

LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL
MARKET
REGULATION,
BUSINESS
DEVELOPMENT AND
GOVERNMENT'S
POLICIES ON
GLOBALIZATION

Editors

F. CAPRIGLIONE – R.M. LASTRA – R. MCCORMICK
C. PAULUS – L. REICHLIN – M. SAKURAMOTO



in association with



LAW AND ECONOMICS YEARLY REVIEW

www.laweconomicsyearlyreview.org.uk

Mission

The “Law and Economics Yearly Review” is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione Onlus (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government’s policies, business development constraints and the “sovereign debt crisis” are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism’s turbulences and to promote a sustainable retrieval.

Address

Fondazione Gerardo Capriglione Onlus
c/o Centre for Commercial Law Studies
Queen Mary, University of London
67-69 Lincoln’s Inn Fields
London, WC2A 3JB
United Kingdom

Main Contact

Fondazione G. Capriglione Onlus - fondazionecapriglione@luiss.it

Editor-in-Chief

F. Capriglione

Editorial Board

G. Alpa - M. Andenas - A. Antonucci - R. Olivares-Caminal - G. Conte - M. De Marco - M. Hirano - I. MacNeil - M. Martinez - M. Pellegrini - C. Schmid - M. Sepe - A. Steinhouse - V. Troiano - V. Uskov

Editorial Advisory Board

F. Buonocore - N. Casalino - A. Miglionico - D. Siclari - I. Kokkoris

ISSN 2050-9014

Review Process

1. Articles and case notes submitted to the Review will be reviewed by at least two reviewers and, where necessary, by an external advisor.
2. Any paper will be submitted by the Editorial Board - anonymously, together with an evaluation form – to the reviewers for an overall assessment.
3. In case of a single negative evaluation by one of the reviewers, the Editor-in-chief may assume the responsibility to publish the paper having regard to highlight this circumstance.
4. In any case, the submission of the paper or its positive evaluation does not provide any right to the author to ask for the publication of the paper. Fondazione Gerardo Capriglione Onlus may reproduce articles published in this Review in any form and in any other publications.

CONTENTS

Presentation	1
---------------------------	----------

Francesco Capriglione

Politics and finance in the European Union	4
---	----------

Francesco Capriglione - Andrea Sacco Ginevri

The influence of politics on regulatory and cultural change in the financial sector after the financial crisis: a UK perspective	110
---	------------

Roger McCormick

Harmonising banking rules in the Single Supervisory Mechanism	124
--	------------

Ignazio Angeloni - Thomas Beretti

Politics and finance with reference to the European institutional frame	144
--	------------

Mads Andenas - Ilaria Supino

EBU and the National Credit Authorities' structure: the Italian case. The role of CICR in the new institutional context.....	161
---	------------

Marco Sepe

The bank insolvency directive (Directive 2001/24/EC) halfway between Scylla (politics) and Charybdis (finance): a comparative and empirical analysis	178
---	------------

Pierre de Gioia-Carabellese

The independence of the European Central Bank between monetary union and fiscal union: the OMT case as a conflict among non-majoritarian institutions	195
--	------------

Stefano Lombardo

PRESENTATION

1. In a particularly delicate moment in the history of the EU – in which certain events that have been difficult to address seriously threaten the endurance of the European institutional framework – we have to wonder about the reasons that have prevented, over the decades, the achievement of cohesion and solidarity within the Union. The search for an adequate answer to this question, apt to clarify the uncertainties of the reality at hand, becomes an essential factor in order to identify the path to follow in view of overcoming what, in the opinion of many, is described as a crisis of the “system”.

It is clear that, in the context above outlined, this analysis should lead primarily to the evaluation of the current European organizational model and, therefore, to the identification of the causes that have prevented the process of economic integration to open a political unity. Such a model has allowed the permanence of national interests and individualism, which prevented the creation of the high level of interaction among the different European Countries needed to build a tangible political union despite the diversities. The hegemonic tendencies of certain prosperous Members have been matched by the shortcomings and delays of the politics in other Members, whose weaknesses have negatively affected the integration process, which process is based - and must be based - on the achievement of a substantial equality among all.

In another field, the establishment of the EMU at the beginning of the millennium - despite revealing beneficial effects in its early stages - has not brought the desired changes towards a strongly cohesive Community. The permanence of different fiscal policies and the failure to achieve a full economic and legal convergence have highlighted the limits of a Union focused solely on the 'single currency'. In fact, the single currency has implied a transfer of sovereignty from the acceding Countries and significantly updated the traditional

architecture of the national State. Instead of uniting the Community, we face a sort of disaggregation of the previous relationships among EU States, since certain Countries have not joined the EMU (primarily UK) and such a decision will inevitably lead them to pursue interests different from those of the Eurozone Members.

The European Union, therefore, is unable to pursue the objective of setting up a joint team of States; its integration process seems not to know how to go beyond a regulatory harmonization towards economic development. Such a context has been confirmed by the recent financial crisis, during which the reaction to the turmoil has not been expressed by the adoption of suitable instruments to combat it; prevalently resulting, instead, in the imposition of austerity measures (by the EU summits) to the weak Countries. Thus, the poor living conditions of many populations are exacerbated, leading to revolts by those who are oppressed by the excesses of the mechanisms of strictness applied; hence the growing spread of Euroscepticism and anti-European attitude.

The identification of a healthy balance between the recovery of a political action (through reforms able to reboot the growth) and the efforts of the technique (highlighted in the measures adopted by the ECB in the recent years) becomes the new goal to be pursued for the purpose of continuing a path taken over half a century ago; such initiatives are required not only by the adherence to the idea of a “free and united Europe”, born in the full rage of World War II, but also by the “hard choices” that should be taken in the face of events of global significance such as migration of people fleeing wars, hunger, dangers of death. The course of history gives way to a new revival of the united Europe, which certainly cannot, and should not, deal with the humanitarian emergency by building walls or by rejecting in other ways those claiming the right to have their dignity of human being respected. A positive input in this sense seems to come from the German chancellor Angela Merkel, who recently opened the German borders admitting the Syrian refugees. Perhaps now is the time to not

increase the fear that the Europe of peoples and nations has been replaced by that of technocratic powers and financial capital!

2. The need to identify some “way out” from the above-mentioned uncertainty, *i.e.* from the impasse in which the EU currently seems to be involved, suggests to address the research in different directions, all of which converge on the relationship between 'politics and finance'. In this perspective we have to find lines of investigation in order to verify if, and how, a “turning point” in the path of European integration can be achieved, as such path is now more rugged and difficult as a consequence of the substantial failure of the ideals based on the original design of the Community.

The editorial board of the Journal Law and Economics Yearly Review, which dedicates its analysis to issues concerning the law and economics, including the analysis of the special relationships between politics and finance, considers appropriate to devote the articles of this monothematic volume to the study of the legal, financial and socio-political events that, in recent decades, have affected the EU, focusing the analysis on such issues. We are aware that this analysis cannot achieve definitive results, since such results are necessarily limited by the development of events still affected by divergences and by deep economic and cultural diversities. However, this does not jeopardize the need to proceed on this road, believing that the present difficulties cannot preclude the hope of continuing on a path that the “creators” of the "United Europe" hypothesized as the ultimate goal of the process of economic integration.

Francesco Capriglione

Editor-in-Chief

POLITICS AND FINANCE

IN THE EUROPEAN UNION*

Francesco Capriglione** - Andrea Sacco Ginevri***

“We think the euro is irreversible. And it’s not an empty word now, because I preceded saying exactly what actions have been made, are being made to make it irreversible”.

(M.DRAGHI, July 26, 2012)

“The Europe I would like to live is not the one of the walls against refugees”.

(J.C.JUNCKER, August 24, 2015)

ABSTRACT: *The European Union-wide financial crisis has shown the degenerative effects of an advanced capitalism including, among others, the limits of a growth-model that proved to be inadequate to balance out certain uneven realities. Some basic points of the regulation concerning the European financial system seem to have become obsolete given that European Union ‘political’ institutions were not able to contest the ‘market power’. Thus, this paper analyses the relationship between ‘politics’ and ‘finance’ in the European Union context,*

* Although jointly elaborated, this article has been drafted as follows: paragraphs 2, 3, 4, 5, 6, 9, 12, 13 and 14 by Prof. Francesco Capriglione; paragraphs 7, 8, 10 and 11 by Dr. Andrea Sacco Ginevri; paragraphs 1 and 15 jointly by the authors.

** Francesco Capriglione is Full Professor of Law and Economics and Dean of Law Faculty at *Università degli Studi Guglielmo Marconi* in Rome.

*** Andrea Sacco Ginevri is Adjunct Professor of Comparative Corporate Governance at *Università Europea di Roma*. Ph.D. in Law and Economics at *Università degli Studi di Roma Tre*. LL.M. in Banking, Corporate and Finance Law at *Fordham University* of New York.

highlighting the modalities by which the European Union exercises its deliberative powers based on a process substantially influenced by a co-decision model.

We focus our analysis on the causes of delays and divergences among the Member States in the homogenization process and on the negative impact produced by an austerity policy on a program of common growth. In such respect, our research considers the ‘role of politics’ in the European financial system, looking at the values on which it is grounded and at the devices that politics put in place to set up the economic processes. In this perspective, we analyze the organizational model adopted within the European framework and, in particular, the dynamics that govern a proper management of the decisional powers within the EU. Our analysis starts from the recognition of certain evolutionary steps (such as EEC, EMU, EU and, more recently, ESFS and EBU) characterized by the predominance of technique over politics and then illustrates the role of the ECB (highlighting the most significant economic measures recently taken within the EU context, including Quantitative Easing and the Fiscal Compact). Then, we briefly explain the features of a construct based on the ‘single currency’ and the theory of its ‘irreversibility’. Finally, we explore the unfulfilled expectations of the euro, describing the different situations of the main Member States (Germany, France, UK and Italy) and including the case of Greece.

We argue that harmonization of the existing rules will not achieve the integration process set up by the Founding Fathers of the European Community since the socio-cultural gap among the Member States is now accompanied by a widening of the economic gap. Therefore, the EU faces unequal positions impeding a convergence of interests toward the creation of a political union. Hence, the need to explore whether an alternative is possible, even though to date it appears unclear and not well determinable.

We conclude that politics should recover its primacy after identification of new methods of intervention appropriate to revive growth. In our view, the competent European authorities should carry out their duties without the myop-

ic eye aimed at the protection of individualistic national needs, but with the consciousness that they must foster, in any event, the common goal of an integration aimed at the development of the EU. This appears the only way to hope that the technique effort, accompanied by the political action, could support the dream of a Europe 'united in diversity', avoiding that such an idea would become an utopia.

SUMMARY: 1. Introduction. - 2. The European regional context: EEC, EMU, EU, all steps of an evolution characterized by an hidden politics. - 3. The structure of the European system: how the decisions are taken. - 4. (*continued*): The primacy of technique. - 5. Certain changes in the EU financial system: ESFS and EBU. - 6. (*continued*): The original role of the ECB. - 7. The market stabilization devices: EFSM, EFSF and ESM - 8. (*continued*): The Quantitative easing. - 9. The limits of a construction based on the 'single currency'. - 10. The unfulfilled expectations of the euro and the theory of its irreversibility. - 11. (*continued*): The *Fiscal Compact*. - 12. The EU geopolitical situation. - 13. (*continued*): Comparing different situations: Germany, France, UK, Italy. - 14. The case of Greece. - 15. Conclusions.

1. The European Union-wide financial crisis seems to be heading towards its end in some countries. After a difficult journey of sufferings, poverty, indignation and anger, a door has opened towards a season of necessary "reforms" to ensure the recovery of the financial system. The European and domestic institutions accomplished a severe "test", verifying the limits of their previous economic and juridical convergences.

From a wide-ranging perspective, the crisis has shown the degenerative outlines of an advanced capitalism and, therefore, the unsuccessful combination of the components of a growth-model that proved to be inadequate to balance out certain uneven realities. This is also because of the negative effects of the globalization.¹ In particular, the financial turmoil (started in 2007) increased the

¹ Such a phenomenon has been long analyzed with focus on all the problems arising from the different rates of growth, the decrease of the interest rates, the uncertain relation between economic growth and the reliability of politics; see, e.g., STIGLITZ, *La globalizzazione e i suoi oppositori*, Torino, 2002; ID., *La globalizzazione che funziona*, Torino, 2006; ONIDA, *La globalizzazione aumenta o riduce disuguaglianze e povertà?*, in *Il Mulino*, 2002, n. 1; ASSO, *Globalizzazione reale e globalizzazione finanziaria: aspetti*

vis demolitoria arising from an intense speculative action, that fed on the “political weaknesses”. The “inoffensive speculation”, to which Friedman reconnected the mechanisms for the stabilization of markets, allows us to understand the limits of the liberalistic ideals.² Conversely, the reference to the well-known Keynesian creeping inflation theory is certainly favored within the macro-economic analysis in order to restart the development process.

In this context, the specificity of the relative financial system arises. Indeed, the system at hand has been characterized by a “market” that has become self-referential, stepping away from the traditional logic in which the development perspectives for the industrial economy were all connected to it. This brought serious implications to the current situation. First of all, it detects the failure of the traditional market function of being the “place of trade” to which the pre-eminent role played by the search for new operative venues is connected (that often results in wearing out justified monopolies and leaves room for competitiveness *for the market* rather than *in the market*).³

Hence the development of a deep disease that ends up supporting the criticalities induced by the financial turmoil. In particular, this applies to the spiral in which the substantial weakness of the market translates into activities (bullying and bearing certain securities) guided by the illusion of easy profits and far from every form of economic rationality. This has challenged many countries presenting high sovereign debt, already attacked by speculation and led to the

teorici e problemi di regolamentazione, in *Ragion pratica*, X, 2002, n. 18; PRASAD-ROGOFF-WEIKOSE, *Effects of Financial Globalization on Developing Countries: Some Empirical Evidence*, LMF Occasional Paper, No. 220, 2003; GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2005; D'ALBERTI, *Poteri pubblici, mercati e globalizzazione*, Bologna, 2008; VENTURI, *Globalizzazione, interconnessione dei mercati e crisi finanziaria. Identificazione di possibili interventi correttivi*, in *Banca borsa tit. cred.*, 2009, I, p. 84 ff.; CAPRIGLIONE, *Globalizzazione, crisi finanziaria e mercati: una realtà su cui riflettere*, in *Concorrenza e mercato*, 2012, p. 878 ff.

² Reference is made, in particular, to the well-known work of FRIEDMAN, *The Methodology of Positive Economics*, Chicago University Press, 1953, according to which the actions of informed speculators push the prices towards their equilibrium value, determined by fundamentals and attenuate oscillations around it.

³ See CAPRIGLIONE, *Ordine giuridico e processo economico nell'analisi di Law and Economics*, in PELLEGRINI et al., *Elementi di diritto pubblico dell'economia*, Padova, 2012, p. 3 ff.

form of protection of savings (in some European Union countries protected even by the constitution).

The extremes of situations in which an indiscriminate loss of wealth takes place are discussed herein. The «financialization of the systems» (simultaneous to the development of a globalized market), emphasized by the crisis, besides translating into a distrust in the operative forms, ends up influencing the political action; this due to its weaknesses and to being unanchored from the concrete instances of the market.⁴

Therefore, we are in the presence of a situation in which some firm points of the regulation concerning the European financial system (built up at the end of the twentieth century) seem to have become obsolete. The efficiency of the current banking supervision mechanisms was put to a severe test; highlighting the deficiencies in foreseeing (and avoiding), the degenerative effects of an activity sometimes carried out beyond *prudential limits*. This has raised doubts on the *quality* of the current regulation: however, the inadequacy of the policy forms for the banking system appeared clear; hence, the loss of *trust* by investors that produces the risk of downfall for the financial industry and jeopardizes the stability of the economic systems.

