative amendments.

In particular the judgments of 12 September 2012 and 18 March 2014 have defined the conditions under which a prior authorization of the *Bundestag* is requested in order for the German representative to support a proposed decision of the ESM governing bodies.[XXXIV] Lacking such a parliamentary authorization, the German representative has to vote against, which, in case of unanimity rule, implied a veto on the ESM decision. Amongst the circumstances that require the prior consent of the *Bundestag*, since the overall budgetary responsibility of the Parliament is affected, are, for instance, those: granting financial support to one of the contracting parties of the ESM; accepting a financial assistance

facility agreement and the corresponding MoU; changing the authorized capital stock and the maximum lending volume. In all these cases it is the plenary of the *Bundestag* who should give its consent.

To them the circumstances under which a prior approval of the budget committee of the *Bundestag* is compulsory must be added, so that the German representatives in the ESM governing bodies can hardly take a position without a binding parliamentary mandate. For example, the budget committee has to authorize decisions on the provision of additional instruments without changing the total financing volume of an existing financial assistance facility as well as the acceptance or material change of the guidelines on the modalities for implementing a rescue package.

Depending on the scope of the decision, being the plenary or its committee in charge, the *Bundestag* cannot "transfer its budgetary responsibility to other entities", i.e. the ESM, "through imprecise budgetary authorisations".[XXXV] These *ad hoc* authorizations that the German Constitutional Court has listed and the legislator included in the Act for Financial Participation in the European Stability Mechanism do not simply limit Government's discretion in the framework of the ESM, but could also impair the effectiveness of the ESM (e.g. by vetoing the change of the conditions under which financial assistance was granted as to adapt on a new economic situation) and the resort to this solidarity fund by other Eurozone parliaments and states. This unilateral strengthening of parliamentary powers, needed to comply with the German Basic Law, according to the Court, is however the source of a troublesome asymmetry between the German *Bundestag* and the other parliaments. The asymmetry derives from a national constitutional choice, which however could have European implications or at least effects for the Eurozone. This phenomenon is not entirely new, however. Some Member States, even Italy for instance, have decided to involve their Parliaments and to assign them veto powers or the power to activate a suspension of the deliberation in the Council –through the so-called "emergency brake procedure"(e.g. articles 82.3 and 83.3 TFEU) – in many more cases than those formally foreseen by the Treaty of Lisbon, e.g. article 42 TEU or 311 and 352 TFEU. A veto from the Parliament prevents the Government from voting in favour of the measure in the Council whereas the use of the "emergency brake" by the Parliament binds the Government to stop the discussion in the Council and to refer the dossier to the European Council (Piccirilli 2014: 219).

Some Parliaments (and Governments) have tried to emulate the model of the *Bundestag*, although the former have not being granted powers as strong as those of the German lower chamber. For example, the French Parliament has to approve by law the payment of any installment under a financial assistance programme in operation; the Estonian *Riigikogu* and the Finnish *Eduskunta* have to give a prior authorization before any decision to grant financial assistance is taken and the Parliament of Estonia also enjoys a veto power on draft MoU, before they are agreed; a power normally delegated to its European Union Affairs Committee, unless the Committee itself asks to defer the decision to the plenary. Although national law in these Eurozone states grant to these Parliaments veto powers on some significant subject matters, these powers are not as extended as those of the German *Bundestag*, which for example is also asked to give its assent on amendments to MoU.

Perhaps the closest example to Germany as for the national parliamentary powers on the ESM is Austria, where a constitutional amendment was adopted in 2012 aiming to establish a role for the Parliament in the decision-making process of the ESM Treaty (Jaros 2014: VIII.6). Indeed, part of the list of *ad hoc* parliamentary authorizations provided by the German Constitutional Court can be found also in the text of the Austrian Constitution (arts. 50b and 50c B-VG) and are further detailed in federal legislation. Art. 50b B-VG allows the Austrian representative in the ESM to agree or abstain, also in the case of special urgency, only if the National Council (the lower chamber) enables him to do so as to what concerns granting financial assistance to another Member State; amendments to the rescue package agreed; change of the authorized paid-in capital, of the authorized but not-paid in capital, and of the overall lending capacity of the ESM (Puntscher Riekmann & Wydra 2013: 579).

The interplay between ESM Treaty provisions and national constitutional law, whereby some Eurozone countries, namely Germany and Austria, assign veto powers to their parliaments over the functioning of the ESM can deeply affect the smooth operation of the fund for all remaining Euro States, especially those receiving financial assistance. The equality among Eurozone countries and parliaments is jeopardized by the choices taken at domestic level, in the light of the national contributions to the fund on which parliaments would lose their control once the resources are transferred to the ESM. Such an outcome is usually deemed a consequence of the intergovernmental, rather than Community-based, nature of the ESM as a financial institution, of the disproportion in the size of the national

share capital and of the current clear-cut divide between current creditors and debtors amplified by the dominant narrative of the austerity. Indeed, the Parliaments of the Eurozone bailout countries that benefit from the ESM are not in a position to decide on the use of the rescue fund, as they are subject to strict conditionality. What is striking is also the asymmetry created among Parliaments of Eurozone net contributors to the ESM, just because of constitutional provisions and case law which make some of them veto players and the other potential victims of a "veto game". The situation could only worsen, should the number of "Parliaments-veto players" within the ESM increase following national reforms.

