A Democratic Legitimacy Assessment of Recent Governance Mechanisms in Economic and Monetary Union

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Governance in the Eurozone has recently been reinforced following two different but complementary strategies. On the one hand, the passing of several legal acts of secondary EU law (known as the Six Pack and the forthcoming Two Pack) has strengthened the existing, but perceived as insufficient, coordination of national economic policies. On the other hand, a piece of international law has been signed by all but two of the Member States (the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) in order to install in their national legal orders the principles guiding European economic governance. This paper is particularly concerned with the legitimation mechanisms for these new arrangements. In previous research the author established a threefold scheme for studying different examples of governance in relation to democratic legitimacy. In particular, governance can be conceived (1) as fully respecting decisions adopted according to democratic legitimacy and emphasizing its efficient implementation; (2) as complementing democratic legitimacy, for instance by accepting or even integrating technical and expert advice in public decision-making; or (3) as an alternative to democratic legitimacy, as is the case when public decision-making relies on independent non-majoritarian agencies. The aim of this paper is to proceed with a democratic legitimacy assessment of recent developments in Economic and Monetary Union (EMU), in particular of the new governance mechanisms resulting from those two strategies. This task cannot be carried out without dealing with the underlying conceptions EMU is based on, and from which its particular features result. Hence, we will first describe and specify the theoretical models according to which the relationship between governance and democratic legitimacy can be assessed (I). In a second step, we will describe the main features of EMU as designed in Maastricht (II) and will compare that construction with the theoretical models (III). A description will follow of the development of governance in the

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European Union and, in particular, of the new governance mechanisms recently designed for EMU (IV). Then, we will assess them against the yardstick of our theoretical models (V). Finally, we will conclude by summarizing the main findings of the survey (VI).

I. A conceptual framework for studying (economic) governance

The relationship between governance and democratic legitimacy depends on the particular manifestation of each concrete governance mechanism. Thus, there is not a clear, stable and permanent link between both *theoretical* concepts. Such a link may exclusively result from each *concrete realization* of governance theories. Departing from this basic assumption, we will articulate the disparate manifestations of governance into three narratives (ideal theoretical reconstructions) under a claim of internal consistency. In turn, these narratives will constitute the parameters against which specific examples of governance can be measured.

Governance mechanisms provide very different responses to some of the challenges Western democracies are currently facing. Among them we can mention how to address increasing social complexity, the decline of political representation because of the power of the media, the relevance of specialized and technical knowledge in the adoption of public decisions (which, in the terminology coined by García-Pelayo (1972), has led to a *technological civilization*), emphasis on results instead of on procedures (*output* versus *input* legitimacy) or the importance of the implementing stage in the political process. Elaboration of the theoretical models results from grouping the several responses to these challenges provided by the various governance mechanisms according to three coherent narratives.[2]

For the purposes of a paper revolving around the economic governance of EMU, it is important to mention, at least briefly, the challenge that the integration of scientific knowledge in political decision-making poses to representative democracies. This challenge, personified in the figure of technocrats, is twofold, since on one hand the compartmentalization of problems inherent to this type of knowledge prevents an adequate response to social complexity (problems may refer to a specific field, but they usually have an impact in related areas), while on the other hand the mere subordination of public authorities to updated technical knowledge removes, avoids, or at least challenges, any political responsibility for their decision.

Habermas has referred to this paradox. His argument could be summarized by saying that the greater the integration of scientific knowledge in public decision-making procedures, the less political responsibility for them (and vice

2 For a more detailed explanation of how the models are elaborated, see Losada, forthcoming 2013 (chapter 2). A different analytical approach to the relationship between governance practices and legitimacy in Bekkers and Edwards 2007, 35–60.

versa). Depending on the relationship between experts on the subject matter and representatives of the political community, Habermas distinguishes three decision-making models. In the first of these, the *decisionist* model, the technique is considered an auxiliary element of political strategy, so that decisions are taken under convictions and not because of an uncontroversial technical reason (Habermas 1999, 132; García-Pelayo 1972, 69). The *technocratic* model, on the other hand, would lead to adoption of these decisions by experts and technicians, detaching decisions from any political agenda or world view and allowing them to achieve the consideration of absolute technical truths.[3] Finally, the *pragmatist* model presupposes a dialogue between the expert and the politician, from which a political decision is expected to emerge according to the technical circumstances (Habermas 1999, 138; García-Pelayo 1972, 69–70).

Our three discourses or theoretical models establishing a relationship between democratic legitimacy and governance mechanisms are an elaborated construction that departs from this distinction (but not equivalent to it, as we will see). We can regard them as three specific and homogeneous views within a continuum. Thus, taking as a reference a line representing democratic legitimacy, we will depart from the end at which governance carefully respects it and just focuses on effective implementation of decisions adopted in accordance with it. We will later stop at a medium point, which corresponds to a narrative in which governance would be a complement to democratic legitimacy. Finally, we will reach the other end, where governance is conceived as an alternative to democratic legitimacy or as a reformulation of the parameter according to which legitimacy should be tested. Thus, our three theoretical constructs exhaust the space of the continuum in which we represent democratic legitimacy.

A) Governance as effective implementation

The first theoretical model articulating existing governance mechanisms that are unrelated to each other in a coherent discourse, conceives governance as a system fully respecting democratic legitimacy and seeking to improve efficacy at the stage in which decisions are implemented or enforced. The core idea of this first model, therefore, is to respect democratic legitimacy and to redefine the role of bureaucracy, replacing its traditional hierarchical character for a more flexible one, according to the approach of governance.

This new approach to bureaucracy carefully takes into account, at least as far as participation is concerned, the view of those affected by public decisions and, especially, of the key institutions responsible for implementing them. Therefore,

3 Habermas 1999, 134; García-Pelayo 1972, 67; Bobbio (1987 [1984], 37) considers that technocracy and democracy are deeply antithetical, since "[t]he hypothesis which underlies democracy is that all are in a position to make decisions about everything. The technocracy claims, on the contrary, that the only ones called on to make decisions are the few who have the relevant expertise".

the main asset of this model is that individuals and groups affected by a norm as well as administrative bodies responsible for carrying out its implementation would be closely involved in decision-making procedures adapting the general rule to the context in which it must be applied. This participation would be aimed at transferring knowledge about the geographical, social or economic peculiarities for more effective implementation. For this reason, coordination between different levels of government during the whole implementing process is supposed to be very close.

Moreover, in this model technical decisions would be assigned to those administrative bodies expert on implementation. Indeed, the administration has a number of technicians integrated into the civil service who guarantee the best possible adaptation of a political decision to updated technical knowledge. Importantly in this respect, executive agencies are the preferred method for acting in specific technical areas (technocratic model) while benchmarking is favoured when dealing with more general areas in which the interaction between politicians and experts is higher (pragmatist model). Thus, a public authority delegates to experts a quota of its power of decision. However, in the eyes of the public, performance by the experts will be part of government action. Indeed, the responsibility for technical decision-making rests with the administrative body, which in turn reports to the government, allowing the political power always to have an input or even the last word on a technical decision.

With regard to the institutional arrangements that would result from this model, this new way of understanding bureaucracy would make administration highly flexible in order to adapt it to the wide range of contexts in which policy decisions are implemented. In addition, some permanent links would be established between representative bodies from all levels of government, perhaps somehow institutionalizing their participation, but always taking into account the identification of particularly affected bodies, which would be carefully addressed.

B) Governance as a complement to democratic legitimacy

A second way of conceiving governance would be as a reinforcement of democratic legitimacy. According to this theoretical model the effectiveness of public action needs to be increased. The key element here is that the improvement in effectiveness is subordinated to democratic legitimacy. Thus, this conception of governance would emphasize that public decisions should properly reflect the will of the political community. But this can no longer be adequately achieved just by resorting to representative institutions. Governance would, therefore, be a correction of this deficiency.

This eagerness to make public decisions accurately reflect the will of the political community means that when adopting them political bodies would devote special attention to participation by social actors, mainly through what is known as

organized civil society. Those interactions, nevertheless, may face some difficulties. First, because although it is true that organized civil society is an indirect means of expressing the will of the political community, it is also true that its most important stakeholders will be precisely the ones which will exercise the decisive influence when adopting the decision. By stakeholders we mean those social actors affected by the decision and those whose interests are involved in it. It should be noted, therefore, that these actors, be they companies, associations of people or private citizens affected, usually defend their particular interests,[4] so that public authorities are ultimately those who will have to represent the common interest. A second problem with this type of interaction is to determine who is affected and who is not, since the final content of the decision may depend on who is entitled to participate in the decision-making process. A final problem concerns diffuse interests, represented by barely relevant actors and individuals, who rarely have access to decision making.

But the relevant point about these interactions is the impact they have on the structure of society. On the one hand, since interests are better defended collectively than individually, this kind of governance fosters the emergence of society-organizing networks of actors, thereby minimizing the chances of exclusion or marginalization of diffuse interests. Thus, by exchanging information and pooling resources, these networks help organized actors to influence the decision-making process by lobbying during the whole legislative process. Furthermore, it should be mentioned as an additional consequence that since those affected by public decisions will be different depending on the case, each decision would involve the participation of a particular sector of the political community. Consequently, we could therefore predict that the more powerful in society an actor is, the more it will participate in public decisions. As a result, its leading position in society will be strengthened and will make of it a factual power.[5] The foundations of a post-democratic society are thus reinforced by this discourse of governance.[6]

Moreover, since in this conception of governance the principle of efficiency is still subordinated to democratic legitimacy, we must assume that the institutional arrangements resulting from it would be similar to those currently existing. Traditional

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4 Non-governmental organizations are a special case, since theoretically they defend the general interest (notwithstanding the fact that they sometimes simply act in defence of their prerogatives and the rights acquired by reason of their political activity).