In order to limit this research to the examination of the European reality, it should be said promptly that the events described above reduce the possibility of achieving the objectives of sociality/solidarity that should be present in the modern systems. This also explains the persistence of the substantial differences that characterize the European Union countries, as well as the different living conditions (or rather: inequalities) between the populations of the Union

⁴ With regard to the financialization of systems, which led to the gradual liberalization and the conversion of the industrial capitalism into a financial capitalism, see, e.g., WILLIAMSON - MAHAR, *A survey of financial liberalization*, in *Essays in International Finance* n. 211 November 1998; recently, see also JANNARELLI, *Il contraente-risparmiatore*, in AA.VV., *I contratti dei risparmiatori*, Milano, 2013, p. 35 ff., according to which: «the financial world enveloped the real industrial system so that [...] it takes advantages of the real economy, forcing it toward its speculative goals increasingly self-referential» (p. 36, footnote n. 2).

countries, often a primary cause of a growing skepticism towards the continuation of this reality.⁵

2. The European regional context is moving toward an evolution that is articulated into steps aimed at increasingly reaching an economic integration. The execution of the Treaties of Rome, establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC), began a path characterized by both accelerations and slowdowns which should have been pursuing an integration, even political, among the member States.⁶ The project to build a “free and united Europe” has been designed by the founding fathers focusing on a political perspective, as shown by the inputs contained in the ‘Manifesto of Ventotene’, signed in 1941 by Altiero Spinelli et al., in which – for the purpose of overcoming the ideological crisis induced by the authoritarian dogmatism prevailing at the time – they evoke an expectation of freedom, opening up for the first time to the dream of a European union as a «necessary premise for the strengthening of the modern civilization».⁷

⁵ Among the several studies highlighting skepticism on the future of the EU, see PIRIS, *The Future of Europe, Towards a Two-Speed EU?*, Cambridge University Press, 2012, pp.138–139; CEAUX, *Habermas: "Ora in Europa il populismo sta conquistando anche i governi"*, in *laRepubblica.it* dated December 2, 2014, in which the analysis of the German philosopher has been illustrated, aimed at focusing on the need to go beyond the dependency towards the Member States sovereignty in order to develop «agreed politics to prevent the increasing social and economics inequalities».

⁶ See PAPA, *Storia dell'unificazione Europea. Dall'idea di Europa al Trattato per una nuova Costituzione europea*, Milano, 2006, *passim*.

⁷ The first edition of the *Manifesto*, published under the title *Per un'Europa libera e unita. Progetto d'un manifesto*, has been lost; subsequently, in 1944 a new edition, edited by Colorni, was printed in Rome in a book entitled *Problemi della Federazione Europea*, with the addition of two other essays of ALTIERO SPINELLI (*Gli Stati Uniti d'Europa e le varie tendenze politiche* and *Politica marxista e politica federalista*) written between 1942 and 1943.

Except for few and isolated critics to the federalist ideas contained on the *Manifesto*, the prevailing view among scholars points out the essential role of the latter for the interpretation of the federalist proposal; see, among others, VOIGT, *Ideas of the Italian Resistance on the Postwar Order in Europe*, in LIPGENS – LOTH, *Documents on the History of European Integration*, Berlin-New York, 1985, vol. I, p. 456 ff; PAOLINI, *Altiero Spinelli, Appunti per una biografia*, Bologna 1988.

More recently, the aforementioned document has been analyzed by FROSIO RONCALLI, *L'origine di un'idea: il nesso tra federalismo e unità europea nel manifesto di Ventotene*, in *Storia del Mondo*, n. 12, 2003; LEVI, *Altiero Spinelli, fondatore del movimento per l'unità europea*, in SPINELLI - ROSSI, *Il Manifesto di Ventotene*, Milano 2006, p. 179 ff; NAPOLITANO, *Altiero Spinelli e l'Europa*, Bologna, 2007, in which, analyzing the *Manifesto*, the author stated that: «It would be arbitrary and wrong to reduce it to a summary appeal for the liquidation of national States. It is worth to recall and highlight the sharpness and modernity of that federalist approach» (p. 77); VASSALLO, *Per un'edizione critica del*

Against the difficulties of pooling together the national policies on the federalist-constituent vision, outlined by Ernesto Rossi and Altiero Spinelli, or on the confederal vision supported by Winston Churchill ⁸ (both related to the creation of a new political organization), prevails the method followed by Jean Monnet, inspired to the «functionalism» of Mitrany⁹ and to the neo-functionalism of Haas and Lindberg ¹⁰. Therefore, it has proved founded the theoretical guidance according to which the initialization of processes of functional integration (in which some States pool together certain assets and economic resources) would tend to encourage and to facilitate further integrations (in line with the so-called Spill Over mechanism) having political value.¹¹

Looking at the steps of the European construction, even in a context of increasing expansion of the EU members, particular attention must be paid to the characteristics of the evolution of the integration process. Such a European unification process, which has been conditioned by instances and trends of the national governments, is not able to head towards in a political perspective; indeed, the EU Community's configuration is limited to the «free trade area», to the «customs union» and to the «common market»; thus achieving a broad regulatory harmonization aimed at promoting consistency in the production models and free movement of people, capital, goods and services.

A turning point of the above mentioned trend should have been caused by the creation of the EMU, intended to produce – by the single European currency – a significant institutional innovation (*i.e.* the transfer to Europe of

Manifesto di Ventotene: prime valutazioni sullo stato delle ricerche, in *Eurostudium*, October-December 2008, p. 61 ff.

⁸ See, e.g., VASSALLO, *Tra Winston Churchill e Hendrik Brugmans. Federalisti e unionisti nella grande assise del dopoguerra*, in *Eurostudium*, January-March 2010, p. 8 ff.

⁹ See MITRANY, *A working peace system*, London, 1943.

¹⁰ See HAASS, *The Uniting of Europe – Political, Social and economic Forces, 1950-1957*, London, 1958; ID. *Beyond the Nation State*, London, 1964; LINDBERG, *The Political Dynamics of European Economic Integration*, London 1963.

¹¹ Please note that in some works of HAAS also a notion of geographical spill over is recovered, alongside with the functional and political one.

monetary sovereignty).¹² With the «monetary union», indeed, the European Union – even allowing the Member States (which joined the Eurosystem) to have fixed exchange rates and macroeconomic common policies – did not make significant amendments to the current structure of the decision-making process, leaving substantially unchanged over the time the political scheme which is its essence.¹³ As the recent events arising from the last financial turmoil have confirmed, the «monetary union», established with the Treaty of Maastricht, failed to reach the goal therein pursued (*i.e.* fostering an advanced structure for the European integration). Such a failure has been essentially caused by an insufficient interaction between politics and finance in the integration process launched therein.

Such an evolutionary process developed along steps and phases that have not recognized a primary role for politics and that, at the same time, seemed to be characterized by the inability of the EU political institutions, who were not able to play their role and face the «market power». In other words, the grounds of the difficulties that the establishment of a European governance met have to be founded in the circumstance that the European political institutions failed to follow a «global vision», which is an essential feature considering the «pressures exercised vis-à-vis the single Member States by external causes that, on the one hand, are not easy to be managed and, on the other hand, exceed the European boundaries being part of the wider globalization process».¹⁴

¹² The «shocking» news represented by the replacement of national currencies with the single European currency is anchored in the constitution of the European Central Bank as it involves «firstly, the unique function of issuing and management of the currency and thus the transfer of a sovereign function from the federated states to the federation»; see, in this sense MERUSI, *Governo della moneta e indipendenza della Banca Centrale nella Federazione monetaria dell'Europa*, in *Studi e note di economia*, 1997, p.7.

¹³ The expectations arising from these significant steps of the process of the European economic integration appeared different, which, according to literature, determined the start of the most intense forms of unification between the States adhering to the euro. See, among others, PELLEGRINI, *Banca Centrale Nazionale e Unione Monetaria Europea*, Bari, 2003, p. 168, who, referring to the assertions of the scholars, stated that «the aggregating function pursued by the single currency» could «contribute to the establishment of a process of political unification».

¹⁴ With regard to the limits of a Eurocentric vision, see BISIO, *Mercati globali e Public Governance in Europa*, in *Emerging Issues in Management*, n. 1, 2004, p. 95, available in www.unimib.it.

The above explains why the political action failed to prevent the negative impact of a renewed economic liberalism and moved back from the purpose of achieving advanced structures for the integration process; hence, such a mission has been taken (mainly) by finance. This led us to evaluate the European “government model”, in modalities that, excluding the possibility of a theoretical approach based on the «exceptionalism»,¹⁵ however indicate the specificity of the ‘formula’ at issue, stressing the fact of being in front of a «multi-level...architecture», which ‘reflects a tension between functional pressures and identity’.¹⁶

The relevant changes adopted by the Treaty of Lisbon - bearer of significant amendments to the way of pursuing the «interests of the European Union, of its citizens and of its Member States», as scholars have pointed out ¹⁷ - even pursuing a greater involvement (compared with the past) of the national parliaments in the activity of the European Union, disappointed the expectations of decision-making processes more effectively and more efficiently¹⁸ achieved through an institutional framework more stable and easier due to a different, and more appropriate, distribution of powers among the European bodies.¹⁹

¹⁵ See MICHELI, *Il sistema politico europeo: quale modello di democrazia?*, Final dissertation discussed in the *Università degli studi di Genova*, academic year 2010/2011, in which it is recalled that this cultural approach «originally born in the United States, in order to show the singularity (i.e. the lack of comparability) of the policy and institutional experience of that country (...) has spread in many other European countries, giving birth to various national exceptions», as asserted by FABBRINI, *L'Unione europea. Le istituzioni e gli attori di un sistema sovranazionale*, Bari, 2002, p.VI.

¹⁶ See HOOGHE - MARKS, *A postfunctionalist theory of European integration: from permissive consensus to constraining dissensus*, 2009, in *British Journal of Political Science*, 39 (1), pp. 1-23; SCHAKEL, *Explaining policy allocation over governmental tiers by identity and functionality*, 2009, in *Acta Politica*, 44 (4), pp. 385-409.

¹⁷ See CARBONE - COZZOLINO - GIANNITI - PINELLI, *Le istituzioni europee*, in AA.VV., *Le nuove istituzioni europee. Commento al trattato di Lisbona*, Bologna, 2008, p. 239; see also MICOSSI, *Un nuovo equilibrio destinato a durare*, *ibidem*, p. 493.

¹⁸ See CASALINO, *Simulations and Collective Environments: New Boundaries of Inclusiveness for Organizations?*, *International Journal of Advances in Psychology (IJAP)*, Science and Engineering Publishing, USA, 2014, vol. 3, issue 4, pp. 103-110.

¹⁹ See, e.g., MANZELLA, *La nuova coesione europea tra processo di Lisbona ed allargamento*, in *Riv. it. dir. pubbl. comunit.*, 2006, 3-4, p. 533 ff., where the new objectives pursued with the Community resources are highlighted as follows: convergence, competitiveness and European territorial cooperation; ZILLER, *Il nuovo Trattato europeo*, Bologna, 2007, with preface of Giuliano Amato; DECARO, *Integrazione europea e diritto costituzionale*, in AA.VV., *Elementi di diritto pubblico dell'economia*, edited by Pellegrini, Padova, 2012, p. 59 ff; *The evolution of EU law*, edited by Graig – De Búrca, 2011, Oxford University Press; KAEDING - HARDACRE, *The European Parliament and the Future of Comitology after Lisbon*, in *European Law Journal*, 2013, vol. 19, n. 3, p. 382 ff.

Despite the rationalization implemented with the introduction of a «strengthening of the democratic decision-making»²⁰ - even in 2014, from the intergovernmental position just now called, were clearly manifest the shortcomings of a «euro-national Parliamentary system», of a government complex and articulated.²¹ In fact, with regard to the situation at hand, an authoritative scholar stressed that, after the Treaty of Lisbon, we still observe the «triumph of the intergovernmental huddle, essentially aimed at preserving itself».²²

In light of the above, we can preliminarily state that any attempt to find a mitigant to the «eurosclerosis» trend that, in the last decade, bothered the EU²³ - in order to identify proper devices to reduce the divergences (strengthened by the recent crisis) currently in place in a context of uncertainty and confusion – requires a preventive test aimed at evaluating the adequacy of the envisaged measures to the goals and features which typically govern the doctrine of the political actions.²⁴ Such preliminary analysis allows the EU institutional bodies to verify the maintenance of the democracy of the system or, on the contrary, the existence of tangible possibilities that such a democracy (or, at least, important phases of the democratic process) could be affected;²⁵ at the same time, such a preliminary analysis clarifies why, more than 50 years af-

²⁰ See DECARO, *Integrazione europea e diritto costituzionale*, in AA.VV., *Elementi di diritto pubblico dell'economia*, supra, p. 59.

²¹ See MANZELLA, *Verso un governo parlamentare euro-nazionale?*, in Manzella, Lupo et al., *Il sistema parlamentare euro-nazionale*, Torino, 2014, pp. 16-17.

²² See AMATO, *Il Trattato di Lisbona e le prospettive per l'Europa del XXI secolo*, in AA.VV., *Le nuove istituzioni europee. Commento al trattato di Lisbona*, Bologna, 2008, p. 445.

²³ See CAPRIGLIONE, *Eurosclerosi e globalizzazione. Contro un possibile ritorno all'euroscetticismo*, in *Riv. Trim. Dir. Econ.*, 2010, n. 1, p. 1 ff.

²⁴ The notion of «politics» changed over time, but the definition of its purpose remained unvaried and consists in the managing of public businesses for the benefit of everybody. This explains the main features of the concept at hand, including: the participation by all citizens to the above mentioned management, the use of force, if necessary, to exercise political powers and the coercive nature of the sovereign collective decisions which incorporate the exercise of the political powers. Despite any possible definition, politics has been traditionally identified, in the theories concerning government structures, as the business carried out by those who are institutionally in charge for this purpose. Hence, any reference to the actions promoted by political parties and, in particular, their different nature depending on the existence of a democratic organization of them; in a nutshell, there is a common action towards a principle of civil responsibility. See, e.g., SARTORI, *Parties and Party Systems. A framework for analysis*, Cambridge University Press, 1976; ID., *Logica, metodo e linguaggio nelle scienze sociali*, Bologna, 2011.

²⁵ See on this issue FABBRINI, *L'Unione Europea come democrazia composita?*, in *Rivista Italiana di Scienza Politica*, n. 1, Bologna, 2004, p. 5 ff.; BRUNAZZO, *Come funziona l'Unione Europea. Le istituzioni, i processi decisionali, le politiche*, Bari, 2009, p. XI.

ter the well-known declaration of Schuman dated 1950,²⁶ we can reasonably say that the goal of establishing a *European federation*, as supposed therein, as of today seems to be certainly far from being reached, and maybe unattainable.

3. In order to deeply understand the preliminary considerations of the preceding paragraph - and thus to analyze the reasons under the lack of adequate forms of cohesion/condivision among the Member States, which seem to be the essential ground of the European integration - it is now time to focus the present study on the modalities and criteria adopted by the EU decisional process. Such investigation will show a picture of the reciprocal functions and roles of the EU institutional bodies entitled to concur in the government of the European Union.