4.2. The case of the rescue packages: different constitutional designs, different national responses

Because of a particularly serious financial crisis which could affect the stability of the entire Euro area as well as trigger a default of the Member State concerned, some Eurozone countries have been forced to request a bailout to international and European authorities – the Commission and the European Central Bank (ECB) – and have received financial support (Greece, Ireland, Portugal, Italy, Spain, Cyprus). The Parliaments of these countries have been subject to more significant financial constraints compared to the Parliament of non-Eurozone bailout countries like Latvia and Romania. In addition to strict conditionality, the former also had to comply with the ordinary fiscal rules imposed by the six-pack, the two-pack and the Fiscal Compact, with some exceptions.

The form and the substance of the financial support or assistance received varied a lot anyway, so that it is not correct to consider Parliaments of the Eurozone bailout countries as a uniform category. For example, whereas Italy just received financial support by the ECB through the Securities Market Programme for a few months in 2011 and the conditions imposed upon its legislature in terms of reforms to be passed still remain unclear beyond the mere indications we can read from the ECB letter of 5 August 2011;[XXXVI] from 2011 till 2013 Ireland received financial assistance by the EU and the IMF and the country is still under post-programme surveillance, which limits parliamentary autonomy in fiscal matters.

For all these countries and Parliaments there is certainly a degree of subjection imposed from outside – international and EU institutions – but, notwithstanding the pressure of

economic and financial contingencies, a wide or narrow margin of discretion remains in place for national political institutions, i.e. Parliaments and Governments, when implementing the conditions set out in exchange for the rescue package. A lot depends on the severity of the economic situation, but the institutional response to the implementation of the rescue packages at domestic level is primarily influenced by Constitutions and national constitutional arrangements. This is shown by looking at the case of the Parliaments in two Eurozone countries receiving financial assistance: their opposite reactions do not appear to derive from the content of the financial and assistance programme in itself, but rather on the national form of government and on the role played by courts, once again. Thus, the asymmetries among national parliaments of Eurozone bailout countries do not depend just by the scope and the extent of the rescue package, but also, and even more so, by national constitutional law.

Take the case of Cyprus, whose government, given a serious banking crisis, on 16 March 2013 obtained from the Eurogroup support for a financial assistance programme of 10 billion euro and from the IMF for a possible loan. Immediately after, the Cypriot government, without any consultation with the House of Representatives, committed to adopt budgetary measures in order to raise revenues and presented to the House a bill which would have established a one–off stability levy on all bank accounts (insured and uninsured) regardless of the warning by the governor of the Central Bank of Cyprus not to withdraw money from the bank accounts up to 100,000 euro. The bill was rejected by the Parliament on 19 March 2013 and the Government was obliged to re-negotiate the package with the Eurogroup. The new scheme for a financial and assistance programme provided for fiscal downsizing and consolidation of the banking sector, privatization and structural reforms as well as for a lower levy on uninsured deposits. This time the scheme was previously debated in the House of Representatives and, in contrast with what happened with the Fiscal Compact (ratified by an executive decree), the House was called to approve the law ratifying the Financial assistance facility agreement and the MoU between the ESM, the Republic of Cyprus and the Central Bank of Cyprus (art. 169.2 Cypriot Const.). The law was approved by a very slight majority, 29 MPs in favour and 27 against.

Why did the Parliament have the strength to overturn the commitment taken by the Government with the Eurogroup and could force it to re-negotiate the term of the agreement? Because of the presidential form of government, which is unique to Cyprus in

the EU. The President of the Republic, directly elected by people (together with the Vice-President), is at the same time the head of State and the head of the executive and appoints and dismisses the members of the Council of Ministers (arts. 37-38 Const.). No confidence relationship between the President and the House of Representatives is in place and both are elected for five years. By the same token, none can dissolve the House of Representatives beforehand but the House itself by absolute majority including at least one third of the Representatives elected by the Turkish Community (art. 67 Const.). These constitutional arrangements imply that the House is free to express different political directions from the Executive and the latter cannot overlook, as it happened in March 2013, the will of the Parliament, which is not, legally speaking, under the Government's control. It does not mean that, where a confidence relationship is in place the Parliament cannot overturn Government's plans, but this is much more unlikely to happen.

Such an outcome, however, was triggered in March 2011 in Portugal, which has a semi-presidential form of government resembling more parliamentary systems than the French model based on a strong dual executive (Miranda 1998: 211-223). The unicameral Parliament rejected the Government's amendments to the Stability and Growth Pact 2011 and, while Portugal was already in the middle of a serious financial crisis and a speculative attack, the Prime Minister resigned. However, given the economic situation, before he left his office, the resigning Prime Minister notified a request for a bailout to the European Commission and the IMF and, while the Parliament was dissolved waiting for new elections after the Government's defeat, the EU and the IMF granted financial assistance to Portugal, through the European Financial Stability Facility (EFSF), then replaced by the ESM, and the European Financial Stabilisation Mechanism (EFSM),[xxxvii] besides the IMF.

The challenge launched by the Parliament against the Government in March 2011 eventually backfired the legislature itself. Indeed, the dissolution of the Parliament, which follows the Government's defeat and resignation, did not allow the *Assembleia da República* to scrutinize closely what was going on between the Executive, the Commission and the IMF, and to be informed about the negotiations on the rescue package; in spite of the constitutional provisions on the Executives' duty to inform the Parliament "in good time" about any development of the EU integration process (Arts. 163.f and 197.i Pt. Const.). Moreover, the new Executive, based on a centre-right coalition, considered the Memorandum of Understanding on Specific Economic Policy Conditionality and the Loan

Agreement signed as political agreements devoid of binding effects (Pereira Coutinho 2013: 147-179).[XXXVIII] As a consequence they did not need a parliamentary authorization for the ratification and the new Parliament elected in June 2011 discussed about the content of the MoU only in Fall 2011, when it had to adopt the annual Budget Act where some of the measures agreed with the Troika (the Commission, the ECB and the IMF) were included. The constitutional design of the form of government in Portugal, i.e. the confidence relationship, the dissolution of the Parliament, etc., and the timing of the resignation and the elections have marginalized the Parliament from the negotiations and the scrutiny of the rescue package.

