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ABSTRACT

In the last few years, the European integration process has increasingly resorted to flexible mechanisms of co-operation and decision-making, involving only a limited number of European Union (EU) Member States. The economic and financial crisis itself - and above all the response of the EU to the crisis - has undoubtedly favoured the trend.

These ongoing asymmetric mechanisms deeply challenge the supranational architecture upon which the EU experience is based, determining a major change in the formal role and powers of both the European and national institutions. In particular, the European Parliament is incapable of adapting its internal functioning to the asymmetric schemes. In order to contrast these trends, some hypotheses of reform have been formulated, aiming either at building a new institution, a sort of Euro-Parliament; or at adapting the internal organisation of the EP to ongoing asymmetric tendencies limiting the voting rights of EPs.

The essay challenges both these hypothesis, assuming that responding to the increasing asymmetries of the EU by making the existing institutions, above all the European Parliament, more asymmetric, would consistently endanger the cohesion of the Union and threaten the good functioning of its governing bodies. Rather, the approach should be based upon a re-consideration of the overall representative circuit upon which the EU is based. This implies that an even more asymmetric EU will have to rely on its traditional channels of parliamentary representation: what will need to change is not related to the nature or the format of parliamentary representation, but rather to its operative patterns, which should count on strengthened co-operation among parliaments in order to accommodate asymmetric tendencies in the EU governance with flexible forms of interaction in the scrutiny of such procedures.

Keywords: multi-speed integration in the EU; asymmetric mechanisms of decision-making among Member States; enhanced cooperation; opt-out; new European economic governance; democratic legitimacy of the EU; parliamentary democracy; European Parliament; inter-parliamentary cooperation; euro-national parliamentary system; parliamentary scrutiny.

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The article derives from a joint work of the authors. However, Nicola Lupo has written the introduction, § 4 and § 5; Elena Griglio has written the § 2, § 3 and § 6. The conclusions have been written together by the two authors.

1. INTRODUCTION

In the last five years, the European integration process has increasingly resorted to flexible mechanisms of co-operation and decision-making involving only a limited number of European Union (EU) Member States. The economic and financial crisis itself – or, rather, the response that the EU has provided to the crisis – has encouraged this trend, by enlarging the gap among Euro and non-Euro countries and by enhancing new cleavages, based upon the economic and financial stability of the Member States. The possibility of asymmetries in the internal functioning of the EU can be considered to a large extent physiological.

Most federal states, in fact, are characterised not only by some *de facto* asymmetries, resulting from social, economic, cultural, geographic pre-conditions, but also by some *de jure* asymmetries: the latter based upon the entrenchment of a series of formal asymmetric institutional devices ending in a differentiation of powers or levels of autonomy established by the federal Constitution or federal law (Burgess, 2006: 217; Swenden, 2006: 63; Watts, 2008: 127 and 2010: 2).

It would therefore be illogical to presume that similar trends would not characterise the EU, which still establishes its basis upon a form of atypical supranational integration not fully comparable to the experience of federal states.¹ The presence of *de facto* asymmetries is indeed intrinsic to the origins of the European integration experience, which has, since the beginning, involved countries with different political, institutional, economic, social, and cultural features. These original asymmetries have intensified over the decades, due to the progressive extension of the European domain to new geographical areas whose features are much more differentiated than those of the six founding Member States.

This process, however, was accompanied by an increasing recourse to *de jure* asymmetries (Constantinesco, 1997: 751 ff.; Gaja, 1998: 855 ff.; Hanf, 2001: 3 ff.; De Areilza, 2001: 27 ff.) as a potential solution in order to activate also some new policy areas in which unanimous answers were not possible. Also due to the ongoing uncertainties regarding the future of the EU – swinging from the return to intergovernmental dynamics to the promotion of a more politically-integrated Union – variable-geometry mechanisms have been turned into a “second best” option (compared with full integration), if not into a potentially-disaggregating factor which hinders the overall institutional architecture of the EU.

¹ On the plurality of compromises (between a supranational union and an intergovernmental union; between Member States constituting the EMU and Member States retaining their own national currency) upon which the EU constitutional system is based, see Fabbrini, 2014: 2.

Constitutional scholars have intensively argued about the effects that asymmetry could cause to the stability and harmonic functioning of a federation. The historic original reluctance to differentiation (Tarlton, 1965) – based upon the idea that the more symmetrical a federation is, the more harmonious and unified it will be, and *vice versa* – was replaced, over time, by a more general preference with regard to asymmetries. Notwithstanding the implicit risk of imbalances and inequalities relating to asymmetrical federalism (Kymlicka, 2005: 286), the latter is perceived by many contemporary scholars as a positive solution: indeed, it is a solution which seems capable of sustaining federal values and structures (Burgess, 2006: 209), inspired by a communitarian principle (directed at preserving political communities), by a functional principle (relating to the idea of efficiency in managing diverse territories) and by a democratic principle (promoting liberty, equality and political participation) (Gagnon and Gibbs, 1999: 78 ff.). It could be stated, as a consequence, that “federal political systems are consciously and purposively designed to facilitate flexible accommodation for the many diversities which acquire political salience” (Burgess and Gress, 1999: 43).

The debate on the impact of the asymmetries developed in federal experiences can hardly be extended to the EU experience. In federations, the existing forms of differentiated co-operation do not seem to hinder the role and functioning of federal institutions and decision-making procedures, as the latter find a bulwark in the tight connections that link its constitutive units, represented by the existence of a central state, and in their common sense of identity (Beauchamp - Dugas - Graves, 1999: 307 ff.).

In contrast, the asymmetric tendencies of the EU are developed by recurring to intergovernmental dynamics, which, from an institutional point of view, challenge the supranational architecture upon which the EU experience is based. Also, from the motivational perspective, some scholars have detected in the debt crisis a turning-point in the recourse to differentiated integration, now used as a tool “not to spur more inclusive decision-making, but to avoid it” (Gostyńska - Von Ondarza, 2012), thus challenging the institutional rationale upon which the EU architecture is founded.

This premise contributes to explain why the present essay addresses the issues of EU multi-speed integration by focusing on the impact exercised over the European Parliament (EP) as a channel of parliamentary representation. As the EP is meant to represent EU citizens as a whole, some

questions arise with regard to the role reserved to this body in multi-speed decision-making procedures, which regard only a limited part of the EU territory. Similar doubts concern the possibility that, in a normative perspective, the organisation and functioning of the EP could be adapted to variable-geometry mechanisms.

These hypotheses are critically assessed in this essay. A general overview of the ongoing multi-speed trends is offered in Section 2, while Section 3 focuses on the differentiated integration resulting from the so-called new European economic governance. Section 4 continues with the idea that increased differentiation in the forms of participation at the EU has ended up worsening the democratic legitimacy of the EU architecture. The role exercised by the EP in the procedures involving differentiated forms of integration is analysed in Section 5, in order to evaluate whether such tendencies have effectively marginalised this representative assembly. Section 6 is meant to assess critically the proposals directed to adapt the internal organisation and functioning of the EP to variable-geometry mechanisms. Finally, the conclusions presented in Section 7 try to demonstrate the insufficiency of a perspective based upon the EP as the exclusive channel of political representation able to fulfil the transparency and participative expectations relating to EU decision-making and to cope with the democratic legitimacy weaknesses of the current experience of the EU.

2. RECENT TRENDS TOWARDS “MULTI-SPEED” INTEGRATION IN THE EU

The recent enlargement process of the EU, which, in less than ten years, has almost doubled its Member States (going from 15 to 28 Member States), has implicitly favoured the development of new forms of co-operation and integration involving a limited number of countries.

Nothing, however, is completely new. The provision of multi-speed mechanisms of co-operation and participation represented a recurrent issue in the European discourse, long before the new enlargement process and the latest economic crisis (Thym, 2005: 1731 f.).