5 Far from being a mere theoretical concern, this seems to be the case. See for example how a network of major corporations successfully lobbied in order to include the most favourable version of impact assessment for them in European Treaties in Smith, Fooks, Collin, Weishaar, Mandal & Gilmore 2010, 1–17.

6 Colin Crouch not only coined the term but has also used it for revealing some hidden features of the concrete realization of the democratic ideal in our times: “My central contentions are that, while the forms of democracy remain fully in place – and today in some respects are actually strengthened – politics and government are increasingly slipping back into the control of privileged elites in the manner characteristic of pre-democratic times; and that one major consequence of this process is the growing impotence of egalitarian causes”, Crouch 2004, 6. Crouch has refined his ideas on post-democracy in Crouch 2011, in which he explores the role corporations play in our society after the economic crisis.

bodies of popular representation (parliaments) and heads of bureaucracy or of executive power (governments) would not lose their current main features and would continue to be the centre of political activity. The only new item this type of governance would imply for the institutional system will be the channelling of participation through consultation processes with stakeholders. This will enhance the deliberative nature of democracy.

Especially important is participation in the legislative process of all the different levels of government. Since they are representative bodies, this way of understanding governance would privilege their participation in the political process. However, in certain matters the interests of some lower representative bodies will be opposed. This means that in these cases their participation will follow the path of negotiations, in which each actor tries to get the maximum benefit to the detriment of the interests of other actors (zero-sum game).

As for technical decisions, since democratic legitimacy still prevails over the claim of effectiveness, representatives of the political community will adopt them. This does not prevent representatives from being advised on the matter by technical experts, whose arguments can indeed influence their decisions, but the final word and, therefore, responsibility for the decision, will lie with representatives of the public interest. The integration of specialized knowledge in public decision-making procedures is thus guided by the decisionist and pragmatist models, but citizens will at the end of the legislature's term of power assess the whole set of public decisions. Therefore, the democratic principle is still observed.

C) Governance as an alternative to democratic legitimacy

The ideal narrative or theoretical model according to which governance would constitute an alternative discourse to democratic legitimacy[7] is determined by two trends. First, the complexity and the constantly changing environment in which decisions are enforced, along with the popular demand for results for social problems, explain a concern about the effectiveness of political action rather than about democratic legitimacy. Secondly, the progress of technological civilization allows specialized and scientific knowledge to become involved in the decision-making process. The combination of these two trends (outcome legitimacy and technocracy) constitutes the foundation of our third theoretical model of governance. As a reply to some legitimacy concerns arising in Western democracies during the last third of the past century (Crozier, Huntington and Watanuki 1975), it emphasizes the weak points of the authority-based hierarchical organization of bureaucracy

7 In fact, this in principle just theoretical possibility has already been detected in Western democracies: "Where the rich democracies were once diagnosed as suffering a crisis of governability (…), today they are more likely to be diagnosed as suffering a deficit of democracy. More exactly, there is fear of parallel government, *imperium in imperio*: new structures of public action, outside the old ones, whose efficacy undermines the legitimacy of traditional democracy without offering an equivalent form of accountability of its own", Sabel 2001, 122.

and its use of classic constitutional and administrative law, and proposes to obviate the traditional decision-making processes.

The basic assumption of this theoretical model of governance, seeking an improvement in the effectiveness of political action, is that public decision-making should be attached to specialized and non-representative bodies or be subject to special procedures not based on democratic legitimacy. Therefore, specialists, as holders of scientific knowledge, would be in charge of deciding on public issues. The political power, as less competent than experts (or even not competent at all), is not to interfere in issues considered technical and should renounce a say on such matters, whereas experts are on institutional authority to do so. Thus, this governance narrative constitutes the highest expression of the technocratic model of decision-making. In this regard it is also worth noting the low profile of the role to be played not only by representatives of the political community in general, but also by other actors who by virtue of their democratic legitimacy would enjoy a special share in the decision-making process, such as representatives of lower (regional or local) bodies.

The aim of increasing the effectiveness of public action would even lead to assuming lack of direct responsibility over decisions, breaking what for certain conceptions of democracy is one of its key principles. However, we must remember that what this model proposes is precisely an alternative institutional realization of democracy which legitimizes resort to decision-making methods other than those used when legitimacy is derived from representative democracy. Therefore, the blurring of direct responsibilities does not break the consistency of the theoretical model. In fact, there are different conceptions of democracy, some of them admitting that diffusion of power and institutionalization of a system of checks and balances to prevent the dictatorship of the majority can be understood as a legitimate and democratic form of domination.[8]

As to the institutional system that this type of governance would entail, the need to adapt to social circumstances or to those arising from continuous technical progress allows us to assume that institutional arrangements for this type of governance would be highly flexible, if they have not been created *ad hoc*. Since their decisions are primarily technical, decision-makers on a particular matter could always be the same (the most renowned experts in the field, for example), but due to progress in scientific knowledge we would assume that these players will take turns from time to time.

Finally, referring to the instruments and practices this vision of governance would resort to, it seems feasible that among them would be regulatory agencies, responsible for development of technical standards that affect a particular sector, as well as self-regulation practices, by which sectoral actors themselves agree and

8 On this see Madison 2003 [1780]. Yet, this realization of the democratic principle, like all others, is not without its problems: “By separating power among President, House, and Senate, the Madisonian pattern not only generates a host of lawmaking pathologies, but also disrupts the coherence of professional public administration”, Ackerman 2000, 725.

adopt regulations affecting them. In this sense a widely established example in our democratic systems is the so called social dialogue between social partners, who are able to adopt sectoral implementing norms, as collective agreements are, without being backed by democratic legitimacy.

D) Some considerations on the models

As a culmination to this theoretical construct of the three ideal narratives according to which the different manifestations of governance can be consistently re-conceived, the possible relationships between these models will be briefly outlined. The first consideration in this regard is that the models which conceive governance as effective implementation and as a complement to democratic legitimacy are not mutually exclusive. Indeed, the two respect democratic legitimacy, but at different stages of the regulatory process: one aims at strengthening it at the time when decisions are adopted and the other when they are implemented. For this reason the measures they both propose can be considered compatible. However, although both models aim at reinforcing the democratic legitimacy of public decisions involving other actors in their adoption or implementation, their approaches are different. While one emphasizes participation by social actors in order to reflect as closely as possible the popular will when taking decisions, the other, still counting on those social actors, primarily fosters contact with institutional stakeholders at local and regional levels as acquainted with the environment in which public decisions are to be applied.

Regarding the relation between the model which conceives governance as an alternative to democratic legitimacy and the other two, their incompatibility is obvious since the assumptions they depart from (observance or not of democratic legitimacy) are radically opposed. Thus, the models that are configured as an alternative and as complement to democratic legitimacy cannot coexist because they are based on assumptions that are mutually exclusive at a particular procedural stage of the regulatory process: adoption of decisions. One might think that, since they refer to different procedural moments, the situation would be different when we relate the model conceiving of governance as an alternative to democratic legitimacy and the model calling for effective implementation of democratically legitimated decisions, but the assumption that makes either speech coherent (their relationship to democratic legitimacy) prevents the compatibility of both narratives.

II. The original design of Economic and Monetary Union in Maastricht

It is well-known that the design of EMU rules in the Treaty of Maastricht was based on a split of monetary and economic policies. This was the result of the compromise

achieved by the Delors Committee in charge of the EMU negotiations.[9] Making a caricature of this compromise, we might say that Germany only agreed to the French claim to establish a common currency (thus renouncing the Deutschmark, symbol of its economic prosperity after the Second World War) on the condition of replicating at the supranational level the main institutional design of the successful German economic setting.[10] This institutional design was mainly based on Central Bank independence, as a way to guarantee price stability and to avoid time-inconsistent policies leading to inflationist experiences of fateful memory.[11] At the same time, a common economic government was rejected, economic policies being still in the competence of Member States.

The result was the twofold conception mentioned. Monetary issues were conceived as a common policy, carried out within a new institutional setting: the European System of Central Banks (ESCB) with the European Central Bank (ECB) at its head. Its main feature, as agreed in the negotiations, was its institutional independence. Economic policies, on the other hand, were still in the competence of national governments, but a new procedure was established allowing for their necessary coordination. In this case no new institutional setting was created. Instead, Member States relied on existing institutions. However, it must be noted that, as to coordination of economic policies, European institutions were given different tasks than those which they were carrying out in other areas of EU law. This represented a move from the *community method* to what can be considered a direct precedent of the *open method of coordination*.

A) Main features of the common monetary policy

EMU was designed as a political process in different and successive stages. For those Member States participating in the third (and final) stage of EMU or, putting it differently, for those Member States whose currency is the euro, all competences related to monetary policy, including fixing the exchange rate, have been conferred on the European Union (Article 3.1.c TFEU). Hence, they are exclusive competences at the supranational level. In addition, and as mentioned above, a new institutional setting (the ESCB and ECB) was established solely for dealing with these new exclusive competences. Thus it is important to bear in mind that competence over monetary issues and the institutional setting for dealing with them are indissolubly bound. The ESCB and ECB exist in order to fulfil the task assigned to them by

9 On the EMU negotiations see Dyson and Featherstone 1999.

10 "In the light of the success of the Bundesbank, it is only natural that the German public will expect that any successor, which could take its place at the European level, should be at least as well equipped as the Bundesbank to defend price stability", Tietmeyer 1991.