In contrast with Cyprus, however, in Portugal another constitutional body, the Constitutional Court contributed to undermine the role of the legislature in the implementation of the rescue package. Starting from 2012, when this Court began to declare provisions of the Budget Act determining pensions and salary cuts for public workers unconstitutional, depending on the case, for a violation of the principle of proportional equality, of equality *tout court*, and of legitimate expectations, constitutional judges (within a highly divided Court) have used the same argument. The economic emergency – according to the Court – does not justify *per se* the overthrow of fundamental principles of a democratic State based on the rule of law (art. 2 Pt. Const.), particularly when the same cohort, i.e. civil servants and pensioners, is systematically affected year after year by austerity measures compared to the less adverse conditions of other groups of citizens. Also the public status and working or retirement conditions do not give ground for a persistent, fi not permanent, discriminatory treatment. In particular, according to the Constitutional Court, there was no evidence that the conditions imposed by the MoU and the loan agreement, which the Court recognized as international agreements, did not leave discretion to the Parliament in their implementation. At the opposite, the Parliament could have explored alternative avenues to implement the rescue package. This was the warning of the Court since judgment n. 353/2012, which has grounded most declarations of unconstitutionality of the Budget Acts from judgment n. 187/2013 onwards (Fasone 2014: 24-30).[XXXIX]

The long catalogue of social rights of the Portuguese Constitution might also have contributed to push the Court in this direction, although social rights have not been used as a standard for review (except in judgments 794/2013 and 572/2014). The effect of this

case law, was however, the marginalization of the Parliament, constrained in between these constitutional judgments, on the one hand, and the pressure of the executive to fulfill European and international obligations and reassure the financial markets. The insistence of the Government to have the Budget Acts and the austerity measures adopted in due time by the Parliament was equally defeated by the Constitutional Court, which forced the Executive to re-negotiate with the Troika the terms of the loan agreement, given the annulment of some of the measures aiming to reached the targets agreed.

In Cyprus, instead, the Supreme Court, which is entitled to review the constitutionality of legislation besides being the highest judicial authority in civil and criminal matters, has not further jeopardized the position of the House of Representatives concerning the implementation of the rescue package. The only relevant case that reached this Court dealt with the suits filed by uninsured bank depositors against the Central Bank of Cyprus, the Governor of the Central Bank and the Minister of Finance. They had issued a series of decrees, in execution of Law 17 (I) /2013, as to impose the depositors a levy on their bank accounts and to force them to participate in Cyprus' bail in. The Court, however, considered the case inadmissible as the controversy did not affect constitutional issues but rather the relationship between depositors and their banks, regulated by private law, and there was no way to review the constitutionality of those decrees.[XL] Also in these circumstances the powers and jurisdiction of the Cypriot Court compared to the activism of the Portuguese Constitutional Court made the difference, beyond the specific content of the rescue package.

Finally, the very recent case of the Greek deadlock in the parliamentary election of the new President of Greece, resulting in the dissolution of the Parliament and in the new elections on 25 January 2015, is a further example of the influence of the form of government on the management of the financial and assistance programme and the role of the legislature. In the country that has been most affected by the financial crisis in the Eurozone, the implementation of the rescue package is definitely conditioned, at the moment of writing, to the solution of an institutional and political crisis which derives from the constitutional requirements to elect the Head of State, in spite of his symbolic powers. According to art. 32 of the Greek Constitution, the President of Greece has to be elected by the unicameral Parliament summoned in a special sitting by roll call vote by two thirds majority of MPs. If the quorum is not reached two further ballots are allowed – the

second by two thirds majority and the third by three fifth majority – at five days one from the other; after that the Parliament is dissolved and a new Parliament will proceed to the election of the President. On 29 December 2014, at the third attempt the Parliament failed again to support the candidate proposed by the Government and thus the mechanism of the automatic dissolution was tripped.

Being Greece the beneficiary of a rescue programme, the political instability has soon triggered financial instability and the IMF, which is providing a $35 billion loan to this country (in addition to the financial assistance of the EFSF-ESM), declared immediately after the announcement of new elections that the financial aid is currently suspended until a new government is formed.[XLI] It is patent from this recent example of Greece how a Parliament worn out by four years of strict conditionality can be further weakened by constitutional mechanisms that instead of enhancing political stability lead the country to new elections following the controversial elections of 2012.[XLII]

To conclude on Eurozone parliaments in bailout countries, the asymmetries among these legislatures are rather evident, but do not derive only and mainly from the gravity of the financial crisis and the external constraints of the lenders. A great role in the differentiation is played by domestic constitutional arrangements, in particular the form of government and the role of courts, which can protect or ultimately undermine parliamentary prerogatives.