On the one hand, from a political perspective, the call for flexible forms of integration has always characterised some of the most critical stages of the history of the European Communities and the European Union (Jensen – Slapin, 2010). For instance, it appeared in the early 1980s, following Margaret Thatcher’s plea for a budget rebate for the UK. In 1997, negotiating the French and

German urgent appeal for deeper co-operation among a small group of Member States;² in May-June 2005, following the rejection of the Treaty establishing a Constitution for Europe by French and Dutch voters (Wohlgemuth - Brandi, 2007: 159 ff.); in June 2008, after the negative Irish referendum outcome on the Treaty of Lisbon (Král, 2008). On all these occasions, the idea of a multi-speed approach was advocated in the political debate as a possible institutional response to the European integration processes at stake.³ All these historical precedents seem to confirm the use of differentiated solutions as a form of “second best” option against the failures of the processes of joint- and homogenous-integration,⁴ often deemed as a sort of threat in order to convince the more reluctant Member States to accept further steps in the integration process.

On the other hand, focusing on the technical provisions, the possibility of pursuing forms of flexible integration among Member States has found three main channels of implementation.

The first channel is well represented by the experience of the Schengen Agreement: an international treaty considered as an example of strict co-operation, in new fields, among some of the Member States, initially signed in 1985 outside the European Communities’ legal order by 5 of the then 10 Member States, and later incorporated into EU law by the Treaty of Amsterdam, to the point that it can now be amended by an EU regulation. However, it still excludes 5 EU Member States (Bulgaria, Cyprus, Ireland, Romania and the United Kingdom) and includes 4 non-EU Member States (Norway, Switzerland, Iceland and Lichtenstein).

A second channel is instead represented by the formal procedures of enhanced co-operation foreseen by EU law, introduced by the Treaty of Amsterdam and then revised by both the Treaty of Nice and the Treaty of Lisbon (Manzella, 2005; Best, 2008: 182 f.). The latter are now disciplined by Article 20 TEU and by the Title III - Part IV TFEU, which regulate the conditions under which at least nine Member States may resort to enhanced co-operation.⁵

² As observed by Webber, 2012: 25, “the political history of differentiated integration in the EU has been shaped primarily by Franco-German relations”.

³ The idea of a flexible integration was formally developed in a number of “multi-speed” projects (Webber, 2008), drafted at different stages of the European history. It is the case, in particular, of the so called *Tindemans Report*, promoted by Belgian Prime Minister during the first oil-price crisis in the early 1970s; of the *Schäuble-Lamers Paper*, approved by the CDU/CSU parliamentary group of the German Parliament after the adoption of the Treaty of Maastricht in 1994; of the *Fischer Humboldt Speech*, held by German Foreign Minister at the Humbolt University in Berlin in May 2000 as a reaction to end of the Cold War and to its impact on the European political geography.

⁴ Part of the literature considered multi-speed integration as a suboptimal, yet likely outcome for the EU (Schmitter, 1996). Some doubts on the concrete feasibility of such a solution were instead raised by part of the economic literature (Alesina – Grilli, 1993).

⁵ The request is to be addressed to the Commission, which evaluates it and submits a proposal to the Council. The latter is to approve it with a formal decision to be adopted through the ordinary decision-making procedure; the Parliament is to consent to the proposal, in the format defined by the Commission.

A third option, the easiest one, is the so-called “opting out”. The possibility for Member States to negotiate certain opt-outs from primary or secondary legislation of the EU has characterised some important stages of the European integration. The history of the EU shows quite a large variety of opt-outs, which are not always fully comparable in terms of the institutional goals pursued and procedural standards. However, a common feature can be found in the fact that, through the opt-out, Member States tend to exclude their participation in certain policy areas.

The United Kingdom chose to opt-out of the Social Chapter, negotiated in 1991 and then abolished in 1997, which was among the first experiences of this kind. The practice was then marked by the implementation of the Schengen *acquis*, on the abolition of border controls between Member States, which saw the United Kingdom and Ireland opt out. The functioning of the European Monetary Union (EMU) was also accompanied by the formal opt-outs of the United Kingdom and of Denmark (while Sweden, which has not opted out from the euro, has, however, deliberately failed to fulfil the criteria for the introduction of the common currency). Apart from the EMU, another three opt-outs from the Treaty of Maastricht, respectively concerning the Common Security and Defence Policy, the Justice and Home Affairs Pillar and European citizenship, were obtained by Denmark.⁶ The entry into force of the Treaty of Amsterdam was, instead, marked by Ireland and the United Kingdom opting out from the legislation adopted in the area of Freedom, Security and Justice.⁷

All these three forms of flexible integration have lately experienced a significant expansion at EU level. In particular, the possibility of strict co-operation in some fields based upon the adoption of intergovernmental agreements or other international law tools have characterised the institutional response of the EU to the ongoing economic and financial crises.

With regard to enhanced co-operation, the mechanism was not enforced for several years. In the last few years, however, in compliance with the revised procedure defined by the Treaty of Lisbon, three initiatives on issues of divorce for trans-national couples,⁸ patents,⁹ and EU financial transaction tax (FTT) respectively, have been initiated.¹⁰

⁶ On the British opt-out from Maastricht’s Agreement on Social Policy, see Brinkmann, 1998: 239 ff.

⁷ The opt-out conditions are now disciplined by the Protocol on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice. The Protocol, which excludes any binding effect of the decisions adopted in the above-mentioned area on the UK and Ireland, ascribes, at the same time, to the two countries opting-out the faculty to opt-in at each successive step, notifying the President of the Council, within three months after a proposal or initiative has been presented to the Council, that they wish to take part in the adoption and application of the proposed measure.

⁸ Council Regulation No. 1259/2010, entered into force in July 2012, which includes 14 Member States.

The combination of these two tendencies has resulted in increased chances of *de facto* opting out for Member States: by either refusing to subscribe to an intergovernmental agreement or by declining to participate in the forms of enhanced co-operation, EU Member States have the opportunity to exercise an opt-out right. In both cases, the exercise of the opt-out option does not preclude, but rather implies, the possibility of adhering to differentiated integration later on.

Moreover, a formal amplification in the resort to opting out was determined by the Treaty of Lisbon, which has enabled it in some specific areas of co-operation (Fletcher, 2009: 71).¹¹

3. THE ENHANCEMENT OF FLEXIBLE FORMS OF INTEGRATION AS A CONSEQUENCE OF THE NEW EUROPEAN ECONOMIC GOVERNANCE

The economic and financial crisis which began in 2008 has undoubtedly favoured the pre-existing EU inclination to undertake forms of differentiated integration. The crisis, in fact, has intensified the link between European integration and the single currency, which, in its turn, has resulted in increased asymmetries in Member State involvement in the European decision-making process. It has enhanced the traditional vocation for multi-speed solutions which has, from the very beginning, shaped the history of the EMU.¹²

⁹ Council Regulation No. 1257/2012, which includes 25 Member States. See also the Regulation No. 1260/2012, of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

¹⁰ COM(2013) 71 final, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, approved in 1stst reading with amendments by the European Parliament on the 3rd July 2013. It includes 11 Member States.

¹¹ The first area is that of the *Charter of Fundamental Rights of the European Union*, which, as interpreted by the European Court of Justice, is to apply fully to EU institutions and to EU legal domain; Protocol n. 30, however, clarifies that domestic legislation in the United Kingdom and Poland, is excluded from the EU jurisdiction; in 2009, also the Czech Republic was included in the exclusion. The area of Freedom, Security and Justice has affirmed itself as a second privileged ground for variable geometry experiences. Two opts out, from the United Kingdom and Ireland, have, in fact, accompanied the shift from unanimous decisions to qualified-majority voting (QMV) in the sector of police and judicial affairs (See Protocol n. 21. Both states will be able to opt into these voting issues on a case-by-case basis). Protocol 36 annexed to the Treaty has recognised the UK to opt out all the police and criminal justice legislation adopted prior to the Lisbon Treaty (or none of it). Moreover, the according to the Protocol on the position of Denmark, this country will remain excluded from the whole area of Freedom, Security and Justice, with no possibility of opting in. On risks related to such provisions, which “ostensibly indicate an outward constitutional stance of isolation towards further and deeper integration and have seemed ripe to generate much legal even political incoherence”, Vara - Fahey, 2013.