11 However, notice that this was not the original purpose, but the result of the *Bundesbank*'s institutional design. On this see Bibow 2004, 2–13.

the Treaties, and that task (monetary policy) can only be carried out by these institutions. Substance and form are inextricably linked in this concrete policy.

This is reflected in the aims of both the policy and its institutional setting. Substantively, the primary objective of the single monetary policy is to "maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union" (Article 119.2 TFEU). Regarding the institutional setting, the main objective of the ESCB is to "maintain price stability. Without prejudice to the objective of price stability the ESCB shall support the general economic policies in the Union" (Article 127.1 TFEU). Underlying this almost identical drafting are two parallel ideas: policy has to be driven towards price stability, and the institution in charge of conducting policy has to lead towards the very same aim. But they also mean that if new actors were assigned a role in policy, price stability will still be the aim to be achieved. The same can be said if new competences were conferred on the ESCB, since price stability will still be the main aim of its activity. This is of significant importance, as we will see.

The link between form and substance is also evident when considering how the ESCB is supposed to carry out its task of maintaining price stability. Independence of the authority in charge of monetary policy from political institutions is the cornerstone of the system. Avoiding all political interference when conducting monetary policy will increase the chances of meeting the aim of price stability. Therefore, members of the ESCB and ECB are forbidden to seek or take instructions from any European institution or any government of a Member State, and in turn the latter agree to respect the independent status of the ESCB and ECB (Article 130 TFEU). As a matter of fact, Member States have to guarantee the independent status of their own Central Banks in their national legislation, so as to avoid all possible influence on them (Article 131 TFEU).

B) Main features of the coordination of (national) economic policies

Establishing a common monetary policy not paralleled by a common economic government requires *coordination* of national economies in order to reduce disparities between them. Otherwise Member States could take advantage of the shared context by transferring the costs of their national policies to the other Member States. But mere coordination is not enough to guarantee EMU stability: *limitation* of national economic policies is also required. This is the reason why the common currency is accompanied by some restrictions of national economic policies, specifically concerning budgetary deficit and public debt.

As to coordination of national economic policies, the main instrument at the disposal of European institutions for carrying it out are the broad economic policy guidelines for the European Union and its Member States (Article 121.2 TFEU). The Council adopts a recommendation with these guidelines after a proposal by the Commission and political agreement by the European Council. The European

Parliament only has to be informed once a recommendation has been adopted. Thus in procedural terms coordination is of a clear political nature, with national executives (either in the formation of the Council or at the European Council) having full responsibility over the content of the guidelines. The same conclusion can be achieved when considering the legal act adopting the guidelines, since the Treaties describe recommendations as having "no binding force" (Article 288 TFEU).

Coordination of national economic policies is monitored through a multilateral surveillance procedure (Article 121.3 and 121.4 TFEU).[12] The Council is responsible for checking that Member States' performance adjusts to the requirements of the overall strategy for the Union described in the guidelines. To that end, Member States keep the Commission informed about all economic measures they adopt, and it prepares a report for the Council. If Member States' measures are not consistent with the guidelines or some economic developments may jeopardize the Union's objectives, the Commission can issue a warning to the Member State(s) concerned. In a further step, the Council may finally adopt a recommendation to that end and, if necessary, even make it public. As is obvious from this description, multilateral surveillance is also of a mainly political nature, since no legal sanction exists for conducting economic policy beyond the margins established in the guidelines. As it was designed, the system bases Member State compliance in their commitment to policy objectives and, if necessary, in the political peer pressure exerted at the Council. Once again, there is not more than an obligation to report to the European Parliament about all events related to multilateral surveillance (Article 121.5 TFEU). All these elements show that according to the basic design of EMU, economic policies remain a national competence.

This basic principle notwithstanding, EMU imposes some restrictions over national economic policies. The whole system is based on the concept of economic stability. Accordingly, "Member States shall avoid excessive government deficits" (Article 126.1 TFEU). The importance of sound public finances is expressed in limitations to Member State budgetary deficits, which cannot exceed 3% of GDP, and public debt, which cannot go beyond 60% of GDP (Article 126.2 TFEU in relation to Article 1 of Protocol No. 12 TEU on the excessive deficit procedure).[13] A somewhat tighter monitoring system than the one for coordination of economic policies is established for ensuring observance of these requirements: an excessive deficit procedure is launched by the Commission if a Member State breaches them or is perceived by the Commission to be at risk of doing so, although it is for the Council to finally decide about the existence of an excessive deficit. In such a case, it must adopt a recommendation addressed to the Member State concerned

12 The procedure was further developed by Council Regulation (EC) 1466/97, of 7 July 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209, 2.8.1997, 1).

13 Rules laid down in Article 126 TFEU were defined more precisely and strengthened by the Stability and Growth Pact, constituted, in particular, by the Resolution of the European Council of 17 June 1997 (OJ C 236, 2.8.1997, 1) and Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2.8.1997, 6).

establishing some time limit for putting an end to the situation. Publicity of these measures can follow if no effective action has been taken by the Member State. If the situation persists nevertheless, the Council gives notice to the Member State of the measures to be adopted in a certain time limit, and can oblige it to submit periodic reports about how political measures for economic adjustment are being implemented (the whole procedure is described in Article 126.3 to 9 TFEU).

Up to this point the procedure is mainly of a political nature. On the one hand, this results from its exclusion from the scope of the infringement procedure before the CJEU (Article 126.10 TFEU); on the other, the Court itself has acknowledged that the Council has discretion not only to determine the existence of an excessive deficit, but also to make its own "assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned".[14] This means that there is no obligation on the part of the Council to follow Commission proposals or, in other words, politics still have a role to play at the Council.

If the Council finally reaches the last stage in the procedure, the door is open for it to impose sanctions on the Member State concerned, namely requiring publication of additional information before issuing bonds, inviting the European Investment Bank (EIB) to reconsider lending policy towards the Member State, requiring the deposit of some sum until the excessive deficit has been corrected, or to impose fines (Article 126.11 TFEU). These measures are all of a binding nature so that their non-observance may result in the Commission launching an infringement procedure.

C) The relation between common monetary policy and coordination of national economic policies

A final consideration must be made about how supranational monetary policy and national economic policies relate to each other. Both policies are intimately linked and it is not easy to separate them. Isolating monetary policy and conferring on the ECB the exclusive competence to define and implement it assures that Member States cannot directly interfere with the objective of price stability. However, some additional measures are required to guarantee that they do not put that objective at risk indirectly, in particular by not caring enough about the soundness of their public finances. To avoid this situation, in addition to the measures of a non-binding character we have reviewed, some other binding provisions in the Treaties prohibit credit facilities from the ESCB to any public institution (Article 123 TFEU), ban privileged access to financial institutions by public institutions (Article 124 TFEU) and rule out the transfer of liabilities from one Member State to other or to the

14 Case C-27/04, *Commission vs. Council,* of 13 July 2004 [2004] ECR I-06649 (paragraph 80).

European Union – what is known as the non-bailout clause (Article 125 TFEU).[15] The result of these provisions in combination is that Member States have to resort to markets when looking for financing. Since the cost of financing in the markets would be higher than when just printing money or borrowing on favourable conditions from the central bank, Member States, the argument goes on, will be aware of the importance of not going into the red. This would contribute to the soundness of their public finances. But, in addition, markets will impose different costs when lending money depending on the economic performance of each Member State. This means that for those with a budgetary deficit or public debt problems the cost of borrowing will be higher. Accordingly, markets will discipline profligate Member States if multilateral surveillance and the excessive deficit procedure do not.[16]

III. A democratic legitimacy assessment of Economic and Monetary Union as established in Maastricht

When seen through the lens of our three theoretical models, EMU provisions as originally designed in the Maastricht Treaty correspond to two of these models. On the one hand, monetary policy was delegated to an independent institution, the ECB, in charge of conducting that policy according to its own technical knowledge. EMU was thus conceived as an alternative to democratic legitimacy. On the other hand, economic policies were to be decided by national parliaments, although different degrees of intervention from the European level were foreseen. This basically corresponds to the model complementing democratic legitimacy, although a more nuanced and detailed assessment is required.

The creation of an independent body with exclusive competences over monetary policy, as is the case with the ECB, corresponds to the model conceiving governance as an alternative to democratic legitimacy. Of significance in this matter are the conditions under which powers are transferred to the independent body. From a political science perspective (theory of principal and agent) the relevant question is how to strike the right balance between independence of the agent and control by the principal, from where legitimate power emanates. The more independent the

15 When seen from the perspective of the ECB these provisions can be understood as guaranteeing its independence. See in this issue Tuori 2013. This seems to be an extended view: "Germany also eagerly designed the Maastricht regime so as to shield the central bank system from public debt in order to protect its glorified independence", Bibow 2012, 31.