The EU organizative structure, as resulting from the applicable regulation preceding the entry into force of the Treaty of Lisbon, was characterized by the concurring action by: (i) *European Commission* (whose members are appointed by the heads of government of the Member States) – which is responsible for bringing the rules necessary for the disciplinary system of the European Union and, therefore, the processing and management of its political strategies; (ii) *Council* (composed of the ministers of the Member States representing national governments) with various powers (definition and coordination of economic policies, execution of joint actions relating to the common foreign, security and defense, international agreements, approval of the budget, together with the European Parliament); and (iii) *European Parliament* (representing the people of the Union). In addition to these bodies there is also the *European Council* (composed of heads of state and government, as well as by the President of the

²⁶ See PISTONE, *La prospettiva federale nella Dichiarazione Schuman*, available at www.eurobull.it.

European Commission), which operates primarily with the purpose of granting political inputs.²⁷

Most of the bodies mentioned above are composed of representatives of the political forces that, in the relevant Member States, won the respective electoral contests; therefore, they have only an *indirect* democratic legitimacy, as a consequence of the electoral mechanism adopted by the relevant Member State. On the contrary, the European Parliament has a structure having its own democratic legitimacy, as its members are directly elected in each Member State. To the latter (articulated in “commissions” and “transnational” political groups) the Community Treaties assign specific functions ranging from an original advisory activity to a power to share certain prerogatives with the Council (both in legislative matters and in the European Union budget), to a power to exercise a democratic control over the institutions of the Community (and, in particular, over the European Commission).²⁸

In this regulative framework the deliberative power in the European Union is structured on an «institutional triangle», based on a substantial *co-decision* process pursuant to which the submission of disciplinary projects lies mainly on the European Commission, while the power to approve the text of the project lies on the Council of the European Union and on the Parliament. It is clear that, at the basis of such a structure, there is the intention of the European Union treaties to link the formation of the rules to an *agreement* among the various parties involved, which results – as a consequence of a final decision substantially shared by all the parties – in a device aimed at overcoming past ambiguities, moving the European system towards new forms of balance and

²⁷ The interventional function of the European Council applied in such way until its institutionalization implemented by the Treaty of Lisbon, by which the European Council was placed at the top of the institutional structures and now plays the leading role in the European Union.

²⁸ For an evaluation of the European institutional framework prior to the Treaty of Lisbon see, e.g., WEILER, *Il sistema comunitario europeo: struttura giuridica e processo politico*, Bologna, 1985; SHAWJ, *Law of the European Union*, 2000; POCAR, *Commentario breve ai trattati della Comunità e dell'Unione europea*, Padova, 2001; TIZZANO, *Trattati dell'Unione e della Comunità*, Milano, 2004; MENGIOZZI, *Istituzioni di diritto comunitario e dell'Unione europea*, Padova, 2006.

thus defining «new limits of competence between the European Union and Member States».²⁹

In the outlined context, the EU Commission (despite its composition as not elective, nor representative of the governments of the Member States that sit there) plays a role that could be defined as technically political; it promotes the disciplinary proceedings to be submitted to the Council and Parliament, to whom only limited functions pertain (such as the approval of the designed European Commission President, hearing of Commissioners and “opinion” on the college) to ensure some form of democratic union. The Parliament – which in relation to the election of its members can claim a full democratic legitimacy – show some structural weaknesses that diminish its activity, granting to it a role of less importance compared with the other EU institutional bodies. In particular, we make reference to the negative implications (in terms of the actual substance of the powers exercised) arising from the current structures that (in the countries of origin of its members) on the one side characterize the electoral procedure for the appointment of its members (in which usually a lower percentage of people electing the members of the EU Parliament participate compared with the national elections) and, on the other side, cause the limitations of the functions attributed to this body, which are significantly smaller than the prerogatives typically assigned to a parliamentary body.

Furthermore, it should be noted that the architecture of the EU executive power is characterized, not only by the presence of the European Council, which shall provide the European Union with «the necessary impetus for its development and shall define the general political directions and priorities thereof» (as expressly stated by Art. 15, par. 1, of the TEU), the assignment of this objective to a comitology mechanism, described in the literature, «a legacy of an institu-

²⁹ See MICOSSÌ, *Un nuovo equilibrio destinato a durare*, Bassanini, Tiberi et al., *Le nuove istituzioni europee. Commento al trattato di Lisbona*, Bologna, 2010, p. 493.

tional balance anachronistically unbalanced in a intergovernmental perspective».³⁰

The “comitology” was born in the early sixties of the twentieth century, in a period characterized by the lack at the European level of a distinction between legislative and executive powers; it responds to a logic of division of powers in which the power to make proposals belonging to the Commission and the power to decide belonging to the Council are balanced – as regards the implementation of the decisions taken by the latter – by the competences of the national governments. The lack of time and technical expertise of the Council in certain matters (for example: agriculture policies) is «compensated» in the articulation of the powers assigned to the Commission, which submits the «projects of measures (regulative or administrative) to the approval of specialized committees, composed by officials of those same national governments which are then, at the end, called to implement them».³¹ It’s clear that the decision-making process, in terms of concreteness, will be consistently delegated to the above mentioned committees, rather than exercised by the competent institutional bodies, which must take into account the opinions expressed by the committees.

Over the course of the years there has been a growing importance of comitology against the assignment of increasingly large powers to the Commission.³² A preliminary attempt to regulate such a matter started with the clarification of the details to be followed by the Commission in the exercise of its “implementing powers”;³³ such an intervention was aimed at rebalancing the system of co-decision that takes place at the expense of the EU procedures.

³⁰ See SAVINO, *La comitologia dopo Lisbona: alla ricerca dell’equilibrio perduto*, in *Giornale di diritto amministrativo*, 2011, p. 1041.

³¹ See SAVINO, *La comitologia dopo Lisbona: alla ricerca dell’equilibrio perduto*, *supra*, p. 1042.

³² With respect to the evolution of the phenomenon of comitology, see BERGSTROM, *Comitology - Delegation of Powers in the European Union and the Committee System*, Oxford, 2005; POLLACK, *The Engines of European Integration. Delegation, Agency, and Agenda Setting in the EU*, Oxford, 2003, 114 ss.; SAVINO, *I comitati dell’Unione europea. La collegialità amministrativa negli ordinamenti compositi*, Milano, 2005, p. 105 ff.

³³ See Council Decision 1987/373/Cee dated July 13, 1987.

That regulation was then modified and extended several times strengthening the legislative role of the Parliament; please see in this regard, in particular, the reform of 2006³⁴ and the Treaty of Lisbon,³⁵ which – in stating the trend towards a gradual approach of the Parliament’s position to that of the Council – significantly amended the previous regulatory regime. Even following these innovations, the elimination of the involvement of national governments in the EU execution process has not been achieved yet; therefore, the comitology survives with its negative impact on the exercise of the EU political function, which in essence results in a weakened function.

Thus, the architecture of the European systems show important limits that should affect its capacity to aggregate different political instances, being such a goal to be achieved, under the European perspective by a democratic process.

These limits are felt also by the European Union bodies which tried to improve the decision-making process. Indeed, the European Council presented, in the context of the *Ecofin’s Conclusions* of November 2000 as subsequently approved in February 2001, a Report, drawn by a committee of wise men chaired by Mr. Lamfalussy, aimed at identifying specific procedures to be followed for the purpose of drafting and enacting new EU rules in the financial sector.³⁶

This Report, taking into account the particularities of each individual State Member, has been based on the assumption that «the dialectic between

³⁴ See, Council Decision 2006/512/EC, that integrated the previous Decision 1999/468/EC, which had identified the criteria on the basis of which the choice between the various committee procedures adoptable should be made. Such procedures consisted in: advisory, management, regulatory and safeguard. The Decision 2006/512/EC added to the aforementioned procedures also the “regulatory procedure with control”. On the reform of comitology dated 2006, see BRADLEY, *Halfway House: The 2006 Comitology Reforms and the European Parliament*, in *West European Politics*, 2008, vol. 31, n. 4, p. 837 ff., and for an *ex post* evaluation BOLM-HANSEN, *Interests, Instruments and Institutional Preferences in the EU Comitology System: The 2006 Comitology Reform*, in *European Law Journal*, 2011, vol. 17, 3, p. 344 ff.

³⁵ Under this Treaty (art. 290), the Commission, has been subjected to the direct control of the legislative authorities; however, the comitology continues to play its role with regard to enforcement (art. 291), but operates according to new rules (Regulation no. 182 dated 2011).

³⁶ In this respect see, e.g., BAGLIONI, *Verso il mercato finanziario unico in Europa*, in *Quaderni dell’Associazione di Banca e Borsa*, Milano, 2002; DESMON DINAN, *Institutions and Governance 2001–02: Debating the EU’s Future*, in *Journal of Common Market Studies*, 2002; ANTONUCCI, *Il credito di ultima istanza nell’età dell’euro*, Bari, 2003, cap. IV; LAMANDINI, *Autorità di vigilanza e mercati finanziari: verso un ridisegno di competenze?*, in *Mercato, concorrenza regole*, 2003, n. 1, p. 117 ff; LASTRA, *Governance Structure for Financial Regulation and Supervision in Europe*, in *Colum. J. Eur. L.*, 2003, p. 49 ff.

politics and technique, between law and economy» can find at the European level «appropriate forms of conciliation, more than it happens in single States»;³⁷ policy that – making reference to the elements distinguishing the finance regulation of the European Union – recognizes and moves from the existence of a market context, characterized by a freely and competitive environment. More specifically, the Report provides that the formation of the rules would be articulated in two different steps: *a)* first, the Commission, after consultation with the Council and the European Parliament, enacts directives' proposals (or proposals concerning other forms of regulatory acts) having general scope; *b)* then, the Commission relies on the technical advice of the Committee of European Securities Regulators (CESR), which in turn starts consultation with market participants and consumers, in order to draft specific legislative measures to be adopted after their submission to the European Securities Committee (ESC).

It is true that the aforementioned purposes of a more expeditious decision making process is pursued through accomplished forms of political coordination (between the Commission, the Council and the European Parliament), hence the right expectation of a better definition (than before) of the general principles that identify the “guidelines” in the drafting of the rules. Conversely, the consultation of the economic parties involved in the process – while allowing (through the involvement of the recipients of the proposed measures in the determination of their technical content) the possibility of proper adjustment to reflect the interests actually affected – weaken the European decision-making process mentioned above.

4. The limits of the EU governance highlighted in the previous pages explain the reason why, at the beginning of the financial crisis of 2007, the

³⁷ See ALPA - CAPRIGLIONE, *Presentazione a Diritto Bancario Comunitario*, Torino, 2002, p. 2, work in which the analysis of the Community legislation anticipated the examination of the internationalization process of the financial systems of the European countries.

definition of policy mechanisms able to correct (or at least contain) the damages (arising from the same) was searched mainly in the technique. The volatility of the markets and the climate of widespread uncertainty, which characterize the context at hand, let glimpse few ways out of the impasse in which many countries are involved;³⁸ from many sides there are questions about what might be the right solution to prevent the financial crisis and the sovereign debt uncertainty from overwhelming the euro, with obvious negative implications for the European integration process.³⁹

The reactions that occur at the level of the individual Member States and at the top of the EU bodies show that pathological events at hand were assessed essentially in their financial value; indeed, in the analysis of the identification of the causes of the same, it does not seem to have been given sufficient prominence to the shortcomings of the institutional apparatus, which is entitled to lead the 'economic governance'. Hence the lack of consideration given by the competent European authorities to the need to tackle the crisis through changes in the governance structure⁴⁰; such an approach is confirmed by the fact that the innovations of the system (introduced in the recent years) are mainly ad-

³⁸ The envisaged solutions have taken into account the U.S. emergency legislation which provides for the possibility for the Ministry of Finance to directly purchase shares issued by banks and financial institutions (*Treasury Announces TARP Capital Purchase Program Description*, October 2008); see the hearing of the Chairman of the Board of Governors of the Federal Reserve System BERNANKE, *Troubled Asset Relief Program and the Federal Reserves liquidity facilities*, Committee on Financial Services, U.S. House of Representatives, November 2008. In this respect see, among scholars, SARCINELLI, *Nuove regole e mercati finanziari*, in *Bancaria*, 2009, 1, p. 31 ff.; SICLARI, *Crisi dei mercati finanziari, vigilanza, regolamentazione*, in *Rivista trimestrale di diritto pubblico*, 2009, p. 45 ff.; see also the considerations of TRICHET, *Remarks on the future of European financial regulation and supervision*, to the Committee of European Securities Regulators (CESR), Paris, February 23, 2009, in which he stated that: «*The system must strengthen itself and build up its own defences. I propose a strengthening of the financial system that focuses on three goals: long-term sustainability, improved resilience and a holistic perspective*».

³⁹ See, e.g., ALESINA - GIAVAZZI, *C'è una sola via d'uscita*, in *Corriere della Sera* dated November 24, 2011. More in general see also PISANI-FERRY, *The Euro Crisis and its Aftermath*, Oxford, 2011; COSTAS, LAPAVITSAS et al., *Crisis in the Eurozone*, London, 2012; DERVIS - MISTRAL, *Europe's Crisis, Europe's Future*, Washington, 2014; SCHWEIGER, *The EU and the Global Financial Crisis: New Varieties of Capitalism*, Cheltenham, 2014; DEMETRIOU, *The European Union in Crisis: Explorations in Representation and Democratic Legitimacy*, London, 2015; SCHWEIGER - MAGONE, *The Effects of the Eurozone Sovereign Debt Crisis: Differentiated Integration between the Centre and the New Peripheries of the EU*, 2015.

⁴⁰ See CASALINO, *An Innovative Model of Transnational Learning Environment for European Senior Civil Servants – Organizational Aspects and Governance*, Proceeding of 11th International Conference on Enterprise Information Systems – ICEIS 2009, Milan, Italy, Vol. 4 *HCI Human Computer Interaction*, Cordero J., Filipe J. (Eds.), INSTICC, Setubal, Portugal, 2009, pp. 148-153.

dressed to the financial sector (even when they are aimed at improving growth objectives related to the introduction of strict accounting policies).

Therefore, at the base of the measures activated within Europe we can find the wide conviction that, to avoid an overflow of the financial turmoil (and, at the same time, to contain the tensions of sovereign debt), a prevention of possible liquidity crisis is preliminarily needed.⁴¹ It is clear that this approach reflects the awareness that the failure of public supervision (at the time present in many countries) was originated - among other things - by the limits of the “market liquidity risk” regulation⁴². In the same logical order are placed reflections dedicated to the inadequacy of devices aimed at conducting a census (or rather: at weighing) risks attached to the securities held in the portfolios of the banks; analysis which reveals the need to ensure suitable forms of supervision over the financial intermediaries.⁴³

In this context, the European regulator has aimed at achieving a rational meeting point between the trend for greater strictness of the sectorial legislation and the need to promote a *homogenization* of the financial operators. In other words, the European regulator wanted to avoid that systemic deficiencies of the supervision system, which could result in inadequate forms of supervision, such that they would affect the autonomy of the operators and, therefore, would jeopardize the logic of the market. Hence the activation of regulatory changes that were not limited to an intervention focused only on immediate response to the recent financial crisis. Indeed, the efforts of the European regulator appear directed to the identification of mechanisms to play in the *con-*

⁴¹ In a scenario in which we go back to normality, see the intervention measures provided for in the so-called «*Recovery plan*» adopted by the President of the United States of America *Obama's speech to Congress*, February 25, 2009 available at www.bbc.co.uk.

⁴² Among the studies that analyze the key role of funding liquidity risk in all historical banking crises See DREHMANN - NIKOLAOU, *Funding liquidity risk: Definition and measurement*, in *Journal of Banking & Finance*, 2013, vol. 37, n. 7, p. 2173 ff.; BRUNNERMEIER - PEDERSEN, *Market liquidity and funding liquidity*, in *Review of Financial studies*, 2009, vol. 22, n. 6, p. 2201 ff.; BOCCUZZI, *Introduzione to Il metodo dei rating interni*, directed by Cannata, Roma, 2008, p. 18.