¹² As observed by Laffan, 2012: 177, “EMU represents one of the most important policy areas not shared by all member states and the euro crisis has accentuated the importance of the EMU club”.

Member State participation in the new regulatory mechanisms – labelled as “new economic governance”¹³ – is not homogeneous. Some procedures, for example, involve all 28 Member States, while others are addressed only to the Eurozone countries. A great part of the EU legislation recently enacted in this field specifically refers to the “Member States whose currency is the Euro”: that is, to the so-called “Eurozone”, currently composed of only 18 EU Member States. There are countries willing to participate in the single currency, but which are incapable of meeting the required standards for economic reasons;¹⁴ others, in contrast, reject adhering to the Eurozone for political reasons.¹⁵ Finally, a third category of mechanisms (such as the Fiscal Compact) are, instead, agreed upon an intergovernmental basis and voluntarily signed only by some Member States.

Measures falling upon the latter category include agreements negotiated mainly during the European Council meetings and reached outside the EU legal order.¹⁶ Adopting the traditional classification of the main categories of differentiated integration proposed by Stubb (1996: 283 ff.),¹⁷ it would be possible to consider the above-mentioned mechanisms as examples of multi-speed integration, in which the *avant-garde* Member States step forward in some aspects of the participation in the EU, leaving the possibility of joining at a second stage open to the others lagging behind. In other terms, the purpose of these measures is meant neither to create permanent divisions among the Member States, nor to enable Member States to choose freely which aspects of European integration to join and foster, as would be implicit in the idea of the Europe *à la carte*.

¹³ The expression identifies the complex and multilevel set of rules and measures adopted within the context of the European Union, usually approved by the EU institutions themselves, but often external to the EU legal order, and therefore characterised by an intergovernmental nature, which attributes them to the category of international norms. See Chiti, Menéndez, Teixeira, 2012; De Gregorio Merino, 2012; Tuori, 2012.

¹⁴ This is the case, in particular, of Lithuania, Bulgaria, Croatia, the Czech Republic, and Hungary.

¹⁵ This is the case of Denmark and the United Kingdom, which have formally opted out of adhesion to the Eurozone. Sweden, which is legally bound to enter the Eurozone, has also postponed the decision due to the negative results of the referendum on the single currency held in 2003. The EU has declared that it will accept this behaviour only from Sweden, but not from the Member States which adhered to the EU in 2004, in 2007 and in 2013. Finally, the adoption of the euro is perceived as unpopular also in Poland where the decision requires a formal modification of the Constitution.

¹⁶ Examples of supranational norms, adopted through intergovernmental agreements in between Members States, are offered by: a) the European Financial Stability Facility, established by the euro-area Member States following the decisions taken on 9 May 2010 within the framework of the Ecofin Council; b) the Euro Plus Pact, signed on 24-25 March 2011 by 17 Euro area countries and by other 6 countries in order to strengthen the coordination of national economic policies (which however represents a political agreement deprived of the mandatory nature characterising legal rules); c) the Treaty to establish the European Stability Mechanism, originally signed on 11 July 2011 and then, after being modified to make it more effective, signed a second time on 2 February 2012 by euro-area countries. On the legal nature of these agreements, see de Witte, 2013.

¹⁷ Stubb distinguishes among three categories of differentiated integration: *multispeed*, characterised by a core of Member States starting an experience of enhanced integration, leaving up to other Member States the possibility to join it later on; *variable geometry*, based on a permanent division among Member States; and *à la carte*, which offers to Member States the possibility to select which aspects of the European integration to engage in. For a different classification of the various concepts of differentiated integration, see Holzinger - Schimmelfennig, 2012: 292 ff. For an overview of the existing literature on the subject, see Webber, 2012.

The crisis, therefore, urged the adoption of legal solutions which enabled a certain degree of flexibility in the participation of the Member States in the new economic governance. Such solutions were not found in the tools of differentiated integration formally disciplined by EU law (specifically, the procedures of enhanced co-operation), but in the traditional intergovernmental decision-making mechanisms, which, as such, stand outside the EU legal order. As a consequence, it can be argued that the attempts of the EU to foster the integration process even in times of economic crisis – which, as such, tend to augment the distance among Member States – have been based upon a renewed resorting to intergovernmental procedures and decision-making bodies (Chiti, Texeira, 2013: 683 ff.).¹⁸

This choice has been criticised by part of the literature. For instance, some scholars (Fabbrini, 2013;¹⁹ Cantore, Martinico, 2013: 475 f.) qualified one of the most important forms of differentiated integration in the EU – to be identified with the Treaty on Stability, Coordination and Governance (TSCG, the so-called “Fiscal Compact”) – as a missed opportunity for enhanced co-operation, compliant with Art. 20 TEU and Title III - Part IV TFEU.²⁰ The Fiscal Compact, formally adopted as an international treaty subscribed by 25 out of 27 Member States (Fabbrini, 2013), can be considered a clear example of European flexible integration, substantially ascribable to the “emerging” forms of differentiation clearly represented by the Schengen protocol. The Schengen experience, in fact, could contribute to describe the future development of the Fiscal Compact, which is expected to become part of EU law in the near future.²¹

With regard to what concerns the special form of asymmetric integration represented by the Eurozone, the relationship between countries inside and outside the Eurozone can, to large extent, be attributed to the category of multi-speed integration. All the Member States of the EU are required to adopt the euro and join the Eurozone, by meeting certain conditions known as “convergence criteria”. An exception has been made for those countries which have “opted-out” of joining the euro for reasons of economic sovereignty, but which, in any case, can accede to it in the

¹⁸ On the exacerbation of the phenomenon of executive dominance in the EU context in response to the economic crisis, Curtin, 2014: 1 ff.

¹⁹ Fabbrini (2013: 14-16) has raised some doubts on the appropriateness of the enhanced cooperation mechanism in the two cases of divorce and patents, stressing the fact that, ironically, the mechanism would have fitted perfectly to the field of economic governance.

²⁰ On the proceedings that lead to the adoption of the TSCG, see Craig, 2012b.

²¹ According to art. 18 of the TSCG, in fact, “Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union”.

future if they so wish.²² This implies that accession to membership in the Eurozone is formally made/extended to all EU countries (Gostyńska - von Ondarza, 2012).

From an institutional point of view, the Euro area, as area of differentiated integration, has seen a fairly evident process of the emergence of new institutions, limited, if not in the participation, at least in the active involvement of the sole representatives of the Eurozone Member States, such as the Euro-group (the meeting of the finance ministers of the Euro area, normally convened in camera a day before the Ecofin meetings) and the Euro-summit (also referred to as the “Eurozone summit”, which is the meeting of the heads of state or government of the Member States of the Euro area).²³

In summary, the financial and economic crisis has deeply affected the intensity and nature of the interaction between the EU institutions and the Member States; it has advocated the adoption of institutional mechanisms based upon very close co-operation among national and EU actors, and it has called for the integration of national rules, procedures and structures within the EU legal order. The response to these emerging needs has significantly transformed the very structure of the EU itself, leaving a distinct political, institutional and governance legacy (Laffan, 2012: 173), which eventually gave space to the enhancement of more flexible forms of integration (Pernice, 2012; Tosato, 2013).