16 The Court of Justice recently arrived at the same conclusion when for the first time it had to interpret the provisions on EMU in a constitutional tone: "It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, 24, 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union". See case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and the Attorney General*, of 27 November 2012, not yet published (paragraph 135).

agency, the more difficult it is to monitor its activities. In turn, the greater the control over the agency is, the less its room for manoeuvre and its independence from political power – the very reason for creating it. The concrete balance in each case is determined by the legal act by which delegation takes place. This is why from a legal point of view (theory of delegation) the issues involved are the exact content of delegated powers, the concrete purpose for which they are delegated and the legal conditions the body has to observe when carrying out its activity.

In the particular case of the ECB the balance struck between Member States (principal) and the Bank (agent) leaves to the agent enormous room for manoeuvre over the highly sensitive issue of monetary policy without establishing any proper control by the principal. Member States and EU institutions have to fully observe Central Bank independence, the treaties explicitly guaranteeing it. This extremely loose delegation can only be understood when broadening the scope to see the full picture of the institutional architecture of EMU as designed in Maastricht. Once we take some distance it seems evident that, as mentioned, the institutional design of EMU and its ECB was very much inspired by the German economic setting and the *Bundesbank*: an independent central bank was in charge of monetary policy, guaranteeing price stability by keeping it away from the reach of politicians. Nonetheless, some differences between the two regimes have to be pointed out. In the German case central bank independence was a measure adopted for the better implementation of a democratically legitimated decision by which the legislative power considered price stability the main aim of Germany's economic policy. It was considered that the best way to avoid time-inconsistencies in monetary policy was to assign its implementation to an independent body, but it was always possible for the German Parliament to overturn this political decision.[17]

A similar setting seemed to be established in the European Union, but a closer examination of the conditions will lead us to different conclusions. In the first place, the independence of the ECB was assured under stricter conditions, since it resulted from the European treaties and not from a national law – which can be amended following easier procedures. Hence, the decision to assign monetary policy to an extremely independent body was of a systemic and constitutional nature.[18] Political power cannot regain monetary policy, as was possible under the German constitutional setting, unless an extremely unlikely agreement is reached between 27 Member States to amend the treaties. The same can be said about determining

17 It would be a different matter if it did exercise that power: "[N]o government has ever used its right to 'veto' a decision of the Central Bank Council. No government has ever seriously considered modifying the Bundesbank Act as a means to deal with cases of conflict, although it could have done so with a simple majority of the Parliament", Tietmeyer 1991, 182–183.

18 This decision had some inherent risks, as Herdegen already pointed out in the nineties: "It is not with great ease that constitutional doctrine approaches principles that place restraints on majority rule in the interest of economic wisdom. Economic wisdom is what economic science in a given moment suggests as economically sound. Freezing institutional rules and substantive principles on this basis implies an obvious risk which is inherent in all dictates of economic wisdom: subsequent falsification by new empirical messages or by scenarios which have not been anticipated", Herdegen 1998, 9.

the main objectives of monetary policy. All this implies that monetary policy is autonomously conducted, and not merely implemented, by the fully-independent ECB following the constitutional mandate of price stability, in what constitutes an example of a governance mechanism alternative to democratic legitimacy.

But there is another key difference between both regimes: the context of which they form part. While in Germany price stability was for historical reasons a matter of concern for all citizens and societal actors, and the independence of the *Bundesbank* was socially accepted and justified in order to achieve what was perceived as a social good for the entire society; while decisions and statements by the German Central Bank were perceived as arguments from authority and central bank independence was justified by the results of its successful monetary policy, in Europe the case was radically different. Member State acceptance of price stability resulted from the signature of a treaty, not from a social consensus about what was the most convenient policy for the Union. The consensus, if it existed, did not reach beyond political elites. The difference between the two regimes lies in the *social embeddedness* of central bank independence. When transferring the German institutional setting and political objectives to the supranational level, central bank independence was decontextualized.

This is of the utmost importance, since legitimation of governance mechanisms constituting an alternative to democratic legitimacy depends on a highly delicate system of checks and balances. In the EU, strengthened (if not extreme) central bank independence is not balanced by social acceptance. This means that, in contrast to the case of the *Bundesbank*, which was implementing a democratically legitimated decision, the sole legitimating mechanism on which the fully independent ECB relies when conducting monetary policy is the results of its performance. Overlooking the fact that output legitimacy cannot be considered a proper legitimacy mechanism,[19] the serious consequence of this conception of monetary policy is that as soon as performance does not satisfy some societal actors, they will perceive the ECB as an illegitimate institution.

Assessing the other side of EMU, economic policies were to be decided by national parliaments, but some input to their decision may result from broad economic policy guidelines and the multilateral surveillance procedure. European institutions and executives from other Member States, as participants in the Council, may thus have a say in national policies. Since their contributions are to lead towards a common agreed political objective, it can be considered that with their knowledge they are complementing the democratic legitimacy of national parliaments. Indeed, coordinating the action of the various democratically legitimated levels should be considered a governance mechanism complementing democratic legitimacy.

A different situation applies regarding restrictions imposed by the rules limiting budgetary deficit and public debt – the Stability and Growth Pact (SGP). In this

19 Since acceptance of the system depends on the results of government action, Max Weber considers effectiveness a reason for obedience. Nevertheless he rejects considering it a basis for legitimacy. See Weber 1978 [1922], particularly chapter III (212–301).

case the range of decisions that can be adopted by national parliaments according to democratic legitimacy is constrained by EU law. This limitation has been agreed by all Member States according to their constitutional provisions and should thus be considered legitimate, but including those restrictions of key legislative powers in treaties makes them fall well beyond the reach of national parliaments. And in democratic legitimacy terms it will be very difficult to justify such a measure if ever it goes against the will of parliament. Once again, subordinating democratic legitimacy to a concrete policy aim, and thus constraining the legislative power of national parliaments, can only be done with wide social agreement. Furthermore, this wide social agreement should not only exist at the foundational moment (in this case, when ratifying the Treaty of Maastricht), but it should also be continuously updated.[20] Putting it in other words, *social embeddedness* is once again required. If one thinks about the difficulties of ratifying the Treaty of Maastricht[21] and the everlasting European treaty amendments,[22] with the peak example of the rejection of the Constitutional Treaty,[23] it seems evident that wide social consensus across Europe on EMU does not exist.

IV. New developments in economic governance since Maastricht

A first revision of the system designed in Maastricht took place when the SGP was amended in 2005. The revision took place after a controversy between Council and Commission over how to interpret the Pact had to be resolved by the Court of Justice.[24] As a result, some elements of the Pact were amended, granting more discretion to the Council. A succinct description of these changes is thus required prior to addressing more recent developments mainly resulting from the economic crisis. Among the overwhelming number of recent novelties,[25] this paper deals with

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20 "A further difficulty with the view that a central bank can receive all the legitimation that it may need from a delegation from the people is that, with the passage of time, the public that live under the decisions of any one bank may be very different from the public whose representatives authorised that independent central bank. Thus, in the case of most euro-zone countries, authorisation of the ECB dates back to treaties ratified by publics and parliaments twenty years ago", Lord 2012, 42.

21 The Danes rejected it in a referendum held in 1992. After some amendments guaranteeing Denmark some opt-out rights (among them, importantly, from EMU) were included in the Treaty, the Danes voted for ratification in a second referendum. The referendum held in France resulted in acceptance of ratification by an extremely narrow margin: 51.05% of votes.

22 The Treaty of Nice was rejected by the Irish in 2001, but after a national debate it was widely accepted one year later in a second referendum. The Treaty of Lisbon was also rejected by the Irish in 2008 and finally accepted in 2009.

23 The Constitutional Treaty was rejected in referenda by the people of two of the founding Member States. In France it was rejected by 54.87% of votes and in the Netherlands, where the referendum was of a non-binding nature, by 61.6%.

24 See case C-27/04, *Commission v. Council, supra* fn. 14.

25 These have been studied in detail by Tuori 2012; Menéndez 2012a; Menéndez 2012b; and Ruffert 2011, 1777–1805.

two strategies taking place in the coordination of economic policies, and not with those related to the monetary policy and the ECB[26] or to the financial assistance mechanisms created to provide Member States with tools alternative to the market once it has proved inefficient in disciplining profligate Member States.[27] In particular, the main developments aiming at giving an automatic and binding character to the previously political sanctions in multilateral surveillance and excessive deficit procedures will be explored: first a *supranational strategy*, focused on amending and supplementing EU secondary law developing Articles 121 and 126 TFEU (generally known as the Six-Pack), and then an *intergovernmental strategy*, consisting in drafting and ratifying a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also known as the 'fiscal compact').[28]

A) The 2005 revision of the Stability and Growth Pact

EMU rules established in the Treaty of Maastricht were revised for the first time in March 2005. This revision was a direct consequence of the Council's reluctance to adopt formal sanctions against Germany and France when they incurred an excessive deficit. The Commission recommended sanctions, but since this was a decision of a political and thus a discretionary nature, agreement in the Council was required, which Member States failed to achieve. Several reasons may explain this situation. On the one hand, incentives for Member States to employ sanctions were weak: not only do they usually try to avoid political conflicts, but they may also expect some reciprocal treatment in case of misbehaviour, especially since the amount for deposits and fines was impressive from the very first stage of the infringement procedure. On the other hand, it was not evident why pecuniary sanctions, worsening fiscal deficits, were the right way to solve the problem. But whatever the reasons were for the Council not imposing sanctions on Germany and France, this situation revealed a clear mismatch between the general design of EMU and Member State incentives to implement its rules, in particular those on imposition of sanctions.[29] In what follows, we will describe first the content of the

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26 For a complete analysis of how the role of the ECB has substantially changed in recent years, see in this same issue Tuori 2013.