⁴³ See, in this respect, CAPRIGLIONE, *Misure anticrisi tra regole di mercato e sviluppo sostenibile*, Torino, 2010, chap. I.

tinuum appropriate actions to harmonize the forms of exercise of the financial activities.

It is then clarified the particular direction in which the reforming activity of the EU is oriented, since it appears (mainly) aimed at changing the top management structure of the financial system, for the purpose of implementing more efficient forms of supervision. It is clear that - as a result of the limits of the politics previously underlined - a technical action substitutes it, and is intended, on the one hand, to support countries in difficulty, and, on the other hand, to create a structure that, with the involvement of the ECB, was meant to correct and improve the forms of financial supervision in the past followed in the European regional context. The EU, seizing the opportunity offered by the crisis, has opted for innovations of its regulation mainly concerning the stability of intermediaries, as well as the prevention and management of the financial crisis .

Hence the tendency of the European regulator to implement organizational and decision-making schemes which interact among themselves at the level of concrete operations in the financial field, rather than carrying out a review of the existing institutional model (which should have created a programmatic project to revitalize the role of the politics). More in particular, the crisis has meant that the need to apply devices suitable to restore certain national realities (from stressful situations, if not even drift, in which they were acting) evolved in an interventional action, which has inevitably led to a sort of prevalence of “technique” in the identification and definition of the measures to be taken. There is no doubt that contributing to determining the orientation indicated above are the limits of the ‘intergovernmental formula’ previously further investigated. Indeed, if the latter, on the one hand, has not been able to promptly coagulate convergent decisions to find adequate solutions for a prompt overcoming of the crisis, on the other hand in the action intended to mobilize financial resources to provide support for countries in difficulty, in the

request for (and sometimes in the imposition of) practices of strictness by certain countries has revealed an attitude of (excessive) stiffness, certainly reprehensible considering that it has been often attributable to the States becoming economically stronger in the Eurozone.

In this logical order is placed, therefore, the evaluation of the measures taken by the European Council as from 2011, with regard to the specific context of EMU. First, we make reference to the decisions in which has been provided for the possibility of an enhancement of the operating volumes of the European Financial Stability Facility – EFSF (which has been later replaced by the European Stability Mechanism – ESM in 2012)⁴⁴, as well as to the set of measures fixing new requirements for the budgetary policies of the Member States, then governed by the Treaty called *Fiscal Compact*.⁴⁵

We can see an *agere* intended, looking at its objectives, to mark a significant change in the interventional actions carried out by the EU for the purposes of rebalancing the economic and financial order in the countries hit by the financial crisis.

Poor cohesion among the European institutions in setting the economic policies, the hegemonic attempts of strong countries, the endemic weakness of the remaining countries (caused by environmental factors as well as from an adverse economic situation) are the basis of the difficulty of “togetherness”, hampered by an economic gap. Hence, the *constraints* which have conditioned the down-drawn of financial support, the strict *behavioral requirements* imposed on the countries in financial trouble, the *monitoring actions* (delegated to special international bodies empowered with supervision competences) to

⁴⁴ As better described below, we point out that the *European Financial Stability Facility* is an emergency fund whose mission is to collect sources in the financial markets benefiting from the guarantees granted by the States belonging to the Eurozone; among scholars, see ANGELONI, *EFSS* (*European Financial Stability Facility*), available in www.treccani.it; BASSAN - MOTTURA, *Le garanzie statali nel sistema europeo di assistenza finanziaria agli Stati*, in *Mercato concorrenza regole*, 2013, n. 3, p. 571 ff.

⁴⁵ Such a Treaty sets the rules to be complied with by the domestic accounting policies, in view of their subsequent implementation in the relevant legislation of each Member State, See CAPRIGLIONE - SEMERARO, *Financial Crisis and Sovereign Debt. The European Union Between Risks and Opportunities*, in *Law and Economics Yearly Review*, 2012, I, p. 61.

which such countries in trouble have been forced; all elements that have caused a loss of power and independence of those countries and that have been accepted for the sole purpose of remaining in the Euro-zone.

From a systematic perspective, we face a further reduction of the «national sovereignty» of the countries belonging to the Euro-system, which follows the loss of the monetary sovereignty subsequent to the creation of the 'single currency'.⁴⁶ Indeed, with reference to the matters falling in those areas of regulation, the power to set their rules is no longer left to the constituent power of the single countries. Therefore, while the European institutions are empowered with supreme authority in certain areas (being entitled to fix the extent permitted for exceeding the amount allowed for the structural deficit with respect to the gross domestic product), the single Member States waived their right to determine the amount of their debt. Not surprisingly, a distinguished scholar, analyzing the reforms pursued at the European level, has rightly pointed out that «it is difficult to interpret with certainty ... the constituent power currently exercised... (considering its) ... modalities and phases of implementation, between formal and informal, between supranational and national».⁴⁷

The same conclusion is reached by looking at the proposal of a 'single system of banking supervision', organized at European level by the recognition of specific powers of intervention applicable vis-à-vis all the banks; such a proposal has been made at the meeting of the European Council of June 28/29, 2012⁴⁸, and has been followed by a specific Communication addressed to the European Parliament and to the Council from the Commission dated September

⁴⁶ See, e.g., DE GRAUWE, *Economics of Monetary Union*, Oxford, 2012; ROMAGNOLI, *L'unione Monetaria Europea: una realtà tra crisi e insuccessi*, in *L'unione Monetaria Europea: una realtà in crisi e modello d'integrazione monetaria regionale*, Milano, 2013, p. 15 ff.

⁴⁷ See MONTEDORO, *Mercati democrazia e potere costituente: categorie giuridiche e necessità storica del cambiamento*, in *Aperta contrada* dated August 3, 2012.

⁴⁸ See *Euro Area Summit Statement*, available on the internet website of the European Council, in which it has been stated, e.g.: "The Commission will present Proposals on the basis of Article 127(6) for a single supervisory mechanism shortly. We ask the Council to consider these Proposals as a matter of urgency by the end of 2012".

12, 2012,⁴⁹ then implemented by the creation of the European Banking Union, which has been established in order to better integrate and reconcile the different supervision structures adopted by each Member State.⁵⁰ It appears clear that this objective is pursued through a substantial loss of the ‘power of supervision’ by the competent national supervisory authorities and in a perspective aimed at defining an ‘exhaustive framework’, in which the «unified banking supervision» will live together with «the necessary assumptions for a tax common treatment, as well as funds and European devices to guarantee the savings of the investors and to solve any crisis».⁵¹

We see a primacy of the technical regulation over the politics in the route towards the consolidation by the introduction of the proper mechanisms to foster the «convergence» among the EU countries. On a substantive level, it was the only way available for the continuity of the process towards a more cohesive integration; therefore, any judgment and analysis on the situation at hand cannot disregard the ability of the Member States to «accept the loss of sovereignty that runs parallel to the need to live together under the same roof», as authoritatively stated.⁵² Thus, a greater transfer of sovereignty (for the benefit of the European institutions) shall progressively be extended to include all the «structural reforms necessary... (to) ... be in compliance with the currency union ... since what happens in one Country affects all the other countries», as recent-

⁴⁹ See *A roadmap towards a Banking Union*, doc. COM(2012) 510 *final*. Such a Communication has been preceded by the announcement (dated September 6, 2012) by Mario Draghi of purchases potentially unlimited of State bonds having a maturity of 1-3 years and issued by Countries in difficult conditions (cd. OMT program), which has marked a turning point in the recovery of reliability by the single currency. Such a Communication was accompanied by the *Proposal* of a Regulation of the European Parliament and of the Council «amending the EU Regulation No. 1093/2010 establishing the European Banking Authority» conferring to the «European Central Bank [...] specific tasks concerning policies relating to the prudential supervision of credit institutions». In this respect, see also VAN ROMPUY, *Verso un'autentica Unione economica e monetaria*, Bruxelles, June 26, 2012, EUCO, 120/12, Presse 296, PR PCE 102.

⁵⁰ See *infra* the next par.

⁵¹ In these terms VISCO, *Intervention* at the ordinary shareholders' meeting of the Italian banking association ABI (Rome, July 11, 2012) during which the Governor of the Bank of Italy pointed out that «the decisions adopted by the Heads of national States and governments of the Eurozone and by the European Council of June 28 and 29 [...] have restated the intent to preserve the single currency and to interrupt the vicious circle between the crisis of the national indebtedness and the conditions imposed by the banks ».

⁵² See TIROLE, *Lectio magistralis*, held on March 19, 2015, at the University LUISS G. Carli during the granting of the *honoris causa* JD.

ly pointed out the President of the ECB.⁵³ Such statement leaves no doubts with regard to the path that the European countries have to follow for the development of the integration process, now strained by the recent crisis events.

5. The scale of the crisis, the international *domino effect* that it produced form the basis of the certainty that global markets require international rules much more effective than those enacted by the national authorities, which often give answers inconsistent or not coordinated with the real context of the financial markets.⁵⁴ This perspective, arising from the acknowledgment of the financial turmoil that since 2007 have affected much of the European continent, explains the establishment of a 'Working group' led by J. de Larosi re which was entrusted with the power to redetermine the rules for the exercise of banking supervision in order to reduce the consequences of the crisis and to prevent, in the future, similar circumstances and events. The solutions reached by this working group have deeply innovated the forms of supervision applicable in the financial sector, imposing a regulatory process which introduced significant and structural changes affecting the powers and the role of the authorities (political and technical) operating in such field.

Actually, prior to the crisis the national peculiarities in the conduct of supervisory policies assigned to individual countries appeared unchanged; so that, as pointed out by the scholars, there was not an appropriate «level of financial integration ... where the mechanisms for cooperation and coordination among national authorities were not fit to ... achieve homogeneous models of control

⁵³ See *Hearing* held on March 26, 2015, by DRAGHI with the Commissions for accounting, finance and EU politics purposes concerning the 'monetary politics of the ECB, the structural reforms and the growth in the Eurozone'.

⁵⁴ See LASTRA - WOOD, *The Crisis of 2007-2009: Nature, Causes and Reactions*, in *Journal of International Economic Law*, Vol. 13, n. 3 (Special Issue on the Quest for International Law in Financial Regulation and Monetary Affairs), September 2010, p. 531 ff.; LASTRA, *Legal and Regulatory Responses to the Financial Crisis*, in *Queen Mary School of Law Legal Studies Research Paper No. 100/2012*, 2012.

over economic activities in the Union»⁵⁵. Even the Community's efforts to overcome the market fragmentation seemed to be inadequate, including the establishment of consultative bodies intended to assist the Commission in the drafting of proposals to the Council for the purpose of a further regulatory amalgamation within the EU.⁵⁶

Such a scenario has been affected by the reforms that arose from the crisis, which brought historical change.⁵⁷ It is important to point out, in fact, that first several controlling bodies have been put in place, whose functions were distinguished on the basis of a criterion which takes into account the specific nature of the recipients of the supervisory activity. Only later a further modification of the forms of intervention was adopted, concentrating their exercise into a 'single mechanism' (SSM, governed by the EU regulation No. 1024 of 2013) operationally delegated to the European Central Bank (which, as will be emphasized later, during the crisis gave good account of itself not only highlighting a capacity to analyze and weigh risks, but also by engaging in operations to stabilize the liquidity in the markets, thus avoiding a further degeneration of the financial turmoil).

Legal and economic scholars extensively focused on the examination of the authoritative framework (ESFS) which, in Europe, has been defined as a result of the crisis in order to «preserve financial stability, create confidence in the financial system and ensure adequate protection of the consumers of financial

⁵⁵ See PELLEGRINI, *L'architettura di vertice dell'ordinamento finanziario europeo: funzioni e limiti della supervisione*, in *Riv. trim. dir. ec.*, 2012, I, p. 54.

⁵⁶ We make reference, in particular, to the comitology structure introduced by the Lamfalussy procedure, which – as mentioned in the preceding par. – has been adopted to simplify and speed-up the European process for the formation and adoption of regulatory measures; please see on this argument also BILANCIA, *Il sistema europeo di regolamentazione dei servizi finanziari*, available at www.giuripol.unimi.it; CIRAIOLO, *Il processo di integrazione del mercato unico dei servizi finanziari. Dal metodo Lamfalussy alla riforma della vigilanza finanziaria europea*, in *Il diritto dell'economia*, n. 2, 2011, p. 415 ff.

⁵⁷ It should be noted that the same Commission felt the need to further investigate possible 'structural reforms in the EU'. In this respect, please see the work of the 'Liikanen group', which is a Highlevel expert group on structural aspects of the EU banking sector, announced by the European Parliament on November 2011. The mandate of this group will be to determine whether, in addition to ongoing regulatory reforms, structural reforms of EU banks would strengthen financial stability and improve efficiency and consumer protection; see ec.europa.eu.

services»⁵⁸. The regulative system of such construction is based on two pillars represented first by the European Systemic Risk Board (ESRB), headed by the President of the ECB (responsible for monitoring and assessing potential threats to financial stability arising from macroeconomic processes) and second by three newly established European authorities (EBA, EIOPA and ESMA) which are supported by a network of national authorities entitled to cooperate with them.

Therefore, if the operations of the ESRB consist of the issuance of inputs and guidelines for the prevention of macro-systemic risks, the EBA (empowered with the supervision of the banking sector) pursue the mission to develop and enact standards of supervision; and, most recently, the action of the ESMA and EIOPA is to ensure, respectively, the regularity of financial markets and of the insurance and pension funds (both company and professional pensions funds).⁵⁹

The effectiveness of the supervision activity carried out by such a network of authorities becomes clear if you look at the need to reach a common commitment to unify the forms of control over all the cross-border groups; in addition, at the micro-prudential level, the new authorities assume, in essence, a role very close to that of the third-level committees «strengthened» (given that their action is in line with the principles of subsidiarity and proportionality established by the Treaty).⁶⁰ Hence, the opportunity to give concrete answers to

⁵⁸ See TROIANO, *L'architettura di vertice dell'ordinamento finanziario europeo*, in AA.VV., *Elementi di diritto pubblico dell'economia*, directed by Pellegrini, *supra*, p. 552.

⁵⁹ See, e.g., FERRAN, *Understanding the New Institutional Architecture of Eu Financial Market Supervision*, in *Legal Studies Research. Paper Series*, University of Cambridge, Faculty of Law, n. 20/2011, p. 34 ff, available at ssrn.com; TARANTOLA, *La vigilanza europea: assetti, implicazioni, problemi aperti*, at «*Master in Diritto Amministrativo e Scienza dell'Amministrazione*», *Università degli Studi di Roma Tre*, April 8, 2011, available at www.bancaditalia.it, p. 16; LEMMA, *La riforma degli intermediari non bancari nella prospettiva di Basilea III*, in *Rivista elettronica di diritto, economia, management*, 2011, n. 1, p. 185; GUARRACINO, *Supervisione bancaria europea (Sistema delle fonti e modelli teorici)*, Padova, 2012, *passim*; CAPRIGLIONE, *Globalizzazione, crisi finanziaria e mercati: una realtà su cui riflettere*, in *Concorrenza e mercato*, 2012, p. 867 ff.; TROIANO, *Interactions Between EU and National Authorities in the New Structure of EU Financial System Supervision*, in *Law and Economics Yearly Review*, n. 1/2012, p. 104 ff. available at www.laweconomicsyearlyreview.org.uk.