Moreover, the current economic trend has consistently increased the differences among Member States, in terms not only of economic and fiscal performances, but also of the country’s capacity to cope with recovery measures (Curtin, 2014: 29). Also from the perspective of the addressees, some of the new mechanisms – such as the rescue mechanisms and the rules on bail-outs – are only directed to specific European States.²⁴

²² Among the other countries excluded from the Eurozone, Sweden has not made the necessary changes to its central bank legislation and does not meet the convergence criterion related to participation in the Exchange Rate Mechanism (ERM II). The remaining States have all joined the EU in 2004 and 2007 and, at the time of their accession, they did not meet the convergence criterion.

²³ The so-called Euro-summits represent a forum of leading representatives of the Eurozone countries where issues concerning the common currency management are discussed. The discussions often include a debate on the strategic guidelines of national economic policies.

The Summit – first held in October 2008, on the basis of common agreements among Member States – has been somehow institutionalised by the TSCG, which requires a *minimum* of two Euro-summit meetings per year. Following a decision adopted in October 2011, the President of the Summit is elected by Eurozone heads of state or government at the same time as the European Council elected its President. Its mandate lasts two years and a half. At the moment, the office is performed by Herman Van Rompuy, elected as the first President of the Euro-summit on 1 March 2012.

On the implicit coincidence between the role of President of the European Council and President of the Euro-summit, see Hyvärinen in Kocharov, 2012: 14.

²⁴ It is, above all, those countries belonging to the Eurozone that have agreed upon the adoption of strengthened procedures aiming at preventing and promptly manage bailouts on the basis of re-inforced fiscal and macroeconomic surveillance and correction mechanisms.

As a consequence, these ongoing trends have fostered the idea that the differentiation vogue would lead not to a “multi-speed”, but rather to a “two-speed” Europe, in which a given group of Member States co-operates crosswise in all policies and areas. Relying on these processes, some authors have suggested a further development of “two-speed” Europe, with a leading group of Member States attaining further steps of integration through their own common institutional architecture (Piris, 2012: 66 ff.). In the contrast, it has been observed (Craig, 2012: 804) that the perspective of “two-speed” Europe could not be taken as the most probable, first of all, because there is not, at the moment, a fixed group of Member States wanting to lead the integration process, as their interests and preferences diverge according to the area considered. Secondly, because the institutional architecture resulting from this “two-speed” Europe would seem heavier and even more complex, with parallel sets of institutions, than the current one.

4. ASYMMETRIC EU AND THE WORSENING OF THE DEMOCRATIC LEGITIMACY PROBLEM: A CHALLENGE FOR PARLIAMENTARY REPRESENTATION IN THE EU

The asymmetric mechanisms which characterise the contemporary European architecture have determined a major change in the formal role and powers of both the European and national institutions involved in the regulatory system as well as in their overall position in EU decision-making. According to Article 10 TEU, parliamentary representation in the EU is ensured by two channels: one embodied by the European Parliament and the other by Member State forms of governments and the national parliaments (Micossi, 2008; Lindseth, 2010). Both these two channels of parliamentary representation have been affected in their institutional role and functions by the ongoing asymmetric tendencies of EU decision-making.

Of the three above-mentioned forms of differentiated integration in the EU, the second – represented by the enhanced co-operation – does not seem to alter the institutional architecture of the EU substantially.²⁵ Both in the initial stage of the activation of the enhanced co-operation and in the subsequent stage of the functioning of the co-operative mechanism, the European procedure – as disciplined by Article 20 TEU, Articles. 329-330-332 and 333 TFEU – involves all the relevant EU

²⁵ Looking at the substantive constraints of, and procedural requirements for enhanced cooperation, Thym, 2005: 1737 ff. demonstrated that they do not contradict the general principles of European law as characteristic features of its supranational legal order and highlighted that the general mechanism of enhanced cooperation are integrated into the single legal and institutional framework of the European Union, thereby preserving its constitutional unity.

institutions, in their ordinary composition, in order to reduce the difference with the ordinary EU law-making rules (Fabbrini, 2013). After being evaluated by the Commission, the proposal for the activation of enhanced co-operation has to obtain the consent of the Parliament and the authorisation of the Council (through ordinary decision-making, based upon qualified-majority voting). Once enhanced co-operation has been activated, the Member States involved make their ordinary use of EU institutions, including the European Parliament, without bearing additional costs. The only variation concerns the special format applied to the Council: all the members can, in fact, participate in the decisions to be adopted in the context of enhanced co-operation, but only those members which represent the countries formally involved in the mechanism can take part in the vote. As correctly observed (Konstadinides, 2009: 251), these rules are based upon the idea that “any initiative for a partnership arrangement should rather occur within the structures and institutions of the community rather than outside them. This means that any agreement involving a certain amount of Member States would come under the Community’s parliamentary or judicial scrutiny”.

A much greater impact on the institutional architecture of the EU is derived from the new European economic governance, which can be considered as a combination of asymmetries deriving from the first and the third categories of differentiated integration, as they are characterised by resorting to both intergovernmental tools and opt-out options.

The institutional consequences of this architecture resulted in an overriding prevalence of informal procedures and practices over the official proceedings and competences (Laffan, 2012). The need to adopt quick and intrusive measures has led to traditional procedures being abandoned, and the decision-making power of the European Council (Rittelmeyer, 2014: 25 ff.; Alexandrova - Caramia - Timmermans, 2014: 53 ff.), whose role is no longer limited to a strategic function,²⁶ the Economic and Financial Affairs Council (Ecofin) and of the European Central Bank (ECB), being strengthened.²⁷ Other emerging institutions, such as the Eurogroup and the Euro-summit (Borges, 2012: 7; Laffan, 2012: 177), also come to play a very significant role. Most of these institutions are composed only of the governments of the Eurozone Member States, a solution which enables variable geometry schemes, and, consequently, makes it possible to cope with asymmetric decision-making.

²⁶ As observed by Leino - Salminen, 2013: 864, it is difficult to maintain that the European Council, and in particular its members, lacks democratic backing. However, its *de facto* legislative role, combined with the shortage of transparency affecting its meetings do represent a problem from a democratic perspective.

²⁷ Peroni, 2013: 183 ff.; Barbier, 2013: 212 ff.

Moreover, the emerging tendency towards bilateralism in the dynamics of political interaction (once led by the Franco-German “Merkozy couple”²⁸ and now headed by the Anglo-German discussions on the future conditions of Britain’s membership²⁹) has contributed to determine a further expansion of the executive branches. This situation has given origin to a new “executive federalism”, which still reflects the “reluctance of the political élites to replace the established mode of pursuing the European project behind closed doors with the shirt-sleeved mode of a noisy, argumentative conflict of opinions in the public arena” (Habermas, 2012: 337).

This renewed preference for intergovernmental methods, however, seems to endanger the supranational architecture upon which the EU is grounded deeply. Scholars have denounced the lack of transparency and democratic oversight which characterises both the procedures and the solutions of the new economic governance,³⁰ which challenges both the channels of parliamentary representation: neither the European Parliament, nor national parliaments, in their respective areas of competence, seem to be capable anymore of fully complying with the increasing expectations of transparency and democratic oversight over the regulatory mechanisms resulting from intergovernmental asymmetric decision-making.

This happens right at the very moment in which the role of directly-elected assemblies would have been more useful: as has been noted, with the “transition from ‘negative’ to ‘positive’ integration”, enhanced after the euro crisis, “problems of distributive justice”, regarding social policies, the labour market, economic and fiscal policies arise (Habermas, 2012: 347). This leads us to reconsider the issues relating to the so-called “input legitimacy” as being potentially strategic (Schmidt, 2012: 108 ff.; Weiler, 2012: 248 ff.; Nicolaidis, 2013: 351 ff.³¹).

²⁸ As observed by Habermas (2012: 348), in a certain phase, “Angela Merkel and Nicolas Sarkozy appear to have settled some sort of compromise between German economic liberalism and French statism with a completely different intent”, extending “the executive federalism, which is implicit in the Treaty of Lisbon, into an outright intergovernmental rule by the European Council”.