27 The key issue being if, and to what extent, these mechanisms observe the no-bailout clause (Article 125 TFEU). An excellent constitutional analysis in this respect in de Gregorio Merino 2012, 1613–1645.

28 According to the President of the European Council, sound national budgetary policies, the expected result of these two combined strategies, constitute a prerequisite for taking an ambitious next step in the development of EMU: providing the Union with fiscal capacity. See his report *Towards a Genuine Economic and Monetary Union* (5 December 2012), 8–12.

29 Lack of incentives for Member States under those conditions was already anticipated by Herdegen: "In any case, the impact of the sanctions regime can only lie in its deterrent effect. Any scenario confronting the Council with the actual imposition of sanctions would be evidence of failure", Herdegen 1998, 31.

subsequent amendments and then explain their significance for EMU's institutional setting.

The revision was substantiated in two Council Regulations amending the two earlier Regulations developing the multilateral surveillance rules[30] and the excessive deficit procedure.[31] As to the former, the main innovation consisted in establishing a differentiated medium-term objective for each Member State which may diverge from the requirement of a 'close to balance or in surplus' position.[32] This aimed at taking into account "the diversity of economic and budgetary positions and developments as well as of fiscal risk to the sustainability of public finances, also in the face of prospective demographic changes".[33] The revised excessive deficit procedure, on the other hand, established a new definition of what a "severe economic downturn" was, by simply equating it to negative growth,[34] instead of previous, more demanding requirements.[35] This was relevant, since deficits resulting from an economic downturn should be considered exceptional and thus could then be more easily justified according to Article 126.2.a TFEU. Another novelty included in the excessive deficit procedure resulted from clearly setting out the elements the Commission should take into account when preparing a report on which to base an excessive deficit procedure against a Member State. Since Maastricht, the Treaties simply established that the report from the Commission should "take into account all other relevant factors" of the national economy having an impact on the final deficit (Article 126.3 TFEU), but after the amendment the list of issues is an exhaustive one, and even includes elements which "in the opinion of the Member State concerned" are relevant to justify the deficit.[36] Finally, the revision also specified the deadline for the recommendation following the declaration by the Council of the existence of an excessive deficit, which according to the Treaties simply has to be "addressed to the Member State concerned with a view to bringing that situation to an end within a given period" (Article 126.7 TFEU). A maximum

30 Council Regulation (EC) 1055/2005 of 27 June 2005 amending Regulation (EC) 1466/97 on the strengthening of the surveillance budgetary positions and the surveillance and coordination of economic policies (OJ L 174, 7.7.2005, 1).

31 Council Regulation (EC) 1056/2005 of 27 June 2005 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 174, 7.7.2005, 5).

32 Article 2a of Regulation 1466/97 after amendment.

33 Recital 5 of Regulation 1055/2005.

34 The severe economic downturn can even be deemed exceptional if it results "from an accumulated loss of output during a protracted period of very low annual GDP volume growth relative to its potential" (Article 2.2 of Regulation 1467/97 after amendment).

35 Only an annual GDP fall of more than 2% was automatically considered a 'severe' downturn by the original SGP. In addition, the European Council could also decide to regard a fall of more than 0.75% GDP as a severe downturn.

36 Article 2.3 of Regulation 1467/97 after amendment.

deadline of one year was established, but the strict deadline was completed with a qualifying clause adding “unless there are special circumstances”.[37]

Although there were also measures increasing the strictness of some elements of fiscal constraint, the overall result of the revision when taking into account the abovementioned changes was the weakening of budgetary discipline. This happened, in particular, because the new rules amended the substantive (economic) content of the previous regime and reduced the severity of its enforcing rules. For instance, by allowing the establishment of a different medium-term budgetary objective for each Member State depending on its particular economic context, the rule requiring a budget ‘close to balance or in surplus’ ceased to be clear and became subject to a discretionary assessment of the concrete circumstances of the Member State concerned.[38] On the other hand, regarding the excessive deficit procedure, the main changes were all directed towards reducing its strictness. This resulted either from widening the scope of justifications for excessive deficits, from enumerating the complete set of issues the Commission is obliged to take into account when assessing the existence of an excessive deficit (and thus restricting its margin of discretion), or from allowing an extension of the deadline for correcting it if special circumstances occur.[39] Therefore, coordination of national economic policies, required to establish and maintain a common currency area, was less strict after the revision. Furthermore, the rationale underlying the new regime is slightly different from the previous one: while the original SGP was based on a quick reaction once an excessive deficit was detected, after the amendment the idea was to give more time to Member States to address the problem. This explains the switch from a “rules-based system back to a system of discretionary fiscal policy making” (Calmfors 2005, 68).

For Member States the amended SGP was the right way to “improve the credibility” of the coordination of national economic policies and to “increase their flexibility” to react to the economic context, thus resulting in an “enhanced legitimacy” of the whole EMU (Woods 2008, 129). We will proceed with the democratic legitimacy assessment of these measures below (Section V), but at this point it is important to stress that the key issue for this analysis lies in where the balance is to be struck between the political discretion needed to legitimately command economic policy, on the one hand, and the legal rules required for coordinating (and constraining) national economic policies in a single currency area, on the other hand. In the original version of the Pact, strict legal rules were established,

37 Article 3.4 of Regulation 1467/97 after amendment.

38 A comment in Artis and Onorante 2008, 170-190.

39 When interpreted with the maximum laxity, the new pact could allow Member States to make the first deposit seven years after the excessive deficit took place, the formal fine (if it finally occurs) only taking place two years later. On these extended deadlines and the lack of strictness of the revised SGP, see Calmfors 2005, 63–66.

but they lacked an enforcing system automatically reacting to any breach;[40] after the amendment, the SGP increases political discretion when deciding on breaches of substantive content, while sanctions still remain non automatic (see Table 1), hence a weakened budgetary discipline.

It was in that context of relaxed budgetary discipline when the economic crisis emerged. Given its seriousness, with the whole EMU at stake, Member States followed two different but related strategies for improving the coordination of national economic policies. Both strategies have in common that they aim at reducing political discretion when implementing the rules of the Pact, even leading to a somewhat automatic enforcement of sanctions, but one does so in the EU law context (supranational strategy) and the other in the international one (intergovernmental strategy).

B) The supranational strategy against the economic crisis: the Six-Pack

The supranational strategy has been substantiated in six different secondary law instruments, some concerning the multilateral surveillance procedure (Article 121 TFEU),41 and some the excessive deficit procedure (Article 126 TFEU).42 In broad terms, the main institutional change is the establishment of a European Semester, according to which national economic policies are closely coordinated, ensuring sustained convergence between Member States.43 But our assessment will only pay attention to some technical provisions of this complex set of pieces of secondary law, namely those which are of potential importance for our analysis.

Starting with the excessive deficit procedure, the main novelty of the new regime is an emphasis on controlling not only excessive deficits, but also excessive public debt. To that end, a budgetary framework is established with common accounting systems for all Member States. This development constitutes a reaction to some

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40 "This system confers a political discretion on the Council the ambit of which remains rather unclear. Such discretion, albeit confined to exceptional circumstances (which justify *bona fide* efforts being honored), deprives the sanction regime of the automatism advocated by strict monetarists", Herdegen 1998, 31.

41 Regulation (EU) 1175/2011 of the European Parliament and of the Council, of 16 November 2011, amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 306, 23.11.2011, 12); Regulation (EU) 1176/2011 of the European Parliament and of the Council, of 16 November 2011, on the prevention and correction of macroeconomic imbalances (OJ L 306, 23.11.2011, 25); Regulation (EU) 1174/2011 of the European Parliament and of the Council, of 16 November 2011, on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23. 11. 2011, 8); and Regulation (EU) 1173/2011 of the European Parliament and of the Council, of 16 November 2011, on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, 1).

42 Council Regulation (EU) 1177/2011, of 8 November 2011, amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 306, 23.11.2011, 33), and Council Directive 2011/85/EU, of 8 November 2011, on requirements for budgetary frameworks of the Member States (OJ L 306, 23.11.2011, 41).

43 Section 1-A of Regulation 1466/2011 after last amendment.

events revealing weak points in the design of EMU, namely potential incentives for Member State authorities to tamper with national figures, as was the case with Greece, or the systemic consequences resulting from the mere risk of default by a Member State participating in the third stage of EMU, as proved by the subsequent sovereign debt crisis which has devastated peripheral economies of the euro area. The aim of the amended system is, thus, to generally reinforce control over budgetary restraint.

In this new version of the excessive deficit procedure, it still is for the Council to declare the existence of an excessive deficit, but its political discretion when doing so has been drastically diminished. According to the current drafting, the Council is, "as a rule, expected to follow the recommendations and proposals of the Commission or explain its position publicly".[44] This provision has been enshrined in a new Section of the Regulation entitled 'Economic Dialogue', but requiring public explanations only when the Council is to adopt a decision different to that proposed by the Commission does not seem to promote such dialogue adequately. Instead, it merely rewards the blind following of the Commission's assessment. Although the Council still retains the power to decide about the existence of an excessive deficit, this new requirement leads to a decision-making procedure with a strong technocratic aftertaste. As a matter of fact, still under the heading of 'Economic Dialogue' the Commission is now given a key role monitoring national budgets. Its permanent dialogue with national authorities allows it to "carry out missions for the purpose of the assessment of the actual economic situation in the Member State",[45] and even to "invite representatives of the ECB (…) to participate in surveillance missions".[46] Therefore, the new procedure promotes a substantial enhancement of the role of institutions with a technical instead of a political approach to economic policies.