⁶⁰ The Lamfalussy procedure provides for the establishment of third-level committees, composed by members of the national supervisory authorities: the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR). Such Committees are entitled to contribute in the consistent and convergent implementation of the EU Directives, in order to assure a more efficient cooperation among the national supervisory authorities.

the questions raised by the cyclical nature of the market through the provision of « corrective measures» proportionate to the difficulties which, in terms of concreteness, operators face.⁶¹ Significant in this regard are: (i) the institutional anchoring of the ESRB to the ECB and the ESCB, resulting from the particular composition of such a controlling body⁶², (ii) and the recognition to the same of specific competencies including the authority to issue *risk warnings* and recommendations of various kinds (general and particular), which highlight its central role in the redefinition process concerning the instruments of macroeconomic policy (which contrast the risks arising from the interconnection of markets).

In the second pillar of the architecture at hand, which is represented by the network of authorities responsible for micro-prudential supervision, there is a substantial equivalence of the purposes and tasks among them in the exercise of functions aimed at preventing regulatory arbitrage (pursued by a careful effort to strengthen the stability, effectiveness and consistency of regulation and supervision), at controlling the risks (implemented through a constant monitoring over markets and financial operators) and at protecting the services' users.

However, it should be noted that, in the context outlined above, the European Supervision Authorities (ESAs) are able to develop binding technical rules in the areas delegated to them by the primary legislation. Indeed, the definition of technical standards - mentioned above – seems to be the most significant power still pertaining to such supervisory authorities, being functional to enact a regulation really homogeneous (so-called *single rulebook* ⁶³) that, if

⁶¹ See MICOSSI - CARMASSI - PIERCE, *On the tasks of the European Stability Mechanism*, in *CEPS Policy Brief*, n. 235, March 8, 2011.

⁶² See EU Regulation No. 1092 of 2010, *Regulation 1092/2010 of the European Parliament and of the Council*, November 24, 2010.

⁶³ The term *Single Rulebook* was coined in 2009 by the European Council in order to refer to the aim of a unified regulatory framework for the EU financial sector that would complete the single market in financial services, available at www.esa.europa.eu.

binding in all the Member States, could avoid any divergence in the international interaction and could achieve the minimum harmonization.⁶⁴

Moreover, this reform pursues the aim of making the regulation in the financial sector closer to the financial markets' innovation and to the technical and operational changes adopted from time to time by financial intermediaries; in addition, proposed technical rules, developed at a European level, reduce the margin of discretion of national supervisors. Therefore, this regulatory model acts as a *trait d'union* between the European legislative trend and the domestic ones, hence its submission to a previous period of public consultation and to a preliminary impact analysis (which usually precede such interventions).

After the creation of the ESFS, the European bodies quickly felt the need to ensure the financial stability of the EU through new structural reforms apt to definitively overcome the risks arising from the crisis. The consequence was the issuance of the aforementioned decision of the European Council dated June 2012, aimed at creating «a single supervisory mechanism for the Eurozone»; so the European Banking Union was established, which is characterized by a significant «involvement of the ECB» and by the possibility to be extended also to countries not belonging to the Eurosystem (and which intended to participate in it).⁶⁵ The above causes a transformation in the exercise of the supervision by means of an organizational structure of the financial sector - or, more exactly, of the credit institutions segment - suitable to avoid the risks that can threaten economic development.

⁶⁴ As of today, since the treaty has not been amended yet, ESAs are not entitled with direct regulatory powers; thus, the Commission has the duty to enact the measures to implement the proposal drafted by the ESAs.

⁶⁵ Please see on this regard the speech of President Barroso at the working session of the Council held on June 2012 in which he stated the following: «*We have agreed a convincing vision for a strengthened economic and monetary union, and this is a point I would like to highlight particularly, following the report presented to the European Council on the genuine EMU [...] This banking union will be designed in a way that fully respects the integrity of the single market. At the same time, we recognize that there are member states that will not want to participate in some areas that are predominantly linked to membership of the euro, now or in the future. Everyone here has agreed that a stable euro is in the interest of the whole European Union. Over the summer, the Commission will put together the legislative proposals to make this a reality.*».

It is a *challenge* which assigns to an innovative project of reform the possibility to strengthen the European integration process; such a project is represented by a model of banking supervision (designed to unify the banking sector). Looking at the future, such a scheme tends to the achievement of uniformity and equality among intermediaries, thus enabling higher levels of competition among them and, therefore, the possibility to improve coordination and cooperation among Member States.⁶⁶ There is no doubt that a supervisory action characterized by the presence of only one supervisory body for all the intermediaries (operating in the European financial system) is the essential premise of their *equal* positions (which is the basis on which the conditions for further stability and progress should be founded).⁶⁷

Many economic scholars doctrine positively evaluated the European Banking Union model, finding its rationale in the criticisms made to the original architecture of the EMU (*i.e.* of the Maastricht Treaty); this is an attempt to overcome the asymmetries that have contributed to the disaggregation (caused by the lack of mechanisms to share the risks) during the crisis.⁶⁸ As a consequence of the increase of diversities in the Eurozone from 1999 to 2007,⁶⁹ the current feeling is that only by granting the ECB «direct responsibility over the greatest 150 European banks» the *fragmentation* of the existing forms of control within the EU must be defeated and this would allow the institutions to

⁶⁶ See BANK OF ITALY, *Report for the year 2013, Final Considerations, supra*, p. 20, in which it has been stated that «the new European supervisory system shares the same fundamental principles applied in Italy: such as attention on the strict connection between remote control and investigative supervision, a qualitative and quantitative evaluation of risks, strict connection between the results of the analysis and the recovery measures taken ».

⁶⁷ See, e.g., FERRAN - BABIS, *The European Single Supervisory Mechanism*, University of Cambridge Faculty of Law Research Paper No. 10/201; TROEGER, *The Single Supervisory Mechanism – Panacea or Quack Banking Regulation?*, *European Business Organization Law Review*, Forthcoming SAFE Working Paper No. 27, in which he points out that ‘the success of the SSM will hinge on establishing a common supervisory culture that provides positive incentives for national supervisors’.

⁶⁸ See SARCINELLI, *L’unione bancaria europea e la stabilizzazione dell’Eurozona*, in *Moneta e credito*, 2013, p. 7 ff.

⁶⁹ See PISANI-FERRY, *The Known Unknowns and Unknown Unknowns of EMU*, *Bruegel Policy Contribution*, n. 18, available at www.bruegel.org.

«break the loop between banks and sovereign countries and the moral hazard related to the rescue, by the taxpayer, of the big banks».⁷⁰

On the contrary, the consequences that such a regulatory innovation would produce on the national regulatory frameworks in legal terms have to be investigated, excluding the hypothesis of contagion from jurisdictions with deficiencies in banking supervision and anticipating that the entire Eurozone will be subject to regulatory requirements aimed at governing in a strict mode the activity of the banks.⁷¹ It should be also underlined that the preliminary analysis shows a generalized instance to see not dispersed the wealth of knowledge of national supervisory authorities. More in particular, such a research focuses on the transfer of supervisory tasks to the ECB, evaluating both the rationale of the attribution to it of such tasks,⁷² and their consistency with the regulatory function recognized to the EBA⁷³; this having in mind that, as a consequence of the impetus towards the unification, «the issue of the transfer of sovereignty rises».⁷⁴

Hence the reflections on the connection of the process with Article 127 of the EU Treaty (which provides that the Council may unanimously decide, after a consultation with both the European Parliament and the ECB, to empower the ECB with specific tasks concerning the prudential supervision over credit institutions). It should also be considered that the EBU project appears consistent

⁷⁰ See MASERA, *Moneta europea credito nazionale*, in *La Repubblica* June 17, 2013.

⁷¹ See CAPRIGLIONE, *Unione bancaria europea e nuovo ruolo della BCE*, in *IlSole24Ore* December 21, 2012.

⁷² See, e.g., WYMEERSCH, *The European Banking Union. A first Analysis*, Universiteit Gent, *Financial Law Institute*, WP, 2012-07, October 2012, p. 1; CAPRIGLIONE, *L'unione bancaria europea*, Torino, 2013, chapters IV and V; SARCINELLI, *L'unione bancaria europea*, in *Banca Impresa Società*, 2012, n. 3, p. 333 ff. With regard to certain important considerations concerning the role of the ECB in the context of the EU, see PADOA SCHIOPPA, *L'euro e la sua banca centrale. L'unione dopo l'Unione*, Bologna, 2004.

⁷³ See WYMEERSCH, *The European Banking Union. A first Analysis*, *supra*, p. 20; GUARRACINO, *Dal meccanismo di vigilanza unico (ssm) ai sistemi centralizzati di risoluzione delle crisi e di garanzia dei depositi: la progressiva europeizzazione del settore bancario*, in *Riv. trim. dir. ec.*, 2012, I, p. 207, in which he pointed out that «the recent project of reform in the banking supervision within the Eurozone, proposed by the Commission on September, contemplates also an amendment to the *governance* of the EBA in order to, *inter alia*, assure its decisional features».

⁷⁴ See PERASSI, *Brevi conclusioni*, speech at 'Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri', Atti, Rome 16 September 2013, *supra*, p. 180.

with strict inter-connection of the «credit-money» policy (which allows a supervisory action, successfully tested in the past in Italy, specifically aware of the link between the government of the *credit* and of the *liquidity*).⁷⁵

However, under a different perspective, granting different responsibilities to the two authorities placed at the top of the European Banking Authority (respectively EBA and ECB) reveals certain difficulties in the relations between these bodies.⁷⁶ Similarly, a *common* and progressive limitation of sovereignty of the EU countries could raise problems,⁷⁷ since the implementation of the ‘Single Supervisory Mechanism’ - causing a substantial decrease in the national supervisory authorities’ powers - provokes, again, a primacy of the ‘technical neutrality’ compared with the ‘political options’, with the risk of a suspension of the traditional principles of democracy.⁷⁸

The framework of changes designed to innovate the configuration of the European financial system is completed with the introduction of significant changes in the regulation concerning the ‘management of banking crises’ (until recently assigned to the different rules in force in each Member State) as well as the ‘deposit guarantee systems’; innovations that attract also the above mentioned matters under the intervention powers granted to the EU bodies.⁷⁹ In

⁷⁵ See CAPRIGLIONE, *Intervento pubblico ed ordinamento del credito*, Milano, 1978, cap. III.

⁷⁶ An accurate scholar, moving from such difficulties, observed an expansion in the mission of the European banking agency, which now includes also the role of «substantial mediation between blocks of Countries (such being the members adhering and not adhering to the single supervisory system) in the construction of a unified system of rules», See TROIANO, *The new institutional structure of EBA*, in *Law and economics yearly review*, 2013, p. 163 ff., available on www.laweconomicsyearlyreview.org.uk.

⁷⁷ See, e.g., MONTEDORO, *Economia della crisi, trasformazione dello Stato, governo dei giudici*, in *Riv. trim. dir. ec.*, 2009, I, p. 66 ff.; ID., *Mercati democrazia e potere costituente: categorie giuridiche e necessità storica del cambiamento*, in *Aperta contrada* dated August 3 2012; GRASSO, *Crisi dei mercati e sovranità dello Stato: qualche elemento di discussione*, in *Aperta Contrada* July 16, 2012.

⁷⁸ See CAPRIGLIONE, *Mercato regole democrazia*, Torino, 2013, p. 67.

⁷⁹ We make reference, in particular, to the *Single Resolution Mechanism of the banking crisis* (SRM), which has been finally regulated at European level with the approval by the European Parliament of the Directive No. 2014/59/EU (so-called BRRD) and of the Regulation No. 806/2014/EU (so-called SRM). Such regulation entrusts the ECB with the power to activate mechanisms of crisis resolution; such power is then facilitated by the participation of the ECB at the ‘single resolution board’, called to manage the different stages of the procedure at hand, in close coordination and decision-operating with the Commission. More specifically, the technical modalities provided for by the applicable regulations are divided into four modes, which alternatively provide the possibility of a *sale of business*, of a *separation of assets* (*bad bank*), the establishment of a «bridge bank» and the adoption of a «bail-in» procedure. See EUROPEAN COMMISSION, *Finalising the Banking Union: European Parliament backs Commission’s proposals* (*Single Resolution Mechanism, Bank Recovery and Resolution Directive, and Deposit Guarantee*

light of the above, we can conclude that the institutional innovations introduced under the influence of the crisis could be considered as definitive only after the expiration of a reasonable period of time. Hence we underline the uncertainty surrounding their initial test (pointing out the virtuous actions promoted by the Presidents of the ECB), following which it should be necessary to review and amend such a framework in order to further improve their systemic coherence.

6. In the European context, where *technique* is triumphing over *politics*, a central role is the one assigned to European Central Bank, which in 1998 succeeded to the European Monetary Institute established by the Maastricht Treaty in 1992. The creation of the ECB aimed at enriching the EU with a body able to ensure, acting together with the European System of Central Banks (SEBC), the achievement of the objectives set forth in the Treaty and, therefore, the presence of all the necessary conditions for the issuance of a European 'single currency' (to be evaluate making reference to four criteria: price stability, foreign exchange stability, interest rate levels, sustainability of public finance conditions in the Member States).⁸⁰

Schemes Directive), STATEMENT/14/119, April 15, 2014; Regulation No. 806/2014(EU), Premises No. 66 ed art. 15 and following. Among scholars, See BOCCUZZI, *Towards a new framework for banking crisis management. International debate and the italian model*, in *Quaderni di ricerca giuridica della Consulenza legale della Banca d'Italia*, n. 71, Roma, 2012; ZAVVOS - KALTSOUNI, *The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing*, in AA.VV., *Research Handbook on Crisis Management in the Banking Sector*, Cheltenham, 2015. It should also be noted that in important EU Countries, such as England and Germany, regulatory measures aimed mainly at introducing new schemes for administration of banks in crisis had previously been implemented. More specifically, in the United Kingdom in February 2011 a procedure ("*special administration regime*") (SAR) was introduced (with special resolution, No. 245 of the *Financial Services and Markets*, referred to as '*The Investment Bank Special Administration Regulations 2011*') applicable "*in Additions to the insolvency procedures established under Parts 2 and 3 of the Act*". In the same perspective, on January 1, 2011 Germany enacted the *Bank Restructuring Act*, which provides for new instruments to solve crisis, granting greater powers of early intervention to the Supervisory Banking Authority (BaFin). Please also note that with the Directive 2014/49/EU, the European regulator has redefined the previous regulation concerning guarantee systems identifying procedures to simplify the methods of protection. This Directive constitutes an «integral part» of a larger package on the "systems for compensating" meant to renovate the matter at hand taking into account the consequences of the recent financial crisis, which has seen a substantial increase in requests for reinstatement; See *Report* to the Directive proposal COM(2010) 369 def., p. 2.

⁸⁰ See, e.g., PAPADIA, *Unione economica e monetaria dopo Maastricht*, in *Il Mulino*, 1992, p. 51 ff; PADOA SCHIOPPA, *Riforme istituzionali al vertice. Il Trattato sull'Unione europea*, *ivi*, p. 59 ff; KENEN, *Economic and monetary Union in Europe*, Cambridge (Massachusetts), 1995; GOODHART,

The analysis of the modalities followed by the ECB for exercising its function of 'government' of the monetary policies shows, over time, a significant evolution that affected the institutional framework preordained to the realization of the Eurosystem and, more generally, the overall EU. In particular, the transition was made from an activity originally aimed at the sole maintenance of 'price stability' - and, therefore, limited (at least in the initial phase) to the prevention of phenomena of inflation and deflation - to a subsequent phase of interventions characterized by the 'discretionary powers' which typically connote the action of any central banks; the latter activity has been executed in particular as a result of the crisis events occurred in recent years, during which the ECB was engaged in the search for remedies intended to contain its negative effects.