5. The Fiscal Compact, the art. 13 Conference and national parliaments: are they all equal?

Although it is not part of the EU legal framework, the Fiscal Compact is the source of many asymmetries in the EU, which in turn affects, depending on national constitutional rules, parliamentary autonomy at national level. The extent to which the Fiscal Compact, through domestic measures of implementation, is able to constrain the powers of national parliaments varies depending the Eurozone or non-Eurozone nature of the Contracting Party and, among non-Eurozone countries, according to the level of commitment chosen, i.e. to be bound to the entire treaty, only to Title V or to selected Titles, as well as if and when the accession to the Euro area is foreseen. Moreover at present three countries, Croatia, Czech Republic and the UK have not signed the treaty, but art. 15 of the Fiscal

Compact makes it open to further accessions subject to unanimity of the Contracting Parties, so that the degree of asymmetry and differentiation can potentially evolve throughout the time.

Asymmetries do exist also among Eurozone parliaments as a result of the Fiscal Compact. First of all there is a Parliament and in particular its Lower Chamber, the German *Bundestag*, that because of the leading role of Germany in the adoption of the treaty and in shaping its contents is, politically speaking, a *primus inter pares*. The balanced budget clause entrenched since 2009 in the German Basic Law was the source of inspiration for art. 3.2 of the Fiscal Compact and *Bundestag* has been taken as a model by other national legislatures.

Secondly the entry into force of the Treaties created in itself a differentiation among Eurozone countries, since the usual unanimity rule observed for EU Treaty revisions was disallowed and replaced by the condition of ratification by at least twelve Eurozone countries. The unanimity, which has always featured the ratification of Treaty changes in the EU, was overcome for strategic and instrumental reasons, like the fear that some countries were not able to successfully complete the ratification in due time (1 January 2013) because of the national procedures for amending the Constitution (Finland and Ireland) or because of the ongoing financial and political crisis (Greece). Based on the argument of the non-EU nature of the Treaty, by abandoning unanimity the result was a challenge to the traditional principle of equality among Member States and, in particular, Eurozone States (Closa 2011: 14-17). Thus the Fiscal Compact entered into force pending the ratification of founding members of the EU, like the Netherlands and Belgium, whose parliaments were able to authorize the ratification only months later. For example, because of the policy concerned, in Belgium all parliaments (federal, regional, etc.) had to approve by qualified majority the Fiscal Compact and hence, because of the national constitutional arrangements, it was much more difficult for this country to complete the process.

Other differences among Eurozone parliaments, depending once again on domestic constitutional procedures, also stood at the moment of the ratification. For example in Cyprus the Parliament was not even called to authorize the ratification of the Fiscal Compact and remained completely marginalized. The Fiscal Compact was indeed considered as an international agreement relating to "economic co-operation (including payments and credit)", which pursuant to art. 169.1 of the Constitution only requests a

Cypriot Council of Ministers' decision and the act of ratification was simply a governmental decree (Pantazatou 2014: IX.3).

Regarding the implementation of the Treaty at national level, in spite of the very much contested provisions of art. 3.2 of the Fiscal Compact and the supposed constitutionalization of the balanced budget clause (Pinelli 2014: 7), besides Germany, only very few countries, like Italy, Lithuania, Slovenia and Spain, decided to amend the Constitution in order to fulfill the treaty obligations (Ruiz Almendral 2013: 189-204; Boggero & Annichino 2014: 247-261; Delledonne 2014: 181-2013; Piedrafita 2014: 319-340). Indeed, in the version of the Treaty finally agreed the constitutionalization of the balanced budget clause was no made compulsory depended on the fear of the governments in office that constitutional amendments would have been rejected by citizens in those Member States, like Denmark, where holding a referendum or new elections in order to enact those amendments is a constitutional requirement. Yet in those countries which finally entrenched the balanced budget clause into their Constitutions, since then the fiscal powers of parliaments have been constrained as any new law has to comply with the new constitutional provisions on debt and deficit ceilings aiming to comply with the Fundamental Charter.

The Fiscal Compact also contains very significant provisions regarding the "national parliaments of the Contracting Parties" alongside the European Parliament which should gather together in an interparliamentary conference "to discuss budgetary policies and other issues covered by this Treaty" (art. 13).[XLIII] Art. 13 is important for our purpose in that it does not draw any distinction between Eurozone and non-Eurozone parliaments (Griglio & Lupo 2014: 23 ff.). Provided that the relevant State is a Contracting Party of the Fiscal Compact, the national legislature is allowed to take part in the conference without any differentiation of powers and status.

The equal treatment of all parliaments of Contracting Parties is a considerable element, if compared to the limited involvement the Governments of non-Eurozone countries enjoy in the Euro Summit, a new body composed of the Heads of State or Government of the Contracting Parties whose currency is the euro and the President of the Commission.[XLIV] Still in the final version of art. 12, following the insistence of some countries and first of all Poland, non-Eurozone Government got an acknowledgement of their (marginal) role vis-à-vis their original exclusion: they can "participate in discussions of

Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation" of the Fiscal Compact (art. 12.3). Moreover, the President of the Euro Summit has to keep these Government informed about the preparation and the outcome of the meetings and the current President of this new body, Donald Tusk, comes from a non-Eurozone State, being the former Polish Prime Minister.