²⁹ Apart from the traditional Franco-German axis of the EU, the recent visit to Britain of Angela Merkel – which took place in February 2014 and culminated in the historic speech of the Chancellor (the first after the reunification of Germany) to the twin Chambers of Parliament at Westminster – seems to bear witness to the emergence of a new dialogue between the United Kingdom and Germany, fostered by the common concerns about the conditions of Britain’s membership of the EU and on the Ukraine crisis.

³⁰ On the problems of clarity affecting the functioning of the EMU structures, whose arrangements can barely be grasped by the “common man”, see Leino - Salminnen, 2013: 862.

³¹ On the perspective of the so called “throughput legitimacy”, which typically relates to the justification of governance modes based upon the quality of procedures, see Schmidt, 2013.

5. THE EUROPEAN PARLIAMENT FACING THE CURRENT TRENDS OF MULTI-SPEED INTEGRATION

A large part of the debate on the institutional architecture of the EU tends to interpret its ongoing adaptations to external changes as a zero-sum game. This has also characterised the dominant approach to the multi-speed integration challenges relating to the Eurozone crisis and the new European economic governance. Many scholars have, indeed, emphasised the fact that there are institutions, such as the European Council (Wessels et al., 2013: 14 f.) and the Commission itself (Smits, 2012: 827 ff.), which are winning. And others, like the Council (Weiler, 2012b: 254) and the European Parliament, in particular, which have been losing weight in recent years.

There are manifold reasons why the European Parliament is supposed to lose power and institutional appeal. The first of these reasons relates to the overall marginalisation of traditional forms of parliamentary oversight which affect the general shift towards European governance based upon intergovernmental, often asymmetric, decision-making dynamics.

A second reason is specifically linked to the position occupied by the European Parliament in the institutional architecture of the EU. It has been argued, in fact, that the European Parliament suffers from ongoing asymmetric trends more than the other EU institutions.

The weakening of the European Parliament can be considered to be the consequence not only of the trend towards more intergovernmentalism in the EU, but also, and, above all, of the coming into force of new legal constructions (such as the Fiscal Compact) separated from the EU and not involving all the Member States (all represented in the EP, by definition). The European Parliament, in fact, is incapable of adapting its internal functioning to these asymmetric and government-oriented decision-making schemes, as its origin and institutional procedures are deeply rooted in the so-called “community method”, which the new European economic governance has *de jure* and *de facto* overcome.

Also, looking at the formal competences of the body, the constant trend towards the enlargement of its functions, which has characterised the institutional path of the European Parliament from the Single European Act of 1986 to the Treaty of Lisbon of 2007,³² seems to have lately experienced a reversal or at least a stop, which the new European economic governance has emphasised. It has been argued that, in particular, in the procedures designed by the so-called “Six-pack” and by the Fiscal Compact, the European Parliament has been involved too late; it does not receive the NRP

³² On the answers given by the Treaty of Lisbon to the problem of the democratic deficit, see Pinelli, 2008: 925 ff., Starita, 2009C; Lord, 2012; Manzella, 2013.

(national reform programmes), the SCP (stability/convergence programmes), nor the draft budgetary plans directly; it is devoid of decision-making power, as it can neither concur in fixing the strategic priorities of the fiscal year and the European Semester, nor review the country-specific recommendations once adopted by the Council (Fasone, 2013). As such, the role of the EP is formally restricted only to the right to receive information. The strategic priorities are defined by the European Council. The European Parliament only needs to be informed on specific occasions and consulted on others.

At the same time, the EP is deprived of concrete and reliable oversight mechanisms, combined with the possibility of political and legal sanctions against the decision-makers of the European Council, its President and the Eurogroup (Maurer, 2013: 3). As is well known, EU and Eurozone fiscal policies, procedures and instruments, such as the European Stability Mechanism and the European Financial Stability Facility, are not dependent on the EU budget. Therefore, the European Parliament, which approves - together with the Council - the EU budget, is excluded from both the decision-making and the oversight of these instruments, which are essential for the EU and Eurozone fiscal policy (Maurer, 2013: 2).

In contrast, national parliaments, although deprived of some of their powers over the definition of national budgetary policies, seem to have gained, from the new European economic governance, new opportunities for intervention in the multi-level and asymmetric decision-making processes (Griglio-Lupo, 2013: 345 ff.), and their active role is strongly needed in a more intergovernmental Europe.

This general overview on the role of the European Parliament does not necessarily imply, however, that the institution is now weaker than in the past.

The relative lack of formal powers has, in fact, been somehow balanced by the attempts of the EP to consolidate “soft” powers tools, which have enabled this institution to dialogue with some of the key actors of the Eurozone crisis management, such as the President of the European Central Bank, the President of the Commission, and the President of the Euro-summit (o Broin, 2012: 2³³). All these meetings take place in the competent EP parliamentary committees. This parliamentary practice, labelled under the formula of the “economic dialogue”, is now formally provided for by the “Six-pack” and by the “Two-pack”, which, through the introduction of these provisions, have

³³ The author mentions as another example of ‘soft’ power: the activity carried out by the European Parliament’s *ad hoc* committee on the Financial, Economic and Social Crisis (CRIS), chaired by German MEP Wolf Klinz.

tried to respond to the criticism relating to the lack of democracy of the new economic governance.³⁴

In addition, the EP has tried to re-inforce the institutional links with the European Council, by promoting, on the initiative of its Speaker, Martin Schulz, a practice of open confrontation on the speeches of the EP President, held at the beginning of each meeting of the Council, within the Council itself.³⁵

From a legal perspective, some scholars have correctly argued that the position of the EP has grown in importance in the Fiscal Compact, if one considers that the previous versions of the Stability and Growth Pact did not even mention the European Parliament (Fasone, 2012; Fasone, 2014a: 164 ff.; Cantore - Martinico, 2013: 466).

Finally, the EP has often played a decisive role in the drafting of some of the fundamental normative pieces of the new European economic governance. To wit, it has contributed to shape the final text of the “Six-pack”, by limiting the attempts by a number of Member States to weaken the automaticity of the new rules (McArdle, 2011; o Broin, 2012: 1). And, in extending the length of the exam of the “Two-pack”, it has also managed to influence the negotiations that led to the Fiscal Compact.

6. THE IDEA OF THE EUROPEAN PARLIAMENT AS A VARIABLE GEOMETRY INSTITUTION AND ITS CONTRADICTIONS

The role of the European Parliament has recently been affected by conflicting tendencies, which have led this institution to try to contrast – mostly upon the basis of informal arrangements – the ongoing marginalisation of its formal role. However, from a normative perspective, a further enhancement of the role of the European Parliament, specifically in the policies concerning the Eurozone, has been considered as largely desirable.

³⁴ More specifically, the “economic dialogue” is provided by Regulation 1175/2011, which formalised the European Semester. On this point, see Tuori, 2013: 45-46. As observed by Hallerberg - Marzinotto - Wolff (2011: 28), in the context of the European Semester, the European Parliament should “become a forum in which information is exchanged and its role of watchdog for the relationship between the Commission and the Council made more visible and effective”.

³⁵ On this point, see European Parliament - Directorate general for internal policies, 2013: 22-23. See, also, Gianniti-Lupo, 2012.

This perspective, however, has revealed itself to be potentially problematical, at least for the time being, for a variety of reasons.

It has been argued, in fact, that an underlying contraction would accompany any attempt to strengthen the role of the European Parliament in the face of the ongoing multi-speed and asymmetric decision-making trends, as this assembly represents the EU citizens as a whole and is therefore not suited to internally differentiated modes of functioning.

In particular, a strengthening of the powers of the European Parliament to intervene in the euro-crisis management would even engage those countries which should not have their say in this policy area in the regulatory mechanism, as they do not participate at the EMU. According to some, “democracy requires that all those concerned be given a chance to participate. But, arguably, it also requires that those not concerned be left without a voice” (Tuori, 2013: 46; Tuori - Tuori, 2014: 215).