Regarding the sanctioning dimension of the procedure it is worth mentioning that extended limits for correcting an excessive deficit are still stipulated,[47] but time limits for adoption of sanctions are dramatically reduced to four months.[48] As a way to increase the deterrent effect of the SGP, among the different measures provided for imposing sanctions in Article 126.11 TFEU "a fine shall, as a rule, be required",[49] its amount now comprising a fixed component of 0.2% of GDP and a variable component which together cannot exceed 0.5% of GDP.[50] This means that

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44 Article 2a.1, second paragraph, of Regulation 1467/97 after last amendment. The same is established in Article 2-ab.2 of Regulation 1466/97 after last amendment, dealing with the economic dialogue between European institutions in the context of the European Semester.

45 Article 10a.1 of Regulation 1467/97 after last amendment.

46 Article 10a.3 of Regulation 1467/97 after last amendment.

47 Article 2.6 of Regulation 1467/97 after last amendment.

48 Article 6.2 of Regulation 1467/97 after last amendment.

49 Article 11 of Regulation 1467/97 after last amendment.

50 Article 12 of Regulation 1467/97 after last amendment.

the sanctioning procedure still depends on the discretion of the Council (Article 126.11 TFEU), but apart from that decision all remaining elements of disciplinary measures (time limits, type of sanction and amount of fines) have been substantially hardened.

On the multilateral surveillance procedure side, even more developments have occurred. In addition to revision of Regulation 1466/97, three new Regulations have been passed. A thorough and detailed explanation of their content is beyond the scope and purpose of this paper. Instead, we will just refer to the features of these Regulations that are more relevant for our research, aiming at assessing the democratic legitimacy of recent governance mechanisms.

These features are three. The first is the voting system arranged for assessing whether a Member State in the newly created excessive imbalance procedure[51] has observed a recommended action,[52] as well as for deciding on formal sanctions against some Member State (be they interest-bearing deposits,[53] non-interest-bearing deposits[54] or fines[55]) or for declaring, one month after there was no agreement in the Council (by qualified majority vote) at first attempt, that no effective action has been adopted by Member States regarding their stability or convergence programmes.[56] For all these situations a similar drafting, altering the qualified majority voting rule established in the Treaties for the Council, has been employed, stating that decisions "shall be deemed adopted by the Council unless it decides, by qualified majority, to reject the recommendations within 10 days of its adoption by the Commission". Both drafting and procedure are reminiscent of the voting rules traditionally applied in some of the committees chaired by the Commission and in charge of the normative implementation of EU law (currently regulated by Articles 290 and 291 TFEU and the 'Comitology' Decision).[57] In some of these committees, mainly dealing with issues of a highly technical content, representatives of the Member States can reject the Commission's proposal under conditions similar to those required in that case. This 'reverse qualified majority voting' goes a step further in reducing discretion when implementing the SGP than the provision of the new excessive deficit procedure requiring the Council, as a rule, to observe Commission proposals.

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51 Chapter III of Regulation 1176/2011.

52 Article 10.4 of Regulation 1176/2011.

53 Article 4.2 of Regulation 1173/2011 and Article 3.3 in relation to 3.1 of Regulation 1174/2011.

54 Article 5.2 of Regulation 1173/2011.

55 Article 6.2 of Regulation 1173/2011 and Article 3.3 in relation to 3.2 of Regulation 1174/2011.

56 Article 6.2, fifth paragraph of regulation 1466/97 after last amendment, in what refers to stability programmes (for Member States participating in the third stage of EMU or, in other words, whose currency is the euro), and Article 10.2, fifth paragraph, of Regulation 1466/97 after last amendment, in what refers to convergence programmes (for Member States with a derogation).

57 Regulation (EU) 182/2011 of the European Parliament and of the Council, of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, 13).

A second feature to be noted is the explicit administrative nature of some of the abovementioned sanctions, according to Article 9 of Regulation 1173/2011.[58] This is a radically new statement in EU law for several reasons. Firstly, because in the history of the EU legal order there has been no clear link between substantive content, material form and decision-making procedure for legal acts (Losada and Menéndez 2008, 347-351). In EU secondary law substantively legal as well as administrative issues were dealt with indistinctly by all legal acts at the disposal of the institutions,[59] adopted following various procedures requiring different majorities. As a matter of fact, the Court of Justice had to establish some broad principles in order to guarantee, at least to a certain extent, a hierarchy between acts of secondary law.[60] This situation has been recently clarified with the entry into force of the Treaty of Lisbon, which distinguishes between legislative and non-legislative acts.[61] However, this distinction is just a procedural one, since it simply results from the procedure according to which the act has been adopted and not from its substance or form. Secondly, it is dubious whether declaring the administrative or legal nature of sanctions is something that in EU law is for the decision-maker to determine. And finally, it is hard to accept that sanctions, which in this case may amount to 0.2% of GDP, can be considered of an administrative nature.

A final feature worthy of comment is the investigative powers of the Commission in order to scrutinize Member State misrepresentations of deficit and debt data relevant for application of Articles 121 and 126 TFEU. The Commission "may conduct on-site inspections and accede to the accounts of all government entities at central, state, local and social security level".[62] These investigative powers also go a step further than the mere "mission" established for the excessive deficit procedure as well as for the new excessive imbalance procedure.[63] In fact, these powers are equivalent to those the Commission has under competition law,[64] although in the coordination of economic policies the existence of a clear legal basis for a development with

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58 Such explicit acknowledgement only refers to sanctions imposed under Regulation 1173/2011.

59 The difference between these acts depends on their legal effects, as established by article 288 TFEU.

60 This hierarchy was based on the distinction between essential and non-essential elements of legal acts. See Case 25/70 Köster, 17 December 1970, ECR [1970] 01161 (paragraph 6).

61 Legislative acts are those adopted following the ordinary legislative procedure or a special legislative procedure (Article 289.3 TFEU), while non-legislative acts are delegated or implementing acts (Articles 290 and 291 TFEU, respectively).

62 Article 8.3 of Regulation 1173/2011.

63 Article 13.1 of Regulation 1176/2011. Article 13.2 also allows the Commission to undertake "enhanced surveillance missions (…) for the purposes of on-site monitoring" of Member States involved in an excessive imbalance procedure.

64 In particular to those expressed in Article 105.1 TFEU and Article 20 of Council Regulation (EC) 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, 1).

such a potential impact on national sovereignty is not evident.[65] In addition, it is well known that in the competition law field, the companies investigated, as legal persons, have been recognized holders of fundamental rights as a measure to face the extraordinarily invasive investigative powers of the Commission.[66] It cannot be ruled out that, faced with a similar situation, the Court of Justice is inclined to grant some rights of defence to Member States under Commission scrutiny, but that could lead us to the paradoxical case of States entitled to rights at least similar to fundamental rights.

In sum, the supranational strategy against the economic crisis drastically reinforces the constraints imposed on national economic policies by strengthening the excessive deficit procedure, now also closely monitoring public debt, and by exhaustively regulating the multilateral surveillance procedure. The latter is now headed by a European Semester strengthening coordination of Member State budgetary policies, and articulated by an excessive imbalance procedure strictly monitoring their implementation under the shadow of severe sanctions.

C) The intergovernmental strategy against the economic crisis: the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

A second, intergovernmental strategy was launched in March 2012, when all Member States but the United Kingdom and the Czech Republic signed a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). The main aim of the Treaty is to "strengthen the economic pillar" of EMU by fostering budgetary discipline, reinforcing the coordination of national economic policies and improving governance of the euro area (Article 1.1 TSCG). It entered into force on the 1st January 2013, and at the time of writing it binds 17 Member States. Although this instrument is an international treaty, it has "to be applied and interpreted in conformity" with the EU Treaties (Article 2.1 TSCG) and, as a matter of fact, "[w]ithin five years (…) the necessary steps shall be taken (…) with the aim of incorporating the substance of this Treaty into the legal framework of the European Union" (Article 16 TSCG). Notwithstanding these provisions, many doubts exist about the exact relationship between EU law and the TSCG.

This paper will just deal with those aspects of the Treaty which are relevant for assessing the democratic legitimacy of its content. In particular, three of its

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65 The legal basis of Regulation 1173/2011 is Article 136 TFEU ("In order to ensure the proper functioning of economic and monetary union […] the Council shall […] adopt measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance") in combination with Article 121.6 TFEU ("The European Parliament and the Council […] may adopt detailed rules for the multilateral surveillance procedure").

66 Case C-94/00, Roquete Frères SA v. Directeur général de la concurrence, of 22 October 2002, [2002] ECR I-09011. For a general discussion, see Bombois 2012.

provisions are scrutinized. The first refers to the introduction of the balanced budget principle, as defined and expressed in Article 3.1 TSCG, in the signatories' legal order "through provisions of binding force and permanent character, preferably constitutional" (Article 3.2 TSCG). Equally important, this provision also establishes that contracting parties "shall put in place at national level" some correction mechanism prepared to automatically trigger as soon as deviations from the SGP objectives take place. Furthermore, when doing so, signatories must observe the principles proposed by the Commission, even regarding "the role and independence of the institutions responsible at national level for monitoring compliance" with SGP rules. Interestingly, "[s]uch correction mechanism shall fully respect the prerogatives of national Parliaments" (Article 3.2 TSCG).