Thus, by contrast with governments, the participation of national parliaments is not limited by art. 13, according to the Eurozone vs. non-Eurozone divide. This should not be seen necessarily as a wise choice. The reason for such an asymmetric composition between the main intergovernmental body established by the Fiscal Compact and the interparliamentary conference established are not entirely clear. For the sake of the effectiveness of parliamentary scrutiny and oversight on the Euro Summit (Wessels & Rozenberg 2013: 32), the fact that the composition of the new interparliamentary conference is also open to non-Eurozone parliaments is not good news since this diminishes the ability of the conference to give political directions to the Summit and to hold it accountable (in addition to the ordinary avenues for governmental accountability at national and European levels). Indeed, there are also parliaments which do not "match" with any Head of State and Governments in the Summit and the same can be said for the Ministers in the Euro Group, in charge with the preparation and the follow up of the Euro Summit meetings.[XLV]

It should be noticed, however, that the mandate conferred by art. 13 to the interparliamentary conference does not explicitly refer to scrutiny and oversight, but rather to "discussions" and perhaps exchange of views and best practices as often happens with interparliamentary cooperation. The reference to Title II of Protocol n. 1 on the role of national Parliaments in the EU in the incipit of art. 13 is not of great interpretive support, being quite vague. This protocol, for instance, foresees an interparliamentary conference like the one of the Committee on EU Affairs (COSAC), established in 1989, at the same time as able to submit contributions to EU institutions, and thus entitled to provide political inputs, and as a forum to exchange information.

The institutional practice so far, following the initial implementation of the Fiscal Compact and the first three interparliamentary conferences held in Vilnius (October 2013),

in Brussels (January 2014) and in Rome (September 2014) reveal that the application of art. 13 has gone far beyond a literal interpretation of the provisions (Cooper 2014: 9-11). All national parliaments regularly take part in the conference, meaning that also the Croatian, the Czech and the UK Parliaments are fully involved, with the same rights as the others. The EU Speakers Conference of Nicosia, on 21-23 April 2013, having a role of coordination of interparliamentary cooperation in the EU, took the decision to establish a "catch all-conference", inclusive inasmuch as possible of every national legislature, regardless of the commitment to sign and to implement the Fiscal Compact of the relevant Member State. Hence the idea of an interparliamentary conference mainly based on discussions and exchange of views was implicitly endorsed, since it is not feasible for parliaments of non-Contracting Parties to control the implementation of a Treaty that their Governments have not even signed.

From this original "sin" other flaws followed. Given the heterogenous membership, the Conference has not been able to agree on its rules of procedure and even as to who should agree on them,[XLVI] on the composition of its delegation (national and European), nor on its powers, name,[XLVII] and scope, e.g. should it be limited to fiscal policy and economic coordination and thus be strictly relevant to the object of the Fiscal Compact or should it consider also financial issues and the Banking Union? Constructive inputs on the part of national parliaments have not prevailed over their strong disagreement, among national legislatures as well as between them and the European Parliament, and so far the new conference has appeared as a "missed opportunity" (Kreilinger 2013: 17).

The attempt to let all parliaments participate with equal powers and prerogatives in the Conference as to neglect that national asymmetries do exist in terms of European and international obligations and among the Governments in terms of involvement in relevant intergovernmental bodies has been counterproductive in the case of Conference based on art. 13 of the Fiscal Compact. Indeed, this has led to a deadlock of its activities, since in the last Conference held in September 2014 not even conclusions of the meeting could be adopted (voting rules are not defined). Perhaps in the case of the new form of interparliamentary conference established under the Fiscal Compact a way out could have been to mirror the functioning of the Euro Summit: to allow MPs from Eurozone countries to scrutinize and oversee the implementation of the Fiscal Compact, MPs from non-Eurozone Contracting Parties to participate in the debates like their governmental

counterparts in the Summit and to exclude Parliaments from non-Contracting Parties as they are not bind nor directly affected by the treaty.

6. Conclusions

That the legal response to the Eurozone crisis has increased the differentiation in the EU appears quite patent (Armstrong 2014: 63-83). Giandomenico Majone has even claimed that "most national governments are forced to accept the solutions proposed by a few leaders representing the major stockholders of the ECB" (Majone 2014: 1221). If this is the case, then the principle of equality of Member States enshrined in the EU Treaties (art. 4.2 TEU) is in danger. Indeed, there are many signals in the Euro crisis measures of these differential treatment among Member States that, in theory, are part of the same cohort, i.e. Eurozone countries, Contracting Parties of the Fiscal Compact, shareholders of the ESM. The rise of the intergovernmental method of coordination seems to have also strengthen national asymmetries at the expenses of the (formal) equality, a principle that nevertheless has been softened throughout the process of European integration compared to other international organizations.

What is perhaps more alarming than the alteration of the legal balance of powers among Member States is that asymmetries are rising also among national parliaments in the operation and implementation of the Euro crisis measures. The "parliamentary asymmetries" derive from an unequal distribution of powers amongst these legislatures, due to a peculiar combination of international, EU and national law. As recently observed by scholars, the financial crisis in the EU should not necessarily be seen as a threat to parliamentary democracy and national parliaments in particular (Griglio & Lupo 2012: 313-372; Puntscher Riekmann & Wydra 2013: 565-582; Martinico 2014; Bellamy & Kröger 2014: 454); it is rather the asymmetric growing of the powers of some national parliaments (Fossum 2014: 52-68) affecting the powers and the autonomy of an "equally sovereign parliament of a fellow Member State" that creates a problem (Majone 2014: 1221).