In order to overcome the above-mentioned objection – which, as we will see, is not devoid of its own weaknesses – two main groups of hypotheses have been formulated. The first group aims at building a new institution; the second group aims at adapting the internal organisation of the EP.

The first group includes the proposal, put forward by German MP Michal Roth (Roth, 2011), which envisaged the creation of a sort of Euro-Parliament, a parliamentary assembly composed of the members of the national parliaments and the MEPs from Eurozone Member States only. In addition, the idea, supported, among others, by Joschka Fischer (Fischer, 2012), of creating a Euro-Chamber composed exclusively of members of national parliaments (thus going back to the institutional architecture of the dual mandate experienced until the first direct elections to the EP of 1979), in order to debate and control the measures proposed by the governments of the Eurozone, can also be included to this group of proposals. An intermediate position, among these two options, has been supported in the Manifesto for Europe, subscribed by Thomas Piketty and 14 others on May 2014,³⁶ advocating the creation of a European chamber composed of the representatives of national

³⁶ The initiative followed other two recent Manifestos, published by German and French intellectuals, which revived the idea of establishing a “Political Community for the Euro” to give the single currency a true system of democratic governance. In particular, on 17 October 2013, a group of 11 German academics, known as Glienicke group, published in the German magazine *Die Zeit* an essay entitled, “Towards a Euro Union” (<http://www.glienickergruppe.eu/english.html>), which advocated the creation of a Euro-government and a Euro-parliament. A few months later, a group of French EU experts established the so called “Eiffel group” (<http://www.groupe-eiffel.eu>), publishing, in early 2014, on the daily *Le Monde* a proposal entitled “Manifesto for a Euro Political Union” which pushed for a strengthening of the institutional apparatus of the Eurozone, turning the latter into a real political community with a parliament (and a government) of its own

parliaments, which would initially involve “only the countries of the Eurozone that want to move towards a greater political, fiscal and budgetary union”.³⁷

A similar position was argued by Renaud Dehousse (2012: 93), who maintained that, if the EP insists on defending its unitary character and rejects the establishment of a parliamentary assembly representing only the Member States involved in differentiated integration, the latter would react by trying to weaken the role of the EP and by addressing national parliaments as the main source of legitimacy and representation.

Among the most significant hypotheses of the second group, there is the proposal put forward in the *Final Report of the Future of Europe Group* of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain. They suggested limiting the voting rights of EPs exclusively to those MEPs elected in the Eurozone countries in all decisions applicable only to the Member States already in the Eurozone.³⁸

These assumptions, and proposals, raise a multitude of doubts and objections.

The position argued by Tuori seems to contradict its own premises and the legal provisions currently in force. In fact, if the European Parliament is meant to represent not each Member State, but the European citizenry as a whole (Article 14 TEU), then it is impossible, without altering the nature of this institution, to make *any* distinction based upon the country of election of the MEPs (which, as is well known, could not coincide with the Member State of which the MEP is a citizen).

In the European architecture, the European Parliament plays the role that, in a federal system, is entrusted to the lower chamber: it embodies the “one citizen-one vote” principle, which is a warranty of equality and democratic representation (Stepan, 1999: 23 f.). In contrast, intergovernmental bodies, such as the Council (of Ministers), tend to give voice to the territorial components of the EU and, as such, convey a deviation from the above-mentioned principle of the “one citizen-one vote”. Any arrangement that alters the institutional ratio of the EP into that of an asymmetric chamber in which territorial representation prevails over the “one citizen-one vote” principle would result in institutional disequilibrium. Over-representation of territorial interests would, in fact, determine a potential breach of the principle of equality.

³⁷ As clearly stated in the Manifesto (Piketty et al, 2014), the aim of this “new democratic architecture for Europe” is to make it possible “to finally overcome today's inertia and the myth that the council of heads of state could serve as a second chamber representing the states”.

³⁸ The Report, released on 17 September 2012, is available at: <http://ec.europa.eu/dorie/cardPrint.do?locale=en&cardId=1275685>. The Report, in fact, records that “Most members were of the view that, if a decision applies only to the Euro area plus other ‘pre-in’ member states who wish to participate already at this stage, ways should be explored to involve the MEPs from these countries (while fully respecting the integrity of the European Union and the European Parliament as a whole)”.

A recent analysis on the voting behaviour in the European Parliament³⁹ has clearly shown that political group membership is a stronger determinant of MEP voting behaviour than nationality. This implies that the direction of EU policies is first and foremost influenced by the political composition of the Parliament and that national affiliation only marginally counts in the definition of voting behaviour.

Notwithstanding this, both groups of proposals do not fail to raise some criticism.

The first group of proposals, in particular, raises the same kind of problems that have always led to the rejection of the attempts to create a new parliamentary institution, representative of the national parliaments: essentially, this is a further increase in the institutional architecture of the EU,⁴⁰ a weakening of the EP, flanked by the risk of having the new chamber transfigured into a voice against the European integration.

With regard to the second group of proposals, it is clear that the re-thinking of the internal organisation of the EP in terms of variable geometry would hinder the fulfilment of the assembly's representative mission, signalling a backward step in the history of the institution (Kreppel, 2002). This approach would implicitly change the very nature of the representative mandate attributed to MEPs, as it would transform the EP into a form of territorial chamber, whose members would be bound to a sort of mandate from their countries of origin, as in the German *Bundesrat* – whose authentic “parliamentary” nature nonetheless raises some doubts⁴¹ – thus falling into the slot which, in the architecture of the EU, is already fulfilled by the Council (of Ministers) (Russell, 2000: 9; Rodden, 2004: 490 f.).

The objection has been made that the Euro is the currency of the EU, and not just of the Eurozone. As a consequence, any form of legislation which has an impact on the Eurozone should be taken in the interest of the Union as a whole (Maurer, 2013: 9). This remark is at the basis of the provision – settled by Article 4 para. 5 of the Rules for the Organisation of the Proceedings of the Euro Summits, adopted by the Council of the European Union on 14 March 2013 – according to which “The Heads of State or Government of the Contracting Parties to the TSCG, other than those whose currency is the euro, which have ratified the TSCG, shall 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,

³⁹ Nissen, 2014: 55. The analysis is referred to the PE legislative mandate 2009-2014.

⁴⁰ As observed by Craig, 2013: 808, “the rationale for this duality would be difficult to comprehend as would the interrelationship between such bodies”.

⁴¹ For further details on the nature of the representation which the *Bundesrat* identifies, see Posser, 1994: 1145 f., and Rührmair, 2001: 80 f.

when appropriate and at least once a year, in discussions on specific issues of implementation of the TSCG”. The need to open up participation at the Euro-summits also to the representatives of non-Euro countries which have subscribed to the Fiscal Compact confirms that the economic and monetary regulation is an issue deeply rooted in the destiny of European integration.

Even economic studies investigating the optimal conditions which could allow some of the member countries of a federation to form a sub-union have demonstrated that, in terms of the governance rules for the federation, “countries which decided to opt out of the sub-union should however be involved in the decision process of the sub-union” (Bordignon - Brusco, 2003: 20).

At a more general glance, it should be highlighted that it is absolutely normal for national parliaments to approve legal provisions which are not applicable to every part of the national territory, and thus with the active – and, sometimes, decisive – participation of members elected in areas in which the legislation will never produce any effect. This is usually deemed as something which does not alter the democratic nature of the national decision-making process.