With regard to the classification of that institution within the European framework, scholars generally recognize a strong and independent power to such a body, being the latter empowered with a function of primary importance within the EU.⁸¹ The EU Treaty granted to the ECB legal personality absolute autonomy in the carrying out of its functions, being protected by any form of solicitation coming *ab externo*; in this respect please note that the ECB shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. In addition, the ECB is also entitled with the power to make regulations, and make recommendations and deliver opinions; as a consequence of the above, the ECB can

The Central Bank and the Financial System, Basingstoke, 1995; BINI SMAGHI, *L'euro*, Bologna, 1998; SMITS, *The European Central Bank in the European Constitutional Order*, Utrecht, 2002, ff.

⁸¹ See, e.g., PAPADIA - SANTINI, *La banca centrale europea*, Bologna, 1998; BERK, *Banca centrale e innovazione finanziaria. Una rassegna della letteratura recente*, in *Moneta e credito*, 2002, p. 345 ff.; AMTENBRINK – DE HAAN, *The European Central Bank: an Independent specialised Organization of community Law. A Comment*, in *Commercial Market Law Review*, 2002, vol. 39, p. 65 ff.; VELLA, *Banca centrale europea, banche centrali nazionali e vigilanza bancaria: verso un nuovo assetto dei controlli nell'area dell'euro?*, in *Banca e borsa*, 2002, I, p. 150 ff.; ID., *La nuova banca centrale europea*, in *www.lavoce.info* dated 18/9/2012; PELLEGRINI, *Banca Centrale Nazionale e Unione Monetaria Europea*, *supra*, chapter VI; AA.VV., *La banca centrale europea*, edited by BELLI - SANTORO, Milano, 2003; MALATESTA, *La Banca centrale europea*, Milano, 2003, *passim*; ID., *Unione monetaria, banca centrale europea e allargamento dell'unione europea*, *Liuc Papers*, n. 148, 2004; LODDO, *Banca centrale, vigilanza e efficienza del mercato del credito*, Milano, 2007; VILLANI, *Istituzioni di diritto dell'Unione Europea*, Bari, 2008; BINI SMAGHI, *Going Forward: Regulation and Supervision after the Financial Turmoil*, in *Paolo Baffi Centre Research Paper no. 2009-47*; PITRUZZELLA, *Austerità finanziaria verso crescita economica nel dibattito dell'Eurosistema*, in *Quaderni cost.*, 2012, p. 427 ff.

impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

In light of the above, we do not share the opinions aimed at resizing the role of the ECB,⁸² at excluding its status of EU institution or body⁸³, or at considering it as a «*sui generis* body placed within the European legal context»⁸⁴. Indeed, the ECB consists in a supranational entity functionally related to the objectives pursued by the EU regulation, of which it constitutes an integral part. Its exclusive monetary sovereignty if, on the one hand, justifies the special nature of its tasks, on the other hand explains why it operates without the mediation of the Community, as highlighted by relevant scholars⁸⁵ and then reiterated by the EC Court of Justice at the beginning of the millennium, stating «the ECB, pursuant to the EC Treaty, falls squarely within the Community framework».⁸⁶

Properly understood, a right placement of such institutional legal entity - taking into account its nature of Central Bank Accountability (from which derives a peculiar liability regime released from specific obligations in the definition of objectives and instruments) – implies its “technical” profile, which becomes essential for the control of money and, therefore, for the assignment of powers to be exercised independently, according to a formula successfully tested in Germany with the Bundesbank.⁸⁷

⁸² See, e.g., TORRENT, *Whom is the European Central Bank the central bank of ? Reaction to Zilionis and Selmayr*, in *Common Market Law Review*, 1999, p. 1231 ff; MALATESTA, *La Banca centrale europea*, *supra*, p. 78.

⁸³ See LOUIS, *Monnaie (Union économique et monétaire)*, in *Repertoire communautaire Dalloz*, 2000, paraf. 160; ID., *L'Autorité monétaire de la zone Euro*, in *Euredia*, 2009, n. 2, p. 277 ff.; in this sense, also PAPADIA - SANTINI, *La banca centrale europea*, *supra*, p. 27.

⁸⁴ See PERASSI, *Banca centrale europea*, in *Enciclopedia. del diritto*, Annali IV, p. 154.

⁸⁵ See ZILIOLI - SELMAYR, *The law of the European Central Bank*, Oxford, 2001, in which the authors represent the ECB as an entity separated and far from the Member States; such separation has been later criticized by KRAUSCOPF - STEVEN, *The institutional framework of the European System of Central Banks: legal issues in the practice of the first ten years of its existence*, in *Common Market Law Review*, 2009, n. 4, p. 1143 ff.

⁸⁶ See EU Court of Justice July 10, 2003, C-11/00, in *Euredia*, 2003, n. 2, p. 269, ELDERSON - WEENINK.

⁸⁷ On the influence of the German model, see PREDIERI, *Non di solo euro. Appunti sul trasferimento di poteri al Sistema europeo delle banche centrali e alla Banca centrale europea*, in *Il diritto dell'Unione Europea*, 1998, n. 1, p. 7 ff.

Undoubtedly, the position of the ECB seems justified by a sense of skepticism towards the mechanisms of politics and, therefore, seems oriented to avoid the excesses of the latter. Its technical neutrality has been fostered, for the purpose of enabling it to operate autonomously (not subject to any constraint or address).⁸⁸ Not surprisingly, after the Maastricht Treaty, scholars stressed that « certain powers ... lost by the national representative institutions are then acquired at the Community level by not representative institutions, or, as in the case of the ECB, by efficient techno-structures »;⁸⁹ hence the concern, already represented in the past, regarding the configuration of the monetary union and the effective 'cohesion' of its institutional structure, all elements that raised doubts concerning the possibility to reach a political union⁹⁰ In this respect, it should be outlined the split - recorded at the time of establishment of the Eurosystem - between States that have opted to participate in the EMU and those who, instead, have decided not to join it; hence the configurability of a further separation factor within the Union (since belonging to one or to another group produce different choices and development programs often diverging, if not even conflicting).

It should also be noted that, in addition to decisions concerning the monetary policy, the ECB plays an advisory role regarding «policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings» (former Art. 105, paragraph 6, EU Tr. and 25 of the EC's statute), contributing to «smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system». Such provisions should have been extensively interpreted, interacting on the exercise of supervision powers in the Member States. However, at the time of the introduction of

⁸⁸ See CAPRIGLIONE, *Moneta*, in *Enc dir*, III update, 1999, p. 761 ff.

⁸⁹ See SORRENTINO, *La Costituzione italiana di fronte al processo di integrazione europea*, in *Quaderni costituzionali*, 1993, n. 1, p. 111.

⁹⁰ See JOCHIMSEN, *Economic and Monetary Union: a German Central Banker's Perspective*, in *Economic and Monetary Union: Implications for National Policy - Makers*, directed by Gretschemann, Dordrecht, 1993, p. 196 ff.

the euro, a strict application of the principle of *subsidiarity* (with regard to the areas of the powers respectively granted to the ECB and to the national central banks)⁹¹ justified maintenance of supervisory powers for the benefit of the national authorities.⁹² Only recently, by the restructuring of the European financial regulation architecture, an important part of the overall picture has been added, which has been represented by the new tasks given to the ECB concerning its supervisory powers over the credit institutions.

More specifically, in order to contain any expansive forms of existing imbalances in the economies of the EMU, the European Central Bank, as from the end of 2010, has put in place a series of “non-standard measures”, including an expansion of purchases of government bonds of the Member States on the secondary market.⁹³ These measures have mitigated the effects of the financial turmoil that swept through Europe, in line with the indications of the scholars according to which doctrine «under conditions of stress in the credit markets the central bank must be ready to provide unlimited liquidity to all at a penalty rate and receiving collaterals which must be of good standing under normal conditions. Available liquidity should be unlimited».⁹⁴ In this manner a reaction to the challenges arising from the crisis started, and such reaction, moving from an increase of the negative impacts related to the crisis, has been implemented by «sharp, prompt and original measures» as was pointed out by the same ECB.⁹⁵

This operating trend – even if focused on a recovery of the regular transmission of the monetary policy - was widely believed not immediately at-

⁹¹ See CARETTI, *Il principio di sussidiarietà e i suoi riflessi sul piano dell'ordinamento comunitario e dell'ordinamento nazionale*, in *Quaderni costituzionali*, 1993, n. 1, p. 9 ff.

⁹² See CAPRIGLIONE, *UME e riforma del 'sistema banca centrale': l'Ufficio Italiano dei Cambi tra passato ed avvenire*, in *Banca borsa e titoli di credito*, 1997, I, p. 684 ff.

⁹³ For a detailed description of the modalities of such action see ECB, *Bollettino Mensile*, July 2011, pp.57-72, in which the technical forms adopted by the ECB for such a purpose are illustrated.

⁹⁴ See BENIGNO, *Poteri straordinari della banca centrale in un sistema di moneta fiduciaria*, in *La gestione della crisi. Il mercato, le imprese, la società*, Padova, 2013, p. 94 ff.

⁹⁵ See ECB, *La risposta della Bce alla crisi finanziaria*, in *Bollettino mensile*, October 2010, p. 66, available at www.bancaditalia.it.

tributable to the statutory mandate of the European Central Bank.⁹⁶ On the other side, we have to take into account the positive impact of such remedies on the progress of the real economy and the circumstance that they slow-down the significant loss of trust (caused by the crisis) in the financial intermediaries.⁹⁷

In this regard, please consider the support offered to certain Member States by: (i) the *Security Market Programme*, buying government bonds as collateral in refinancing operations for the benefit of the banks, hence the ability to temporarily stabilize the markets, avoiding the possibility of speculative attacks against a particular country;⁹⁸(ii) the *longer-term refinancing operations* (LTROs), supplying credit in the long run and at a low cost, in order to allow the banks to arrange their liquidity in a long-term view⁹⁹ and thus substantially reinterpreting the open-market transactions; (iii) the *Outright Monetary Transactions* (OMT), acquiring on the secondary market the securities issued by the Member States (which have accepted the conditions for the admission to the EU rescue funds), that, once announced, successfully sustain the financial markets stability so that it has been recognized as a turning point in the euro crisis.¹⁰⁰

From a legal point of view, the above mentioned *non-standard* operations can be considered in compliance with the purposes of the Community legislation; being implemented in the secondary market with counterparties

⁹⁶ See, e.g., BELKE, *Driven by the Markets? ECB sovereign bond purchases and the Securities Markets Programme*, in *European Parliament, Policy Department Economic and Scientific Policies*, Brussels, 8 June 2010, p. 4; GROS, *Conflicts of interest in central banking*, in *Central Banking Journal*, 22 Aug 2011; REICHLIN, *Il duello (e l'equivoco) tra la Cancelliera e Trichet*, in *Corriere della Sera*, July 20, 2011; ID., *Tassi e ruolo della BCE*, in *Corriere della Sera*, August 18, 2011.

⁹⁷ Cfr. CAPRIGLIONE - TROISI, *supra*, p. 35.

⁹⁸ See widely CAPRIGLIONE - SEMERARO, *Il Security Market Programme e la crisi dei debiti sovrani. Evoluzione del ruolo della BCE*, in *Riv. trim. dir. econ.*, 2011, I, p. 270 ff.

⁹⁹ In the past, standard operations having a short term view were accompanied by LTROs having 3 months duration, aimed at furnishing additional loans with a period of time slightly longer, in order to allow a better compliance with the expiration dates; see DRAGHI, *The euro, monetary policy and the design of a fiscal compact, Ludwig Erhard Lecture*, December 15, 2011, European Central Bank, Frankfurt; <http://www.ecb.europa.eu>.

¹⁰⁰ See COEURÉ, *Outright Monetary Transactions, one year on*, lecture at “*The ECB and its OMT programme*”, Berlino, September 2013; GERNER-BEUERLE - KUCKUK - SCHUSTER, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on*, in *German Law Journal*, 2014, p. 281 ff.

other than the State issuers, they do not infringe in any way the provision set forth by under Article 123 of the Treaty, since such a prohibition is limited only to forms of direct financing (loans to Member States or purchase of their bonds on the primary market). Furthermore, no violation of the following Article 125 (*no-bail-out clause*) happened, considering that according to such provision the Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, « without prejudice to mutual financial guarantees for the joint execution of a specific project »;¹⁰¹ this conclusion is grounded on the consideration that the operations above mentioned cause the assumption, by the ECB, of a credit towards the Member States but do not produce any transfer of liabilities as prohibited by Article 125.¹⁰²

Evaluating now the effect of the above mentioned non standard operations we can say that - not violating the mission given to the European Central Bank (*i.e.* driving the monetary policy, through the purchase of securities, towards the purpose of price stability in the medium term) – they allow such a body to directly assume «an intermediary role in providing liquidity for the benefit of the individual banks, normally done by the money market ».¹⁰³ Thus, the precious effort of the ECB in designating remedies against the disturbances currently afflicting the European financial system; an effort continued even more recently with a very expansive operation, the «*Quantitative easing*», as better described hereinafter.

¹⁰¹ See BUITER - RAHBARI, *The future of euro area: fiscal union, break-up or blundering towards a you break your own it Europe*, in *Citigroup Global Markets Global Economics View*, 9 September 2011, in which the authors propose a disputable interpretation of the term “specific project” mentioned by Art. 125, stating that it includes «projects aimed at reinforcing the stability of the sovereign indebtness».

¹⁰² Uncertainties have been expressed by BUITER - RAHBARI, *The future of euro area: fiscal union, break-up or blundering towards a you break your own it Europe*, in *Citigroup Global Markets Global Economics View*, September 9, 2011.

¹⁰³ See ECB, *Impatto e graduale rientro delle misure non convenzionali della BCE*, in *Bollettino mensile*, July 2011, p. 61.

Last but not least, looking at the powers granted to the ECB, we should take into consideration the opinions of those scholars who pointed out its role as lenders of last resort.¹⁰⁴ Since in the European context a similar provision is missing, such role is not generally recognized to the ECB; uncertainties arise also from the complexity of such form of intervention, which does not permit it to clearly identify boundaries between itself and activities carried out for the benefit of banks in default.¹⁰⁵ Again clarifications seem to come from the operational innovations implemented by the ECB as a result of the events of the crisis of recent years. Indeed, its operations - being addressed «to prevent countries from being pushed into bad equilibrium by self-fulfilling fears of liquidity crises in a monetary union»¹⁰⁶ - substantially look like 'last resort credit measures'. Therefore, we can conclude that - despite the absence of a specific regulatory provision *in subjecta materia* - the ECB is currently exercising powers that are consistent with those typically granted to central banks for the purpose of maintaining a reliable monetary policy as well as financial stability.

7. Among the measures taken in the Eurozone to resolve the problems concerning the stability of the bonds issued by single countries, a prominent role has been conducted by the European Financial Stabilisation Mechanism (EFSM), established in May 2010 by the Ecofin Council through a framework agreement pursuant to which, in June 2010, the European Financial Stability Facility (EFSF) has also been created.¹⁰⁷ Both the above mentioned initiatives - being characterized by a temporary mission - were created to support the EMU countries in «exceptional difficulties», granting loans to such countries, injecting equity in the relevant banks and purchasing sovereign debt. Therefore, they op-

¹⁰⁴ See, e.g., GOODHART, *The Central Bank and the Financial System*, *supra*, p. 325.

¹⁰⁵ See, *ex multis*, GIANNINI C., *Enemy of None but a Common Friend of All? An international perspective on the Lender-of-Last-Resort Function*, in *Temi di discussione* (Servizio Studi della Banca d'Italia), 1998, n. 341.

¹⁰⁶ See DE GRAUWE, *The European Central Bank: Lender of Last Resort in the Government Bond Markets?*, in *Oxford Journals Social Sciences CESifo Economic Studies*, 2013, vol. 59, Issue 3, p. 520 ff.