When read together, the contents of this provision result in the replication at national level of some commitments Member States have already accepted via EU law, as well as in the establishment of an additional and independent institutional apparatus in charge of monitoring their observance. The reason for this replication is to turn those commitments into national legal rules, thus internally binding and subject to judicial review from the national judiciary. The aim is, in sum, to make the contents of the SGP an internal legal obligation in addition to a political compromise at European level. Whereas strict observance of the Pact can be improved by diminishing discretion in the Council whenever it has to adopt a decision from which a subsequent sanction may result, as amendments in the supranational strategy prove, creating an internal obligation at state level complemented by an automatic reaction mechanism monitored by an independent institution will guarantee almost full compliance.

Several questions arise in relation to this provision. First of all, despite the content of its Article 2.1, the TSCG cannot be consistently applied and interpreted in conformity with EU Treaties, because they are founded on a different premise. While the TSCG aims at replicating in the national legal order (preferably in constitutional norms) some of the contents of the SGP, even establishing a specific set of institutions in charge of monitoring their observance, EU law is based on a completely different rationale, according to which it is for Member States to decide how they implement supranational law. As long as they assure the effectiveness of EU law through their own institutions and procedures, they have discretion regarding the latter's particular features. The TSCG operates exactly the other way around: since it requires Member States to replicate the SGP basic rules, preferably by constitutional norms and monitored by an institution which at least has to be independent (though not specified, presumably this means independent of both Government and Parliament), the TSCG is thus not observing the EU principle of institutional and procedural autonomy. This is difficult to reconcile with the idea of state sovereignty, unless we accept that the TSCG implies an extremely serious loss of power by Member States, a power which, importantly, has not been conferred on any other level of government. It is difficult to overemphasize the importance of Member States' unilateral renunciation of these competences.

Requiring this renunciation to fully respect the prerogatives of national Parliaments seems, at least, contradictory, since the aim of the self-restriction is precisely to reduce those prerogatives.

A similar contradictory situation takes place regarding a second provision, Article 7 TSCG, which establishes that "[w]hile fully respecting the procedural requirements" of the European Treaties, the contracting parties "commit to supporting the proposals or recommendations submitted by the European Commission" regarding the declaration of excessive deficit. If the Treaties gave the Council discretion when adopting some EMU decisions, it seems that an international agreement between the Member States, aiming at ignoring such discretion and transferring *de facto* to the Commission the power to decide about the existence of an excessive deficit, will be difficult to reconcile with the observance of the procedural requirements of the European Treaties. Interestingly, this obligation to follow the opinion of the Commission ceases to exist as soon as a qualified majority of Member States rejects the proposal. This means that, resulting from this agreement between the contracting parties, a reverse qualified majority, in the same terms as analyzed in the previous section, is the required voting procedure. With this measure, contracting parties want to make the sanctioning procedure of a binding, legal character instead of a political one as was originally designed. To put it differently, this is a political agreement for changing *de facto* the decision-making procedure in force. But it is worth stressing, once again, that establishing a new voting rule not amending, but circumventing the literal tenor of the treaties distorts their content in such a way that it may be considered as against the general principle of sincere cooperation (Article 4.3 TEU).

Finally, a third provision of the new TSCG worth discussing is Article 8. Its first paragraph establishes that the Commission has to present a report assessing how contracting parties have implemented the changes required by Article 3.2 TSCG. Regardless of the Commission assessment, any contracting party concluding that another party has failed to comply with an obligation may bring the case to the Court of Justice. The second paragraph establishes that if the ruling of the Court is not observed by the contracting party affected, the issue can be brought back to the Court requesting imposition of financial sanctions, which can amount to 0.1% of GDP of the affected party.

The content of Article 8 TSCG is reminiscent of some procedures guaranteeing the observance of EU law by Member States, in particular of Articles 259 TFEU (infringement actions by one Member State against another Member State) and 260 TFEU (financial sanctions in case of not complying with judicial decisions of the Court). However, there is a crucial difference between those proceedings and what is proposed in Article 8 TSCG: the yardstick against which legality is to be reviewed. While the role of the Court in the former is to determine if Member States have breached EU law, in the latter the control is of observance of the TSCG. Importantly, it is not clear if the Court will simply check that the institutions and procedures required in Article 3.2 TSCG have been actually incorporated into

national legal orders or if it will monitor how properly they work. The importance of this distinction between formal and substantive control should not be ignored. A Member State might have introduced in its legal order the principle of balanced budget and the institutions and proceedings for adequate monitoring and, if required, correction, but delays in the work of the judiciary, for instance, may diminish or even avoid their effectiveness (Ferreres Comella 2012). This could be considered a breach of the TSCG only if a substantive review of the obligations of the contracting parties is carried out.

Another tricky question refers to control by the Court of Justice of the contracting parties' observance of the last sentence of Article 3.2 TSCG, establishing that the "correction mechanism shall fully respect the prerogatives of national Parliaments". A literal reading of Article 8 TSCG suggests that the Court is competent to proceed to such a review, since it mentions Article 3.2 TSCG without excluding any of its contents. This will lead to the paradoxical situation in which the prerogatives of national Parliaments are the object of a report by the Commission, lead to an infringement procedure before the Court after a complaint by some contracting party or even result in a sanction on the State for not observing them. This interference by other States, the Commission or the Court of Justice in constitutional issues of Member States is completely new in the European legal context and reveals that a radical shift has taken place in the model of integration – with even more extreme consequences if this provision is finally incorporated into EU law following Article 16 TSCG. Of course, the Court of Justice can decide that its assessment of respect for the prerogatives of national Parliaments can depend on the analysis and opinion of national (constitutional) courts, thus deactivating the potential legal conflicts arising. But that option will at the end of the day allow Member States to decide by themselves about their own observance of an international commitment, which plays down any effective control. Previous experience in European integration inclines us to think that a common definition of the concept of 'prerogatives of national Parliaments' will be established by the Court, that being the yardstick against which national legal orders must be compared. This means that the constitutional structure of Member States will be reviewed not according to their own constitutional provisions, but to those of the TSCG.

V. A democratic legitimacy assessment of new developments in economic governance

Once the new governance mechanisms recently put into practice in EMU have been described, we will proceed to assess their democratic legitimacy using our threefold scheme. Substantial changes have occurred in the coordination of (national) economic policies, but when assessing them according to our three models some difficulties arise resulting from the two different dimensions that coordination entails. By the first dimension, the *active side* of coordination, we

refer to the set of political decisions and commitments Member States can adopt, according to EU Treaties, in order to make their economies converge, while the second dimension, the *passive side* of coordination, comprises all restrictions and constraints imposed on national economies.[67] Our difficulties result from these limitations on national economic policies not easily fitting in any of our three models conceptualizing the relationship between governance and democratic legitimacy, since they do not establish a decision-making procedure but just constrain the range of policy options. Thus, an additional and more detailed analysis will be required, paying special attention to how much discretion is allowed when interpreting and enforcing those rules.

Beginning with the assessment of the active side of the coordination of (national) economic policies, a first intuition is that the conditions under which it happens have been constrained since Maastricht. In the original agreement, national parliaments were to decide economic policies, but a say was given to European institutions and representatives of other Member States in the Council. We considered this a mechanism complementing democratic legitimacy, since through this multilateral surveillance procedure national parliaments were advised by experts from European institutions and from other Member States. Certainly, peer pressure could be exerted at the Council on a Minister of Economy when decisions with a potentially damaging effect for other Member States were adopted by its parliament, but this should be understood as giving voice to all those affected by the decisions of a single Member State in achieving some commonly agreed political objectives. The situation, however, is now radically different.

During the European Semester, which corresponds to the first half of the year, all activities related to coordination of economic policies at the supranational level are gathered. These comprise the formulation, surveillance and implementation of broad economic policy guidelines as well as of employment guidelines (Article 148.2 TFEU), and also the submission and assessment of all stability and convergence programmes and national reform programmes.[68] National budgetary procedures need now to be planned ahead and included in a scoreboard,[69] so budgetary estimates can be revised at this point at the supranational level and, if needed, be the object of an in-depth review by the Commission.[70] The new excessive

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67 The distinction between the active and the passive dimensions of coordination of national economies resembles the distinction between positive and negative integration made by F. W. Scharpf in several of his writings. However, our distinction differs from Scharpf's in several aspects although, as a matter of fact, they often overlap. Firstly, because sanctions in EMU (passive dimension of coordination) require a positive decision by the Council (positive integration); but secondly, and even more important, because Scharpf's distinction is not applicable to EMU, where measures are not aiming at "eliminating national restraints on trade and distortions of competition" (negative integration) nor are they shaping "the conditions under which markets operate" (positive integration). Instead of microeconomics, where this distinction is pertinent and relevant, EMU deals with macroeconomics. See Scharpf 1996, 15–16.

68 Article 2-a of Regulation 1466/97 after last amendment.

69 Article 4 of Regulation 1176/2011.

70 Article 5 of Regulation 1176/2011.

imbalance procedure will ensure observance by Member States of budgetary stability through a permanent dialogue between the Commission and national authorities and, if needed, via enhanced surveillance missions for the purposes of on-site monitoring,[71] thus curtailing national parliaments' budgetary discretion.