Even when the territorial extent of legislation is perceived as a problematical issue due to the specific constitutional arrangement of a certain political organisation, any solution aimed at differentiating the internal composition or voting of the parliament is clearly seen as awkward. This is the lesson that the latest debate on the well-known “West Lothian Question” (sometimes called “English Question”: Hazell, 2006) – that is, whether members of the House of Commons elected in Northern Ireland, Scotland and Wales could vote on matters that affect only England – teaches us. The Report on the Consequences of Devolution for the House of Commons, released in March 2013 by the McKay Commission⁴² tries to offer a solution to the objection – first raised by Tam Dalyell, Member for West Lothian, during the debates on devolution in 1970s, and still to this day unanswered – known as “English votes for English laws”.⁴³

The Commission, in fact, explicitly rejected the creation of a separate English legislature, stating that such a solution would produce de-stabilising effects and would, in any case, require a complete constitutional reform. At the same time, it also abandoned the “minor” option, which consisted of the limitation of the right to vote on those laws likely to have a “separate and distinct effect” upon

⁴² The McKay Commission (TMC) was set up to consider how the House of Commons might deal with legislation which affects only part of the UK, following the devolution of certain legislative powers to Scotland, Northern Ireland and Wales. The independent Commission was chaired by Sir William MacKay, former Clerk of the House of Commons and considered among the maximum experts in parliamentary procedures.

⁴³ The central issue of the West Lothian Question is to be found in the contradiction according to which “MPs from outside England could help determine laws that apply in England, while MPs from England would have no reciprocal influence on laws outside England in policy fields for which the devolved institutions would now be responsible”. See The McKay Commission, 2013: 7.

England exclusively to MPs representing English constituencies. This proposal, in fact, would favour the creation of different “classes” of MPs and lead to potential “deadlock”, as the majority of English MPs might not coincide with the majority that supports the government. Finally, the Commission also highlighted the vagueness of the “separate and distinct effect” formulation, arguing that the application of such a criterion would undoubtedly be controversial.⁴⁴ As a result, the Commission suggested a “partial, practical workaround to a problem created by a disjointed set of constitutional changes” (Elliott, 2013), based upon the idea that English MPs should be heard and considered on those bills liable to have “a separate and distinct effect” upon England (for instance, by creating a Grand Committee consisting of all the MPs representing the relevant constituencies which could render an opinion), but without any power of veto.

The conclusions of the MacKay Commission can be usefully referred to the above-mentioned hypothesis of differentiation in the internal composition and voting of the European Parliament based upon the country of origin of MEPs. It has been remarked that the transposition of the West Lothian question to the European Parliament would be even more difficult (Fasone, 2014b).

Finally, a legal reason against the proposals for an asymmetric functioning of the European Parliament can be found in the experience of the enhanced co-operation procedures as disciplined by the Treaty of Lisbon. As previously observed (Section 4 above), Member States participating in enhanced co-operation do, in fact, make regular use of EU institutions.⁴⁵

7. CONCLUSIONS: FACING FLEXIBLE INTEGRATION, A CHALLENGE WHICH REPRESENTATIVE ASSEMBLIES SHOULD EMBRACE TOGETHER

For a long time, scholarship has advocated an improvement in the quality of political representation and in the circuit of accountability for the European experience, which has been

⁴⁴ The problem clearly emerged in the discussion on the Legislation (Territorial Extent) Bill, a Private Member’s Bill, promoted by Harriet Baldwin and considered in Committee on March and April 2011, whose aim was to implement the principle of the “English votes for the English Laws” by providing that each draft primary and secondary legislation shall contain a statement setting out its legal effect on each nation of the United Kingdom. In developing this solution, the Bill highlighted the concern that a bill may formally apply only to a nation, but, for instance, by depressing public expenditure there, may at the same time produce an indirect impact on the other nations. The problem was solved by the Legislation (Territorial Extent) Bill by providing that draft legislation should be accompanied by a financial memorandum, which will show the financial effects on each nation.

⁴⁵ Member States participating at the enhanced co-operation can in fact make use not only of representative bodies, such as the European Parliament and the Council (of Ministers), but also of other institutions, such as the European Court of Justice. On the different impact that the differentiated integration respectively on majoritarian and non-majoritarian institutions, see Dehousse, 2013: 92 f.

described as being “stretched in opposite directions by the centripetal forces of integration and the centrifugal pull of regionalism” (Downs, 1999: 90). These remarks seem to acquire new relevance in the contemporary framework, characterised by increasing complexity, ongoing pulses to differentiated integration and sharpened cleavages among Member States. An improvement in the democratic legitimacy circuit is universally expected also in order to rescue the European Parliament from the burden of the often unpopular choices devolved upon its responsibility.

Responding to the increasing asymmetries of the EU by making the existing institutions, above all the European Parliament, more asymmetric, would consistently endanger the cohesion of the Union and threaten the good functioning of its governing bodies. This is the argumentation developed in the previous sections. The comparison with federal experiences in particular proved that the institutional architecture of the EU should be based upon a balanced combination of territorial and unitary elements, as happens in federal states. A consistent variation in the institutional ratio and internal functioning of the European Parliament would substantially alter the democratic nature of the representative dimension of the EU, endangering the principle of the “one person-one vote” which this assembly embodies as well as the prohibition of a binding mandate, on which the political representation is founded.

This idea leads us to re-consider the overall representative circuit upon which the EU is based. In particular, it suggests a reflection upon the compound nature of the democratic representation of the EU, based upon a double channel of parliamentarism and upon the intervention of a multitude of intergovernmental bodies more or less directly related to elected assemblies.

The stratified and composed nature of the representative dimension of the EU – well depicted by the image of the “multi-level parliamentary field” (Crum - Fossum, 2009: 249 ff.) or by the idea, albeit slightly different from the former, of the euro-national parliamentary system (Manzella - Lupo: 2014) – looks like a fundamental point of reference when one reflects upon the institutional solutions to be advocated in order to face the current trends of the EU. In particular, it is not possible to entrust the institutional burden of representing European citizens and of overseeing the activity of the EU fragmented executive (Curtin: 2014) to one single body. The EP itself, notwithstanding its direct democratic legitimacy, is not capable of managing this situation on its own. Its unitary institutional mandate and representative function render it ill-suited to asymmetric solutions aiming at differentiating its organisational and functional standards according to the nature and the territorial extension of the decisions to be taken.

A possible response to the challenges that the perspective of differentiated European integration raises may, instead, be found in the further development of co-operation and interaction among

representative levels and bodies, which can be pursued by combining different forms of democratic participation.

Representative parliaments can, in fact, take advantage of a multitude of more or less formally disciplined procedures and powers. For national parliaments, the reference is, in particular, to the “early warning mechanism” (EWM) and to the “political dialogue”, both of which directly involve the representative assemblies of the Member States in an “early” making of EU draft legislation.⁴⁶ These tools may acquire growing relevance as collective instruments for the democratic oversight of the EU decision-making process. As correctly observed, “with their new powers under the EWM national parliaments have in effect become a collective actor within the EU”, a sort of “virtual third chamber” (Cooper, 2012: 441 f.).

The practical implementation of these tools and procedures, however, tend to differ substantially from parliament to parliament, as only part of national representative assemblies have been able to exploit their participative opportunities in EU affairs fully in the latest period (Höing, 2013: 255 ff.; Neyer, 2014: 126). Moreover, the scrutiny activity carried out by national parliaments finds its main institutional reference in the national executive branch and, as such, is incapable of fully covering the range of action of EU decision-making procedures and institutions.⁴⁷

This remark helps to explain why the intervention of national parliaments must be co-ordinated and possibly integrated with that of the EP.⁴⁸

The European Parliament, in fact, can positively contribute to the dimension of early collective scrutiny embodied by the national parliaments: through the economic dialogue and the practice of open confrontation, the European Parliament has the opportunity to be involved at the very beginning of the decision-making process, also participating in those procedures in which only a limited part of the Member States are involved. The information acquired and the position assumed at these stages of European decision-making could be effectively confronted with those of the national parliaments, in order to create a network of representative assemblies capable of sharing, if

⁴⁶ Scholars have widely debated on the nature (Kiiver, 2008; Eriksen 2009: 224-8) and on the institutional consequences of the EWM (Maurer, 2008; Raunio, 2010; Piris 2010).