¹⁰⁷ See EU Regulation No. 407/2010.

erate outside the area, regulated by the general European rules, concerning situations characterized by ordinary diseases.¹⁰⁸

The European governing bodies created such bodies to implement extraordinary actions aimed at ensuring, in certain critical circumstances, an adequate financial assistance. In other words, they introduced a form of intervention intended to implement greater measures compared with those provided by the national government bodies; such extraordinary intervention tried to improve the conditions of the real economy (affected by the crisis) in the Member States requiring such assistance.¹⁰⁹

At the beginning such financial assistance - as anticipated above - was provided for by the European Financial Stabilization Mechanism, by granting loans or opening credit lines for the benefit of the relevant Member States, for a limited period of time and within a maximum amount.¹¹⁰ To finance such financial assistance, the European Commission was allowed to borrow up to a total of € 60 billion in financial markets on behalf of the Union under an implicit EU budget guarantee; further finance sources should have been provided also by non-European bodies, such as - for instance - the IMF.

Certain scholars pointed out that the EFSM was not a «solidaristic tool» since its rationale appears to be the shared assumption of the existence of a own EU interest to rescue its Members in financial crisis.¹¹¹ However, such a device shown a limited scope of intervention compared with the needs of financial

¹⁰⁸ Among others, please consider not only Article 126 of the Treaty, but also the Protocol (No 12) on the excessive deficit procedure attached to the Treaties, the EU Regulation No. 1466/97 of the Council, dated July 7, 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies, as amended by the EU Regulation No. 1175/2011 of the European Parliament and of the Council, and the EU Regulation No. 1467/97 of the Council, dated July 7, 1997, on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by the EU Regulation No. 1177/2011 of the Council.

¹⁰⁹ See DIECKMANN, *The Announcement Effect of the EFSF*, AFA 2013 *San Diego Meetings Paper*, available at www.ssrn.com or www.dx.doi.or, in which the author pointed out the net positive impact of such measures on the debt exposure of the EMU Members, notwithstanding the different impact had case-by-case; MESSORI, *Can the Eurozone Countries Still Live Together Happily Ever after?*, CEPS Policy Briefs, available at ssrn.com.

¹¹⁰ See CAPRIGLIONE - TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, *supra*, p. 42 ff.

¹¹¹ See RUOTOLO, *La costituzione economica dell'Unione europea al tempo della crisi globale*, in *Studi sull' integrazione europea*, 2012, p. 448 ff.

assistance raised by the recent crisis; such a limit has been confirmed, on the one hand, by the circumstance that only few Member States benefited from its operations (Ireland and Portugal),¹¹² and, on the other hand, by the fact that many countries could not be assisted by such a player on the assumption that their difficulties «cannot be considered as fully provoked by external events».¹¹³ As a result of the above, we find that it represented an experimental tool in the more complex plan to safeguard the financial stability in the Eurozone.

The above considerations explain why promptly after the establishment of the EFSM another player created to promote financial assistance in the EU - the European Financial Stability Facility (EFSF) - started to operate. The latter has been created as a consequence of intergovernmental decision, taken «to provide assistance through a *Special Purpose Vehicle* that is guaranteed on a pro rata basis by participating Member States in a coordinated manner and that will expire after three years».¹¹⁴

Thus, the EFSF was created with a mission wider than the one characterizing the precedent initiative, being able to operate with sources obtained by the issuance of bonds and other debt securities on the financial market, in other words the same modalities followed by the *Medium-Term Financing Facility*¹¹⁵. In July 2011, a new resolution adopted by the European Council expanded the operating volumes of its action, which at the end added to its institutional activity represented by the issuance of securities and the granting of loans to

¹¹² See Report of the Commission for the European Parliament and for the Council, August 9, 2011, COM(2011)485 def., pp. 8 and 9, in which the sums granted to Ireland and Portugal are illustrated.

¹¹³ See BIANCO, *The new financial stability mechanisms and their (poor) consistency with eu law*, EUI Working Papers, RSCAS 2012/44, p. 2, in which he recorded the opinion of the Commission pursuant to which “the situation can only be corrected by decisive action of the Greek government [...otherwise] the reliability of Greek deficit and debt data will remain in question” (See *Report* by the Commission of 8 January 2010 on Greek government deficit and debt statistics (COM (2010)1 final, p. 4).

¹¹⁴ See Cover note from General Secretariat of the Council No. 9614/10, available at *register.consilium.europa.eu*.

¹¹⁵ Please note that the possibility of granting mutual assistance to a Member State with difficulties as regards its balance of payments is laid down in article 143 of the Treaty. The facility to provide *medium-term financial assistance* has been established by Council Regulation (EC) No 332/2002.

Member States a direct action on the primary and secondary financial markets focused on the securities issued by Member States.¹¹⁶

The securities issued by the Fund - far from being classifiable like a 'common debt' of the Member States - seemed to be substantially similar to the granting of «bilateral loans», directly agreed by certain States as part of a plan subject to permanent monitoring (or "conditionality").¹¹⁷ On the other side, the securities issued by the Fund were guaranteed by commitments taken by the member States, justified by the emergency nature of such a Fund;¹¹⁸ however, this structural measure did not further expand the entirety of financial sources available to the Fund, and therefore the size of its loans appeared to be extremely restrained.¹¹⁹

The creation of the European Financial Stability Facility allowed certain States (Greece, Ireland and Portugal) to benefit from loans *ad hoc*.¹²⁰ It should be noted that such a financial assistance has been preceded by the execution of a plan providing a process for the rebalancing of the financing conditions of the recipient States (since the financial assistance was subject to the execution of a macroeconomic adjustment programme aimed at restoring the market trust in the credit standing and in the long-term competitiveness *of the recipient States*);¹²¹ such a programme caused the beginning of a strict supervision by the

¹¹⁶ See COUNCIL OF EUROPEAN UNION, Brussels, 21.7.2011, *Statements by the Heads of State or Government of the Euro Area and EU Institutions*, available at www.consilium.europa.eu.

¹¹⁷ See EUROSTAT, *The statistical recording of operations undertaken by the European Financial Stability Facility*, News release of January 27, 2011, available at www.epp.eurostat.ec.europa.eu.

¹¹⁸ In this respect see BASSAN - MOTTURA, *Le garanzie statali nel sistema europeo di assistenza finanziaria agli Stati*, in *Mercato concorrenza regole*, 2013, n. 3, p. 571 ff.

¹¹⁹ As noted by MESSORI, *Can the Eurozone Countries Still Live Together Happily Ever after?*, *supra*, p. 3, footnote 3, «in principle, the EFSF can issue up to €440 billion of liabilities, covered by a guarantee of the same amount allocated pro rata among all the EMU countries. But since only some member countries have AAA ratings and Greece and Ireland are excluded as direct or indirect beneficiaries of European financial support, reliable estimates put the EFSF's effective lending capacity at under €300 billion».

¹²⁰ See («financial assistance to Ireland, Portugal and Greece. The assistance was financed by the EFSF through the issuance of bonds and other debt instruments on capital markets»).

¹²¹ In this respect please see the considerations formulated by the European Stability Mechanism: «to fulfill its mission, EFSF issues bonds or other debt instruments on the capital markets. The proceeds of these issues are then lent to countries under a program. The EFSF may also intervene in the primary and secondary bond markets, act on the basis of a precautionary program and finance recapitalizations of financial institutions through loans to governments»; available at www.efsf.europa.eu. For certain critics see BINI SMAGHI, *Morire di austerità*, Bologna, 2013, chapt. 8.

so-called *troika* (*i.e.* representatives of the ECB, of the European Commission and of the International Monetary Fund).¹²²

Furthermore, the activities of the EFSF, unlike the activities of the EFSM, are not funded in any way nor guaranteed by the EU budget. The above shows the intent of the European regulator to create an alternative tool to the non standard operation of the ECB, given that the financial assistance power assigned to the EFSF has been attributed to a player legally different from the ECB. Consistently, the EFSF has the legal nature of a “*Société anonyme*” regulated by the Luxembourg corporate law (and operates under the direct supervision of the Ministers of the Eurozone, who have a veto power on all its significant decisions), and thus, as a result of its legal nature, its activities are not accounted for within the financial statements of the ECB.

Only with the entry into force of the *European Stability Mechanism* (ESM) - which was established by the European Council on 2011 to ensure financial stability and to replace the ESFS in mid-2013¹²³ - was the capacity to finance countries in trouble significantly expanded.¹²⁴ The measure establishing the ESM, amended at the beginning of 2012, qualifies such body as an *international financial institution* based in Luxembourg, and grants it several privileges and immunities (with respect to its goods and its funds). Significant is the fact that any financial assistance to countries in financial trouble can be granted only if such a measure is essential for the stability of the Eurozone and if the recipient State executes with the Commission a memorandum of understanding

¹²² The term refers to the *troika* audit committee made up of representatives of the European Commission, the ECB and the IMF. It is aimed at overseeing the rescue procedure adopted by the European Union for the Member States risking a default, through the imposition of economic austerity measures, such as to enable them to undertake a way of rebalancing aimed at the reconstruction of their economic and financial situation. The assessment of the effects of the work of such committee is still at the center of a broad institutional debate; for more details, see the Survey of the European Parliament on the role and operations of the Troika (ECB, Commission and IMF) with regard to the Euro area programme Countries (2013/2277(INI), available at www.europarl.europa.eu.

¹²³ See the European Council decision No. 2011/199/UE of March 25, 2011, by which Art. 136 of the Treaty has been amended to introduce the stability mechanism in the Eurozone; see *GUUE* L 91, April 6, 2011.

¹²⁴ See *Il Sole24Ore* del March 30, 2012, entitled *Fondo salva-Stati, passa l'accordo da 800 miliardi* in which it has stated that the limit of loan capacity of EFSF and ESM «increased to Euro 700 billion» available at ilsole24ore.com.

aimed at the *macroeconomic adjustment*, being then subject to a strict analysis of the sustainability of its public debt.¹²⁵

Once consumed the extraordinary and urgent initiatives preceding the establishment of the European Stability Mechanism, there are not in the EU devices able to ensure the stability of financial markets.¹²⁶ This effect has been reached despite the above mentioned applicative limits of the measures at hand (such as the exclusion from such benefits of the States which have not ratified the Treaty on stability and on the Fiscal Compact, that set forth constraints for their Members aimed at limiting any form of increase of the public debt).

All the above mentioned measures implement the intervention tools provided by the treaty of Lisbon; in light of the above, some scholars stated that now «a governance of the European economy is beginning to have from a ... remarkable plan, which intend to ensure, at least in the Eurozone, the necessary consistency between the monetary policies and the economic decisions».¹²⁷ Similarly, certain theories see in the recent financial turmoil the environment in which the ability of the EU to manage crisis at the intergovernmental level must be scrutinized, emphasizing the attempt, which underlies the creation of the bodies above examined, to mitigate the pressure exercised by the market on the Member States in difficult conditions.¹²⁸ However, the adoption of a common politics - which could be considered as expression, by the European governing bodies, of the awareness of the need to predetermine the conditions for a greater cohesion among the Member States - seems to be still far. Indeed, the limited effectiveness of the efforts carried out by the bodies mentioned above on the one hand affect the validity of the 'intergovernmental system' (practiced within the EU) concerning the adoption of techniques to contrast sit-

¹²⁵ See the act establishing the ESM at www.europeancouncil.europa.eu.

¹²⁶ See CAPRIGLIONE, *Mercato Regole democrazia. L'UEM tra euroscetticismo e identità nazionali*, *supra*, p. 115 ff.

¹²⁷ See VILLANI, *Prove tecniche di governance europea dell'economia*, in *Sud in Europa*, dicembre 2011, p. 1 ss., available at www.sudineuropa.net.

¹²⁸ See FABBRINI, *Beyond Intergovernmentalism: The Puzzle of European Economic Governance*, in *The Eurozone Crisis and the Transformation of the EU Governance: External and Internal Implications*, 2014, available at ssrn.com.

uations of crisis but, on the other hand, reveal the need for a change that gives a more compelling content to the will of 'stand together'.

Sharing the objectives under the reforms concerning the economic recovery and development must lead not only to a governance of the financial support measures, but also to a government, which takes into account the interdependence among Member States (particularly relevant in the context of the Eurozone) and aims at overcoming the diversities;¹²⁹ the above explains why, at today, we must still face separation instances and hegemonic attempts to impose strict measures on the weaker countries, that do not attenuate the negative features of the current context, while exacerbate reactions by the populations bearing the costs of the austerity.

8. As anticipated above, among the interventionist measures adopted by the ECB to stabilize the financial markets a significant one is represented by the *Quantitative easing*. Such a initiative - belonging to the non-standard measures - was announced by Mario Draghi during the *World Economic Forum* on January 22, 2015, and consists of the commitment to purchase, on the secondary market, either private or public debt securities from March 2015 at least until September 2016, for an amount of Euro 60 billion per month, and in any case until the date on which the inflation rate in the Eurozone should have been close to the 2%.¹³⁰

The European Central Bank, not satisfied by the results of the monetary policy measures, estimated the total amount of liquidity injected into the eco-

¹²⁹ See MASERA, *Macroprudential policy as a reference for economic policies: an analysis for the EMU*, XI "Mario Arcelli" lectio held on March 2, 2015, at the *Università Cattolica del Sacro Cuore* of Piacenza, during which the author deeply illustrated the measures apt to contain the systemic risks and the financial instability in the Eurozone.

¹³⁰ The reasons explaining why the ECB resolved to initiate such «wider program to purchase assets (PAA)» are mentioned in the *Monthly Bulletin* of the ECB, 2015, No. 1, p.17 ff., in which the main features of the program are illustrated.

Among scholars, see COVA - FERRERO, *Il programma di acquisto di attività finanziarie per fini di politica monetaria dell'Eurosistema*, in *Questioni di economia e finanza (Occasional Papers) della Banca d'Italia*, n. 270, April 29, 2015, in which a detailed analysis of the program to purchase public and private securities in the Eurozone for purposes of monetary policy and of the modalities that should influence the economic activity and the inflation is provided.

nomie sector (by means of various actions in recent times) inadequate for a reasonable expansion of the Eurosystem. This, in a financial environment in which the reduction in borrowing costs in the private sector and, in particular, the lending rates charged by banks to businesses were lower than expected, compared with a prospect of rising inflation (to levels around 2%) still significantly distant.¹³¹ Hence the decision to launch a purchasing program aimed at creating money to be injected into the market for the purpose of contrasting – by this additional liquidity - any risk of deflation in the Eurozone and, therefore, of supporting the price stability as a consequence of this important and positive action. Such a measure has been appreciated by certain EMU countries¹³² and at the same has been digested with difficulty by other Members which have seen possible distortions in its execution.¹³³

The additional acquisitions (compared with those made under the AB-SPP and the CBPP3) will concern bonds having a residual maturity between 2 and 30 years (including government bonds) and will have to meet certain thresholds in value for each issuance. Bonds included in the program must meet the requirements to be accepted as collateral in refinancing transactions, hence the publication by the ECB of a special list, in which are listed the international

¹³¹ In this respect the *Bollettino economico* of the Bank of Italy, 2015, n. 1, p. 13, explains that – as a consequence of two refinancing transactions in a long term (carried out between the end of 2014 and the beginning of 2015) « net of amounts not renewed in other maturing transactions, the financial statements of the Eurosystem will be increased to about 2.17 trillion, from just under 2,000 in mid-September ». Hence, the intention of the ECB's Governing Council to increase the size of the budget to the level reached in March 2012 (approximatively 3,000 billion), to hinder the growing risks for the price stability ... (confirming) ... the commitment to review, to the extent necessary, the size, the composition and the frequency of its operations including through purchases of large-scale activities.