Through the analysis of several examples in which these asymmetries in the powers of national parliaments can impair the democratic legitimacy as well as the effectiveness of Euro crisis measures, the article highlights that such an outcome can mainly occur under three circumstances, dependent in part on EU and international law and partly on national

law. The first case deals with parliaments able to block or veto the adoption and implementation of Euro crisis measures even though their Member State is not bound by them, e.g. the participation of non-Eurozone parliaments in the simplified revision procedure for amending art. 136 TFEU or the participation of parliaments of the non-contracting parties of the Fiscal Compact and perhaps of non-Eurozone parliaments in general in the new interparliamentary conference provided by art. 13 of this treaty.[XLVIII]

A second case concerns the power of some national parliaments, and first of all of the German *Bundestag*, to block the functioning of collective mechanisms, like the ESM, as a consequence of constitutional case law, constitutional rules and national legislation. The other parliaments which have not been granted comparable powers at national level cannot prevent such an outcome, even less so the parliaments of the Member States receiving financial assistance that are directly concerned by such a veto, but which are subject to strict conditionality. Under these circumstances, it is not desirable that the number of "parliaments-veto players" increases; rather the conditions should be posed so as to restore mutual trust among the Member States and prevent the adoption of national decisions that could jeopardize the joint liability towards these solidarity rescue funds, in spite of the intergovernmental arrangements.

Finally, the third case regarded as highly problematic is that of parliaments in – both Eurozone and non-Eurozone – countries subject to strict conditionality. In particular, the extent to which some of these legislatures are able to keep their role as democratically accountable institutions towards citizens only derives from domestic constitutional arrangements. The level of protection of national parliamentary prerogatives in the bailout countries as for what concerns the adoption and the implementation of rescue packages is not taken into consideration at European and international level, where financial and assistance programmes are agreed. Hence we can see very different responses of national parliaments to similar rescue packages which depend on the national form of government and on national constitutional case law.[XLIX]

A final point, which can be drawn from the analysis, concerns who is responsible for the emergence of such asymmetries among national parliaments, when the asymmetries derive from national law. In most cases they are a consequence of judgments of Constitutional or Supreme Courts (Everson & Joerges 2014: 197-210), as the case law of the German Constitutional Court shows as to protect the overall budgetary responsibility

of the *Bundestag* with responsibility to the people; whereas the case law of the Portuguese Constitutional Court has gone in the opposite direction, that is to further marginalize the power of the *Assembleia da República*. There are few exceptions, influenced by national constitutional prerogatives of Parliaments, like the Constitutional Law Committee of the Finnish Parliament, which has considered a first version of the ESM Treaty unconstitutional, or the rejection by the Cypriot House of Representatives of the commitment taken by the Government in exchange for financial assistance.

These latter cases of autonomous parliamentary responses to the risk of an asymmetric distribution of parliamentary powers under the Euro crisis governance are to be preferred to the today more frequent ones of judicial struggle for the protection of parliamentary prerogatives, where sometimes in an attempt to protect democracy Courts might even trigger a worse scenario, whereby it becomes then very difficult to redress and justify imbalances among national parliaments in the EU once created via constitutional case law. When the protection of parliamentary prerogatives in Euro-crisis procedures is achieved through constitutional judgments, such a protection is rooted in more ambiguous bases, like in Germany, where it is grounded on a peculiar and creative interpretation of constitutional clauses by the *Bundesverfassungsgericht* (section 4.1). This Court is actually willing to protect the enforcement of the principle of democracy as such and not the Parliament *per se*. The *Bundestag* is incidentally guaranteed by the Court as long as the Parliament is capable to preserve the right of the people to elect their representatives and to be effectively represented by them. Otherwise, as threaten in the referral for a preliminary ruling,[L.] the Bundestag (and the Federal Government) can be sanctioned though a declaration of unconstitutionality by omission, without further specifications of what this implies, of how this would affect parliamentary prerogatives, and of whether the Parliament can be compelled to act based on the Court's instructions whenever it has not taken appropriate action to enforce citizens' rights. This explains why a very active Court not necessarily is the best solution for keeping parliamentary powers "alive".

Whether this is for a Constitutional Court to decide does not form the subject of the present article, but the fact that parliamentary autonomy is broadened or narrowed down based on constitutional interpretation, subject to judicial discretion that can change country by country or within the same country throughout the time, appears problematic. It does not depend from an autonomous choice of the democratic body itself, the legislature, but

rather from an independent and non-democratically legitimized institution which defines based on a constitutional text what is the present standard of parliamentary accountability to be ensured at national level vis-à-vis the other Member States, their parliaments, and EU institutions, according to the "constitutional priorities" identified. Perhaps more legitimate appears the choice of the Austrian Government and Parliament to amend the Constitution as to strengthen parliamentary powers, although such a choice risks to create asymmetries among parliaments that are likely to endure for years, unless a new constitutional amendment removes it.

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I I am grateful to Diane Fromage for having brought the issue of the polysemy of the notion of equality applied to EU Member States to my attention.

II See, for instance, the case of the Treaty on the European Stability Mechanism and the judgment of the Court of Justice in the *Pringle* case, C-370/12, 27 November 2012.

III On the powers retained by parliaments towards their executives in selected EU national legal systems in the aftermath of the Eurozone crisis, see the article by Diane Fromage in this *Special Issue*.