⁴⁷ A study on the different modes of national involvement in the exercise of the EU scrutiny activity has been carried out by Auel et al. within the OPAL project (see the results of the project cited in Auel - Höing, 2014). The study reveals that only a minority of Parliaments try to develop a direct dialogue with the EU institutions, and specifically with the EU Commission, through the political dialogue and the participation at the early warning mechanism. The majority of national Parliaments, in fact, directs their scrutiny activity at national governments.

⁴⁸ This perspective is now favoured by the belief that the economic and financial crisis has shared between the EP and NPS a common concern on the risk of a marginalisation of the role of elective assemblies in the governance circuit. On this point, see the Annual Report 2012 of the European Parliament “*Interparliamentary relations between the European Parliament and national Parliaments under the Treaty of Lisbon*”, available at: http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/shared/Publications/Annual%20report/11900%20Annual%20Report%202012_EN_lowres.pdf.

not co-ordinating, their scrutiny behaviour and positions. The multiple forms of co-operation that this perspective offers are particularly suited to offering a solution to the institutional challenges that an asymmetric Europe raises.

Aside these procedures and tools, it could not be underestimated – as a fundamental component of the multilevel parliamentary field – the inter-parliamentary co-operation (IPC) which, in its multifaceted manifestations, could more easily adapt to the flexibility expectations stemming from ongoing asymmetries.

There are many formats of IPC, which can be collected around two main models. A first model, well represented by the COSAC experience, seems to result in the creation of an *ad hoc* Grand Committee, in which all competent representatives of national parliaments are given the chance to participate. A second model is identified by the European Convention,⁴⁹ which could be summoned to draft a new EU Treaty and which is composed, among others, of national MPs and MEPs.⁵⁰

The recent creation of the “Conference for Economic and Financial Governance” (Kreilinger, 2013), enshrined by Article 13 of the Treaty on Stability, Coordination and Governance – which combines features of both formats of IPC –, as well as the Interparliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), set up in April 2012 (Wouters, 2014), show that the dialogue among parliaments is addressed at the growing expectations and new tasks in European governance (Manzella, 2012; Esposito, 2014: 133 ff.). At the same time, however, the first steps of this Conference seem to confirm most of the contradictions of the current forms of IPC, as they are unable to cope with the asymmetries among the Member States and lack the capacity to adopt binding decisions (Lupo, 2014: 113 ff.).

These remarks confirm that the co-operation among national parliaments and the EP should change its institutional conception and start to be considered as an opportunity not only to exchange information and best practices, but also to co-ordinate respective positions and co-determine future

⁴⁹ On the positive impact that the Convention method exercises over the legitimacy of the EU treaty-making, see Fossum, 2005: 143 ff.; Risse-Kleine, 2008; on the results achieved through the Convention format on the ground of inclusiveness, participation and involvement of different institutional actors, see Closa, 2003; Bourne, 2006.

⁵⁰ The procedure is now disciplined by Article 48 of the TEU. Any Member State, the European Parliament or the Commission may submit to the European Council proposals for the amendment of the Treaties. The Council forwards such proposals to the European Council. NPs must be notified. If the European Council agrees to examine the proposals, a Convention composed of representatives of the national Parliaments, the Heads of State or Government of the Member States, the European Parliament and the Commission is convened by the President of the European Council. The Convention shall adopt by consensus a recommendation to an Intergovernmental Conference (IGC). Alternatively, the European Council may decide by a simple majority, with the consent of the European Parliament, not to convene a Convention; in this latter case, the European Council itself, through its President, convenes an IGC by defining the terms of reference of its activity.

arrangements of mutual interest. With all its weaknesses and failures, IPC can still play a fundamental role as a facilitator, which could help both channels of parliamentary representation effectively to meet the challenges that affect their role and their participation in the multi-level decision-making process.

Examples of the potential role that IPC can play at European level can be drawn by focusing on the functioning of the new European economic governance. Both the EP and national parliaments could take advantage of the existing conferences - in particular, the Conference of the Speakers of European Union Parliaments and the new Conference for Economic and Financial Governance - as a place where the positions adopted or to be adopted at domestic level with regard to some core stages of the governance mechanism can be pooled. For instance, the strategic decisions entitled to the Board of Governors of the ESM by Article 5.6 of the Treaty establishing the European Stability Mechanism - directed to the disbursement of financial assistance to beneficiary Member States which are experiencing, or are threatened by, severe financing problems - could be put on the agenda of such Conferences in order to promote a common discussion on respective parliamentary directions issued at national levels. The same could be done with regard to parliamentary decisions referred to the implementation, in compliance with the Treaty on Stability, Coordination and Governance, of the so-called “correction mechanism”.

Such examples clearly show that existing tools of IPC could be thought of as “federal” devices which offer the possibility of confronting and co-ordinating parliamentary policies on specific EU affairs, based upon the assumption that such policy-pooling would not endanger the sovereignty that each representative assembly exercises over its field of action,⁵¹ and would not alter the possibility of national parliaments tailoring their approaches to the management of EU affairs (which, even in the fields covered by the new European economic governance, tends to vary consistently among Member States – Fasone, 2014c). Instead, a proactive use of IPC tools could reproduce at European level, in the parliamentary direction and oversight of executive’s decisions, the praxis of co-operation and policy co-ordination which is typical of a model of co-operative federalism.

So far, the overall functioning of IPC has been shaped as a form of international co-operation among legislatures (Šabič, 2008: 255 ff.; Kissling, 2011), characterised by loose relations, lack of continuity and of binding power. The latest developments of European integration, however, make it necessary - in order to promote the well functioning of the democratic circuit of responsibility and

⁵¹ As correctly observed in a normative approach to the issue (Schäfer - Schulz, 2013), even though inter-parliamentary co-operation “can contribute to the parliamentarisation of Europe, the responsibility for democratic legitimisation of political decision-making remains with those actors whose central task this is: parliaments at national level and the European parliament”.

to grant effectiveness to policy implementation⁵² - to develop patterns of “federal” co-operation among parliaments in order to legitimate and to permit oversight of decisions taken by the Euro-national executive branch.

This instrumental role of IPC – as a dimension that can contribute to build up patterns of precautionary co-ordination among representative assemblies in the exercise of their participatory rights in EU affairs – explains the limits of this experience which can be developed only *within the powers* conferred on legislatures⁵³ and which is not designed to create a completely new autonomous parliamentary level.

This implies that an even more asymmetric EU will have to rely on its traditional channels of parliamentary representation for the fulfilment of its requirements of democratic legitimacy, confrontation and scrutiny. What will need to change is not related to the nature or the format of parliamentary representation, but rather to its operative patterns, which should count on strengthened co-operation among parliaments in order to accommodate asymmetric tendencies in the EU governance with flexible forms of interaction in the scrutiny of such procedures.

⁵² It has been argued (Martin, 2000: 184) that institutionalised legislative participation increases the credibility of states' commitments: “States where those responsible for implementing agreements, whether in the national parliament or in regional governments, are involved in the negotiation process have better records of implementation”.

⁵³ The constitutional jurisprudence of many federal experiences has clearly stated that cooperation cannot disregard the legal distribution of power nor can be developed among subjects deprived of formal titles for the exercise of that competence. Among others, see for instance the case *Re Wakim; Ex parte McNally* ruled by the High Court of Australia, which, although recognising the limits of cooperation (“Where constitutional power does not exist, no cry of co-operative federalism can supply it. If the object lies outside the reach or the effect of what a State or the Commonwealth can constitutionally do, the subject matter is beyond the reach of the legislatures of Australia” - *Re Wakim; Ex parte McNally* (1999) HCA 27; 198 CLR 511, at 55), stated at the same time that “There is no doubt that, as a result of co-operation between a State and the Commonwealth, the Commonwealth may achieve objects that are beyond the constitutional competence of the Commonwealth. Similarly, as the result of joint legislation, a State and the Commonwealth may achieve an object that neither could achieve by its own legislation”.

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