This new coordinated budgetary procedure, although still aiming at achieving a common political objective for all Member States, does not fit so well in the model of governance mechanisms complementing democratic legitimacy. The line distinguishing between what national parliaments are receiving, technical inputs from experts or instructions from non-representative institutions, has become thinner and, therefore, our analysis places these new rules closer to the model of governance mechanisms alternative to democratic legitimacy. Although an economic dialogue is established with the European Parliament, it should be noted that its content is merely informative and for the sake of transparency.[72] This means that no alternative mechanism of checks and balances legitimates this new decision-making procedure, even though it deals with one of the core areas of national sovereignty: deciding how the money collected through taxes will be spent. The result is that the legitimacy of the European Union and its Member States are both jeopardized.

If constraints have been established regarding the active dimension of coordination of national economic policies, now to a great extent uploaded to the supranational level via the European Semester, on the passive side they have been strengthened to the point of making sanctions semi-automatic. This is a direct consequence of the new 'reverse qualified majority vote' required for the imposition of sanctions. The decision declaring the existence of an excessive deficit is still a matter to be assessed by the Council (Article 126.6 TFEU), although its discretion is now limited by constraints stemming, on the one hand, from the supranational level, since the observance, "as a rule", of the position of the Commission is required in the context of the 'economic dialogue';[73] and on the other hand, from the international level, where Member States have committed to supporting Commission recommendations and proposals (Article 7 TSCG). But these are neither the sole nor the most important constraints imposed on Council discretion, since once the existence of an excessive deficit has been declared, sanctions attached to it are to be adopted according to the new 'reverse qualified majority vote'. Discretion in the Council has been reduced to a minimum. As a matter of fact, a detailed analysis of this procedure reveals that, according to the voting rules about qualified majority in the Council currently in force, Germany, the

71 Article 13 of Regulation 1176/2011.

72 Article 14 of Regulation 1176/2011. See also Articles 3 of Regulation 1173/2011, 6 of Regulation 1174/2011, 2-ab of Regulation 1466/97 after last amendment and 2a of Regulation 1467/97 after last amendment.

73 Article 2a.1, second paragraph, of Regulation 1467/97 after last amendment, and Article 2-ab.2 of Regulation 1466/97 after last amendment.

Netherlands, Finland and Austria would compose a "qualified minority" enough to adopt *any* proposal coming from the Commission.[74]

As mentioned above, the design of this reverse qualified majority is reminiscent of some of the 'Comitology' procedures. Indeed, when read together with the provision declaring the administrative nature of these sanctions,[75] it seems that European institutions have tried to consider these mechanisms as merely adopting normative implementing rules, thus corresponding to what according to our scheme would be the efficient implementation of democratically legitimated decisions. But when the scope of the analysis is broadened, several reasons lead us to think that it actually represents an instance of a governance mechanism alternative to democratic legitimacy. First, in formal terms, because this voting rule *de facto* alters the content of the Treaties, and therefore ignores the basic terms of the agreement between Member States as ratified by their parliaments. Secondly, as to the substance, because the sanctions imposed are not decisions of a technical nature, but of an extremely sensitive political content. And thirdly, combining form and substance, because the democratically legitimated decisions which it is allegedly implementing result from the new 'European Semester' which, as detailed above, constrains Council discretion and gives a prominent role to non-majoritarian institutions, mainly the Commission but also the European Central Bank, in the design and coordination of economic policies.

This substantial enhancement of the functions of non-representative institutions when designing economic policies leads us back again to the issue of what legitimating mechanisms alternative to democratic ones have been established. The Commission is an independent institution acting as agent of the Member States, but only accountable, to a certain extent, to the European Parliament. This institutional arrangement results from its assignments according to the original treaties, namely aiming at monitoring compliance with EU law by Member States and at implementing competition policy. These tasks were all related to microeconomics and, thus, did not have an impact other than tangentially on political decisions of macroeconomic weight. Hence institutional independence was justified and no additional mechanisms were required for legitimating its decisions. The situation changed, nevertheless, when new tasks were attributed to the Commission, first under the Maastricht Treaty and now, indirectly, resulting from the provisions of the Six Pack and the TSCG. In the original EMU these tasks just consisted in monitoring, advising and guiding Member States in coordinating their national economic policies, all decisions being adopted by the Council. The role of the Commission could be justified in terms of complementing the democratic legitimacy of those decisions with its technical advice. But, resulting from the contents of recent reforms, the Commission now is not only actively participating,

74 A similar analysis, including Slovakia instead of Austria, was carried out by Menéndez 2012b, 66. Notice, nevertheless, that it is only possible to attain the majority required with just four Member States if it is Austria who votes in favour.

75 Article 9 of Regulation 1173/2011.

in the context of the European Semester, in coordinating the whole set of Member States' macroeconomic policies, but it can even impose sanctions (needing the support of a minority in the Council) if the changes in national policies it suggests are not observed.

After all this analysis, we can summarize the evolution of EMU rules since Maastricht, in particular concerning the passive side of coordination of national economic policies required to guarantee the stability of the single currency, by distinguishing three different stages, depending on how much discretion is allowed when interpreting the substantive content of the SGP, on the one hand, and in the adoption of sanctions, on the other. In the first stage, SGP rules were strictly interpreted but sanctions required a political agreement. In a second stage, after revision of the SGP, some more leeway in the interpretation of rules was allowed, sanctions still being political. Finally, after recent developments in EMU, strict legal rules are to be implemented under the shadow of semi-automatic sanctions (see Table 1).

TABLE 1 – Discretion allowed in the coordination of national economic policies in EMU

		Substantive content	
		Political discretion	Strict legal rules
Enforcement of sanctions	Non-automatic	Original SGP (1997)	Amended SGP (2005)
	Automatic	Six Pack (2011) TSCG (2012)	

The current design of EMU is an example of institutional experimentalism, where new powers and competences have been *de facto* conferred on an independent and pre-existing institution, aimed at radically different objectives and, thus, legitimated under a different rationale, without careful analysis of the consequences of those changes for the legitimating mechanisms of the European

Union as a whole. The result is that the sole mechanism able to legitimize EMU action nowadays is based on providing citizens with efficient results. Given the precarious and uncertain economic situation of many European citizens today and the social disembeddedness of the integration project, this seems far from being the general perception.

VI. Conclusions

Our democratic legitimacy assessment of EMU has revealed several trends in the European integration process which, when approached from a systematic point of view, identify some acute deficiencies of the European Union, raising certain and even urgent democratic concerns. The recent reform of the rules implementing the provisions of the Treaty on EMU (the supranational strategy) as well as the incorporation into national law of some of those arrangements via an international treaty (the intergovernmental strategy) respond to what was perceived as a collapse in the prevention of systemic risks for EMU. After the so-called failure of that 'preventive arm', more radical measures have recently been adopted in order to ensure compliance with the SGP under the shadow of extremely severe sanctions (the 'corrective arm'). It is in this new field where enormous power has been *de facto* transferred from democratically legitimated to independent non-majoritarian institutions (the Commission and the European Central Bank). This transfer of power sacrifices democratic legitimacy on the altar of a more efficient EMU, and parallels in the economic domain what has been happening during recent decades in other fields, where security has prevailed over freedom or uncertainty. Executive dominance seems to be the only reply to systemic crises.

But we ourselves should question why all these corrective mechanisms did not exist before the crises. Was EMU badly designed just having a 'preventive arm' and relying on political sanctions to guarantee Member State observance? The truth is that a corrective arm did not exist simply because, according to the system designed in Maastricht, it would never be used: Member States should rely on markets for their financing, and even default if required. The need for all these measures is a direct consequence of the political decision not allowing default by a Member State (after the combined effect of that state disregarding its commitment to other Member States by tampering with its figures, and the markets not working as a disciplinarian mechanism), as should have happened if the original provisions of EMU were followed.

The consequences of *de facto* abrogating these clear rules are nowadays evident: a redesign of the constitutional rules of EMU had to be improvised through supranational and intergovernmental strategies, thus paying more attention to the specific details of the huge economic problems to be solved than to the potential democratic risks to be avoided. In sum, the efficiency of concrete policies prevailed over abstract constitutional thinking. This is not without risks and, as a matter

of fact, this unbalanced approach finally resulted in a model which we can label 'exacerbated governance'.

This model jeopardizes the whole European integration project in several ways. First, by putting at risk the mechanism through which it has been traditionally carried out: law. Since EMU provisions will not only be internalized by national legal orders via the principle of primacy, but now they also have to be included in "provisions of binding force and permanent character, preferably constitutional", the door is open for national courts to interpret those provisions, thus undermining uniform interpretation of EU law by the Court of Justice. Secondly, by challenging national democracies, on which the European Union is based, by imposing economic policies not only against the will of their citizens but even without giving them a say. Thirdly, by corrupting the institutional setting of the Union, since non-majoritarian institutions are now *de facto* dealing with issues which correspond to representative institutions. This also entails a connected problem resulting from the different and contradictory requirements for each role these institutions have to play. In the case of the Commission, independence is required for it to guarantee enforcement of EU law and, importantly, competition rules, but at the same time the pressure to make it a representative institution will increase once its role as *de facto* decision-making power in EMU is recognized.[76]

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76 For a similar assessment of the different roles of the ECB, see Tuori 2013.

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