IV Like the UK, Denmark enjoys a "permanent" opt out from the Eurozone, which however can be repealed at any moment on the initiative of this country (Protocol n. 16 annexed to the Treaty of Lisbon). See, recently, 'Danish PM says country 'should' join the euro', *EurActiv*, 21 February 2014, retrieved at http://www.euractiv.com/euro-finance/danish-pm-country-join-euro-news-533661

V Regulation (EU) n. 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation (EU) n. 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, and, for some provisions, Regulation (EU) n. 1175/2011 of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies as well as Regulation (EU) n. 1177/2001 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure do not apply to Member States outside the Eurozone and thus to their parliaments. Regulation (EU) n. 1175/2011 creates some obligations, however, like the submission of a convergence programme under art. 121 TFEU. The two Regulations of the two-pack, instead, only apply to Eurozone countries and parliaments: Regulation (EU) n. 472/2013 of 27 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability and Regulation (EU) n. 473/2013 of 27 May 2013 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.

VI The case of the Fiscal Compact, which is examined in this section and in section 5, is borderline in that, as argued by many scholars (Fabbrini 2012; Cantore & Martinico 2013: 463-480), the provisions included in this international agreement could have been adopted in the framework of EU law by means of enhanced cooperation and its entry into force was subject to the completion of the ratification by 12 Contracting Parties from the Euro area and not by unanimity.

VII The Treaty amendment – adopted through the European Council Decision 2011/199/EU of 25 March 2011 – consisted in adding a third paragraph to art. 136 TFEU, which states: "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

VIII Art. 136 TFEU amendment can affect non-Eurozone countries and parliaments in the medium-long term, if they join the euro in the years to come.

IX Art. 2 of the European Council Decision 2011/199/EU foresaw its entry into force on 1 January 2013 provided that all the notifications from the Member States were received, which was not the case because of the refusal of the President of the Czech Republic to sign until April 2013. The ESM Treaty, instead, entered

into force on 27 September 2012, following the ratification of the then 17 Eurozone countries.

[x] Moreover, based on the European Union Act 2008, prior approval of the UK Parliament was also requested before the Government could agree within the European Council on Decision 2011/199/EU as well as to a decision to amend the Treaties under the Article 48.6 TEU. Parliamentary approval was given without delay in March 2011 (Hancox 2014).

[xi] The case of the Polish Constitutional Court is K 33/12 of 26 June 2013, § 7.4.1. The *Pringle* case, C-370/12, of the Court of Justice, was decided on 27 November 2012 and was based on a preliminary reference of the Supreme Court of Ireland also dealing with art. 136 TFEU amendment. Before the Polish Constitutional Court delivered its judgment, it waited for this decision of the Court of Justice and for the entry into force of the revision itself and did not refer to the Court of Justice for a preliminary ruling, like did the Irish Court. Finally the Polish Constitutional Court also referred *ad adiuvandum* to the German Constitutional Court ruling (Case 2BvR 1390/12) and to the Austrian Constitutional Court judgment (Case SV 2/12-18) both incidentally addressing art. 136 TFEU amendment (§7.5. of the Polish judgment).

[xii] As highlighted by Closa (2014: 114), it is extremely unlikely that a Constitutional or Supreme Court of a Member State of the EU rules a Treaty reform unconstitutional, especially under the *ex post* review, i.e. once the Treaty revision has been ratified and maybe entered into force and thus a constitutional amendment must be approved.

[xiii] These six countries are Bulgaria, Croatia, Czech Republic, Hungary, Poland and Romania.

[xiv] See Council Decision 2009/289/EC to grant mutual assistance to Latvia; Council Decision 2009/290/EC to provide medium-term financial assistance for Latvia; Council Decision 2009/592/EC amending Decision 2009/290/EC of 20 January 2009 providing Community medium-term financial assistance for Latvia. The EU financial assistance was disbursed in four installments for a total of €2.9 billion euro.

[xv] Croatia acceded to the EU on 1 July 2013 and since then has been eligible to sign the Fiscal Compact.

[xvi] See Constitutional Law XII-1289, on the implementation of the Fiscal Compact into constitutional law, published in TAR, 18 November 2014,n. 17028.

[xvii] In July 2013 the ESM also replaced the EFSF, which was a temporary rescue fund established in 2010.

[xviii] Following the completion of the German ratification of the ESM Treaty and in the light of the case law of the German Constitutional Court, Eurozone countries adopted a Declaration on the European Stability Mechanism, Brussels, 27 September 2012, which also states: "(…) Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation (…)."

[xix] See Annex I, Contribution Key of the ESM, to the ESM Treaty, available at http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf

[xx] See the Opinion of the Constitutional Law Committee of the Finnish Parliament, PeVL 25/2011. Since 2012, when the most recent amendment to the Finnish Constitution entered into force, arts. 94.2 and 95.2 Fin. Const. requires an authorization by two thirds majority vote in Parliament for any "significant transfer" of powers from the state to the EU or international organization.

[xxi] See Opinion PeVL 13/2012.

[xxii] The way the Constitutional Law Committee treated the ESM Treaty cannot be analyzed here, but it is important to notice that in many regards this Treaty was not considered as international law, but was instead assimilated to EU law, if we take the role of the Grand Committee into consideration, for example.

[xxiii] It should also be highlighted that, in contrast with the Opinion PeVL 25/2011, the Constitutional Law Committee, given its composition, usually leaves wide discretion to the Government and tends to consider the Government's action in compliance with the Constitution; a circumstance that in turn leads minority groups to adopt a minority opinion of the Committee.

[xxiv] See Supreme Court of Estonia, constitutional judgment n. 3-4-1-6-12 of 12 July 2012, available at http://www.riigikohus.ee/?id=1347

[xxv] Indeed § 216 of the Estonian Supreme Court's decision tackles precisely the issue of the competence of the European Union Affairs Committee of the *Riigikogu* in response to a request of the Chancellor of Justice, who initiated the proceeding, on whether this Committee could be entitled to adopt binding opinion for the Government on behalf of the Parliament on this matter. The Court said that this is allowed under the Constitution, if the power is not a prerogative of the sole Committee, but is a power of the *Riigikogu* as a whole exercised on its behalf by the European Union Affairs Committee.

[xxvi] See, for example, the Austrian Constitutional Court, Judgment on the case n. SV 2/12-18, 16 March 2013.

[xxvii] See Case C-370/12, *Thomas Pringle vs. Government of Ireland*, Judgment of the Court of Justice (Full Court), 27 November 2012.
[xxviii] See Supreme Court of Ireland, Thomas Pringle vs. The Government of Ireland, [2012] IESC 47, 19 October 2012.
[xxix] By contrast, all Eurozone Parliaments have been asked to approve, by parliamentary act, the (first installment of) paid-in capital required by the ESM Treaty, usually within the same act authorizing the ratification of the Treaty.
[xxx] The ESM key for Germany is 27.07 %; the second contributor is France, with a share capital of 20.33%.
[xxxi] One of them, against the ESM and the Fiscal Compact was supported by more than twelve thousand citizens through the NGO, *Mehr Demokratie,* and was decided in the Case 2BvR 1390/12 delivered on 12 September 2012.
[xxxii] See German Constitutional Court, Second Senate: BVerfG 2, BVR 987/10, 7 September 2011; BvE 8/11, 28 February 2012; 2 BvE 4/11, 19 June 2012; 2BvR 1390/12, 12 September 2012 (decision of temporary injunctions) and 18 March 2014 (final decision).
[xxxiii] See German Constitutional Court, Second Senate, 2 BvE 2/08, 30 June 2009.
[xxxiv] The Act for Financial Participation in the European Stability Mechanism (*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz* – ESM Financing Act, ESMFinG) affirms that "the Federal Government may through its representative only vote in favour of a proposed resolution in matters of the European Stability Mechanism or abstain from voting on a resolution when the plenary session has passed a resolution in favour of this." The reference to the abstention, which under the unanimity rule of the ESM implies a constructive abstention, may give some leeway to the Government, but only when the *Bundestag* voted in favour.
[xxxv] See German Constitutional Court, Second Senate, 2BvR 1390/12, 18 March 2014, § 163.
[xxxvi] The text of the letter is available here http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml
[xxxvii] The EFSM is an instrument established by EU law, in contrast with all the other funds (EFSF and ESM) set up via intergovernmental agreements. The EFSM was provided under Council Regulation EU n. 407/2010 of 11 May 2010.
[xxxviii] This interpretation is however disputed and the Portuguese Constitutional Court has always confirmed the binding value of the *Memoranda* and of the Financial and Assistance Programme (judgments no. 187/2013, 413/2014, 574 and 575/2014).
[xxxix] See judgments 353/2012, 187/2013, 474/2013, 602/2013, 862/2013, 413/2014, 574 and 575/2014.
[xl] See Supreme Court of Cyprus (revision jurisdiction/branch), Full House, 7 June 2013, summary available at http://www.supremecourt.gov.cy/judicial/sc.nsf/All/ADC518816A38904DC2257B830035B8A2?OpenDocument
[xli] See H. Smith, Snap elections will be decisive for Greece's Eurozone future, says Samaras, *The Guardian*, 30 December 2014, http://www.theguardian.com/world/2014/dec/30/snap-election-greece-future-eurozone-samaras-syriza
[xlii] Indeed in the election of May 2012 for the first time ever 7 parties won seats in Parliament and this institutions was unable to find a majority to support a new government; as a consequence, one month later, in June 2012 new elections were held this time leading to the formation of a coalition government, subject to reshuffles in June 2013 and 2014.
[xliii] In this article the role of the European Parliament in the interparliamentary conference is not taken into consideration as this goes beyond the focus of the analysis on the asymmetries among national parliaments. On the European Parliament see the article by Edoardo Bressanelli in this *Special Issue*
[xliv] According to art. 12 of the Fiscal Compact, "the President of the European Central Bank *shall be invited* to take part in such meetings", whereas "the President of the European Parliament *may be invited* to be heard" (emphasis added).
[xlv] The idea of not having a purely Eurozone interparliamentary conference was nonetheless opposed by non-Eurozone parliaments as well as by the European Parliament, which, given the principles of institutional unity, of free mandate and of equal representation of citizens, would have been in trouble to exclude some MEPs from the participation in the conference because of their nationality (Cooper 2014: 10).
[xlvi] E.g. Should it be the new Conference itself or, as happened for the interparliamentary Conference on

CFSP and CSDP, should the Conference of EU Speakers be called to set the rules first?

[XLVII] At the third meeting, held in Rome at the Chamber of Deputies, on 29-30 September 2014, the conference was just named "Conference under Article 13 of the Fiscal Compact".

[XLVIII] Although, as stated above, in the case of this conference an obstacle to the agreement on its functioning also derives from the different standpoints of the European Parliament vis-à-vis national parliaments of some Eurozone countries, like France and Germany.

[XLIX] The case of Greece is different in many regards, in particular for what concerns the remarkable level of detail of the condition posed in the rescue package. See the contents of the First and Second Economic Adjustment Programme for Greece, available on the European Commission's website: http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm

[L] See German Constitutional Court, Second Senate, Order of 14 January 2014 - 2 BvR 2728/13, Dissenting Opinion of Justice Lübbe-Wolff, § 21-22.

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