¹³² See VISCO, *Speech* at the 21 Congress ASSIOM FOREX, held in Milan on February 7, 2015, p. 4, in which he defined the measure at hand « a measure of great importance, which is characterized by its amplitude, above expectations of the markets », expressing appreciation for « the speed with which it has been activated, the absence of a time limit strictly settled »; the text of such speech is available at www.bancaditalia.it.

¹³³ See in this respect the interview of the Governor of the Bundesbank Jens Weidmann published in *la Repubblica* on December 13, 2014, in which he expressed criticism on the program concerning « the purchase of sovereign securities in the Eurozone (evaluated and not excluded by the President of the ECB Mario Draghi) ». With regard to it, Weidmann said that such a program “must be judged differently than in other currency areas: the US and Japan are unitary states with a single financial policy, in Europe we have a common monetary policy but with 18 States, financial policies and independent rating on sovereign debt are very different, and in this case you can create an incentive to borrow more by transferring the consequences on others States”, available at repubblica.it.

and supranational institutions, and agencies located in the Eurozone having securities that may be bought.¹³⁴

The modalities of the program are compliant with the regulatory principles governing the ECB activity (or rather: its forms of assistance) since such acquisitions are executed on the secondary market and with guarantees that should limit (or even exclude) the risks arising from such transactions.¹³⁵ Furthermore, the technical features of these transactions prevent (or at least, significantly reduce) the possibility that in these circumstances unjustified and/or illegitimate transfers of sources among the countries involved could happen.

First, it should be noted that such purchases will concern only securities which meet “criteria of eligibility” set forth by similar financial transactions carried out in the Eurosystem’s monetary policy operations; and a decisive element – which identifies the high quality of the securities at hand - must be founded in the provision of the Governing Council under which «in the case of Euro area Member States subject to financial assistance programs, the eligibility will be suspended during the verification phase and restored only in case of a positive result».¹³⁶

Under a different perspective, it is important to underline the distribution criteria of the securities purchased between National Central Banks and ECB. Indeed, such a program - providing that «purchases of securities of European institutions ... will amount to 12% of purchases of additional assets (with respect to those carried out in the context of ABSPP and CBPP3 programs) and will be carried out by national central banks»¹³⁷- it intended to limit the commitment taken by the ECB, which has the right to hold only the «8% of the additional as-

¹³⁴ In this regard, see www.ecb.europa.eu.

¹³⁵ The modalities for the purchase of public securities are detailed in the ECB website, see «*Implementation aspects of the public sector purchase programme*» and «*Q&A on the public sector purchase programme*», available at www.ecb.europa.eu and at www.ecb.europa.eu.

¹³⁶ See *Bollettino economico* of the ECB, *supra*, p. 20.

¹³⁷ The ‘additional purchases’ mentioned in the text are those exceeding the purchases carried out in the context of the ABSPP and CBPP programs.

sets acquired ».¹³⁸ In light of the above, only a limited part is subject to a regime governing the risk distribution!

The above described program reflects certain concerns expressed by some countries on the possible negative implications of the project at hand; implications coming from the possibility of hypothetical losses that Member States called “virtuosos” did not want to see burdened indiscriminately on all the members of the Euro-system.¹³⁹ Therefore, such a program seems to be the result of a compromise, as demonstrated by the intent to avoid in the purchasing transactions the application of a regime founded on a ‘full sharing of risks, which is considered by Governor of the Bank of Italy «more consistent with the uniqueness of the monetary policy ».¹⁴⁰ On the other side, the fact that a part (even small) of the risks associated with Quantitative easing transactions is sustained by the national central banks and thus accounted in their financial statements must be appreciated; such solution aims at fostering the Quantitative easing transactions, on the assumption that such measures will have the positive effect of reducing the macroeconomic risks threatening the Euro-zone countries and, consequently, even those accounted in their financial statements.

There is no doubt that, at least in its initial phase, such program presents certain uncertainties which are often mentioned by the representatives of Germany, considering that such Country claims a “leading role” in the Eurozone that is certainly reasonable in light of the size of its economy but can slow-down the process of European economic integration. More in particular, we consider *extreme* and *adverse* to the spirit of cohesion that should drive the EMU Mem-

¹³⁸ See *Bollettino economico* of the ECB, *supra*.

¹³⁹ In this respect, see the comments concerning the criteria of ‘risk sharing’ followed by the ECB; see e.g. *IlSole24Ore* January 22, 2015, *La Bce batte le attese: maxi-Qe da oltre 1.000 miliardi. Ma l’80% dei rischi è a carico dei Paesi* available at *ilSole24ore.com*, in which it has been pointed out that: «the central banks of the interested Countries will guarantee a portion equal to the 80% of the total. Thus, only the 20% will be the risk shared between national central banks and ECB, as outlined by the President of the ECB. This appears as a concession to the hawks led by the Chairman of the Bundesbank Jens Weidmann.

¹⁴⁰ See VISCO, *Speech* at the 21 Congress ASSIOM FOREX, *supra*, p. 5.

bers the repeated attempts to emphasize certain weaknesses of the *Quantitative easing* program, affirming that the latter could decrease the pressure to improve reforms «also in countries like Italy and France».¹⁴¹

Actually, the criticism above mentioned should have been considered by Mario Draghi, who designated (and then sustained) the measure at hand. Moreover, notwithstanding certain hypothetical dangers connected to a potential “financial fragmentation”, such intervention seems to be based on the idea that it could support the more complex reforming action that EU leaders are promoting in EU countries (in view of the consolidation of a slight recovery that, after years of recession and stagnation, we glimpse). Of course, the enthusiasm and confidence should not give way to the lack of prudence, but even to unjustified fears, indicative of a lack of sharing, of a hegemonic vision that contrasts with the desire to be together, still believing in a European dream!

In this respect, another influential member of the Governing Council of the ECB, the Governor of the Bank of Italy, expressed certain concerns regarding the «risk that such intervention could lead to unreasonable increases in the prices of real and financial assets such as to threaten the financial stability ».¹⁴² This, of course, without falling in the excess of an enthusiastic expectation directed not to take into account the fact that the growth forecasts, related to the *Qe*, are «subject to high uncertainty, mainly connected with the evolving geopolitical conditions and their impact on international trade, on oil prices and on the same exchange rates».¹⁴³

An impartial evaluation of the *Qe* should underline the fact that - albeit to a limited extent - for the first time in the history of the euro, the wall of resistance to jointly address the financial needs of EMU countries was broken.

¹⁴¹ See *Riforme*, Visco replica a Weidmann «*Il Qe non riduce la spinta per farle*» in *Corriere della sera* January 23, 2015, in which are referred the words of Weidmann, Governor of the Bundesbank, when he tried to contrast the initiative promoted by Draghi: «it is a fact that as a consequence of this new program the central banks in the Eurosystem are among the biggest creditors. This produces the risk that balance-sheets consolidations could be ignored and that political pressure over such central banks could increase, in order to maintain for a long time a low interest rate», available at *corriere.it*.

¹⁴² See VISCO, *Speech* at the 21 Congress ASSIOM FOREX, *supra*.

¹⁴³ See VISCO, *Speech* at the 21 Congress ASSIOM FOREX, *supra*, p. 6.

Maybe, the desirable success of such non-standard initiative could represent the necessary basis for future evolutions towards a shared management of all the sovereign debts in the Eurozone and towards the official undertaking by the ECB of the role of 'lender of last resort'.

However, it would be deceptive and misleading to believe that the use of this financial practice constitutes a panacea capable of remedy to the many ills of the present; which (with reference to some countries) do not seem to be attributable only to the crisis. The *Quantitative easing*, as stated by the President of the ECB, « by itself does not reduce the imbalances, but provides general support to the economy of the euro area. Those who can take advantage more, go better. Those who make more reforms, grow more. And, if it is a debtor Country, perhaps it also reduces imbalances».¹⁴⁴ Such initiative, not to disappoint the expectations of those who look to it with *confidence*, must be connected to the achievement of significant changes needed to strengthen the 'recovery' (at today still weak and uneven in the Euro area). These changes could affect different sectors (institutional, financial and industrial), but they should all look at the implementation of new *models* and *tools* apt to eliminate (or at least reduce) the procedural and administrative discrepancies that characterize (negatively) some countries; at the same time, increasing levels of productivity and employment, which are essential prerequisites for the creation of new income and new demand.

Hence the clear conviction that the program at hand can be translated «into more credit to the real economy, families and businesses», which is a purpose consistent with the forecasts of the European Central Bank dated March 2015 related to the growth in the area of euro, which « have been increased» compared to their original formulation.¹⁴⁵

¹⁴⁴ See DRAGHI, *Hearing on the «monetary policy of the ECB, structural reforms and growth in the Euro area»*, held on March 26, 2015 at the Italian House of Representatives.

¹⁴⁵ See DRAGHI, *Hearing on the «monetary policy of the ECB, structural reforms and growth in the Euro area»*, *supra*.

Consistently, on the need for reforms recent indications from the Commission in the interpretation of the Stability and Growth Pact also insist¹⁴⁶ as well as the proposal, formulated the President Jean-Claude Juncker during his first speech, to increase the level of private and public investments in the EU looking at new possibilities of development «making the best use of the flexibility within the existing rules of the stability and growth pact».

9. The analysis made so far on the process of European integration shows that the predominance of *technique* over *politics* - essentially linked to the limits of the decision-making mechanisms that prevent advanced forms of aggregation and sharing – did not find in the creation of the ‘single currency’ the desired coagulation factor, apt to readdress the path to a unity not only economic, in compliance with the functionalist theory mentioned above. The establishment of the EMU - while marking a turning point in the search for operational relationships (among Member States) more intense compared to the past - was not able to overcome the difficulties met in taking (without delay) the way of a «joint statehood» and of a «enhanced cooperation» within the EU, as highlighted in the document known as the Delors Report presented in the late eighties of the twentieth century during an historically significant moment for the redefinition of the geopolitical picture of Europe (fall of the Berlin Wall, reunification of Germany and disintegration of the Communist Party of the Soviet Union).¹⁴⁷

Only now - after a quarter century from such step of the arduous route which implemented the transformation of the EMS into the European Monetary Union - we realize that, at that time, the 'expectation' of more intense forms of

¹⁴⁶ See EUROPEAN COMMISSION, *Commission issues guidance to encourage structural reforms and investment. Frequently Asked Questions*, January 13, 2015, available at www.europa.eu.

¹⁴⁷ See COMMITTEE FOR THE STUDY OF ECONOMIC AND MONETARY UNION, *Report on economic and monetary union in the European Community*, 1989; DELORS et al., *Libro bianco "Crescita, competitività, occupazione: le sfide e le vie da percorrere per entrare nel XXI secolo"*, COM(93) 700, 1993; and, among others, OLIVI, *L'Europa verso l'unione monetaria: dallo SME al Trattato di Maastricht*, Torino 1992; TAMBORINI, *Dal Rapporto Delors al Trattato di Maastricht e oltre. Cos'hanno da dire gli economisti?*, in *Economia politica*, 1997, n. 3, p. 361 ff.

unification between the countries was *unbalanced* in terms of practical feasibility, since the monetary union was not accompanied by common fiscal policies. In particular, the awareness of the deep differences between the Member States *maybe* should have recommended greater caution in instilling hope regarding higher levels of cohesion within Europe. Probably a careful evaluation of the real, different legal and economic features of the various Member States should have prevented imaginative programs of egalitarian development; on the other side, the maintenance in the long term of 'equal conditions' (achieved by compulsory parameters set forth in the Treaty of Maastricht) would have fatally resulted - as recent years have highlighted - in the imposition of a regime of *austerity* to weaker countries, with the obvious, despicable consequences known to all.

Going back to the creation of the 'single currency', there is no doubt that such device substantially restricted national sovereignty. EMU States have accepted, in fact, to self-limit their sovereignty: the latter was, therefore, decomposed with regard to its funding elements, ceasing to symbolize the unity of the State (notoriously defined on the basis of its components). Therefore, the currency has come off the monopoly of «political decisions» reserved to the States and, given its peculiar technical meaning, was called to carry out its functions according to criteria of «neutrality», the management of which is attributed to the activities of a supranational independent body, equidistant from the recipients of its activity: the European Central Bank (which, as mentioned above, has been originally empowered with specific tasks that did not give it the nature of a central bank).

As a consequence of the above, the EU architecture - as better illustrated in the next paragraph - affects the paradigm of the modern State, which identifies the «unity of sovereignty» in a model based on the «political unity» (hence the embodiment of the authoritative apparatus of the State and the reference

to its sovereignty to justify any amendment to the powers of the State).¹⁴⁸ More specifically, the «unlimited power» characterizing the sovereignty of the countries has been reduced as a consequence of the loss of the monetary policies and of the resizing of their potestative scopes (now connected to the mere existence of a *set of rules*, remaining the symbol of an organization of powers concerning a given territory).¹⁴⁹

In this perspective, we can better understand the wide debate - started by the creation of the System of European Central Banks (ESCB) and of the European Central Bank (ECB) – concerning the *sustainability* of the measures established by the Maastricht Treaty and, more generally, the concrete possibility to realize the broad program that, in such context, was formulated.

Already in the past certain observers noticed the difficulties regarding the solution of certain problems arising from the single currency, sometimes stating that the EMU did not have any valid economic justification (highlighting its potential capacity to worsen unemployment)¹⁵⁰, such considerations have been emphasized as a result of the recent financial turmoil. In particular, doubts are now increasing about the validity of the parameters defined in the Maastricht Treaty and the real possibility of implementing its multiple objectives (price stability, the solidity of public finances, the fixing of exchange rates and interest rates); such doubts also concern the criteria followed to determine the above mentioned parameters, including the limits of the complex architecture at the time designated.¹⁵¹

¹⁴⁸ See SCHMITT, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 1950.

¹⁴⁹ See CAPRIGLIONE, *Moneta*, in *Enciclopedia del diritto*, Update, III, Milano, 1999, p. 752 ff;

¹⁵⁰ See, e.g., FELDSTEIN, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, in *Journal of Economic Perspectives*, Volume 11, Number 4, 1997, p. 23 ff.; SALVATORE, *The common unresolved problems within EMS and the EMU*, in *American Economic Review*, 1997, vol. 87, n. 2, p. 224 ff.; BALDWIN - WYPLOSZ, *L'economia dell'Unione Europea*, Milano, 2005.

¹⁵¹ See, e.g., GUARINO, *Diritto ed economia. L'Italia, l'Europa, il mondo*, Roma, 2011; SAVONA, *Eresie, esorcismi e scelte giuste per uscire dalla crisi. Il caso Italia*, Catanzaro, 2011; ID., *Serve un piano B per uscire dall'Euro. Da Renzi mi aspetto molto*, interview dated March 9, 2014, available at www.forexinfo.it; MASERA, *Ecco i compiti a casa per l'inconcludente Unione europea*, in *Il Foglio* November 30, 2011; DI TARANTO, *Le basi problematiche della moneta europea*, in *Aspenia, I futuri del capitalismo*, 2012, n. 56, pp. 176-183; ID., *Il salvataggio temporaneo di Atene? Vantaggioso solo per*

Such theories resulted in a judgment in conflict with the goal to standardize the regulatory and managerial framework of the different Member States. The resulting disapproval concerning the participation at the EMU - which sometimes is reached through 'summary judgment' affirming the lack of validity of the euro¹⁵² - tends to devalue the benefits arising from a project that, in the future, should be helpful, since it aims at implementing in a more efficient way the development strategies in the Community, which should lead to identify (in the logic of the *step by step*) the conditions for the creation of a *political union*.¹⁵³

As mentioned above, the systemic framework governing the 'single currency' seems characterized by intrinsic limits; so that the construction at hand shows certain contradictions, which certainly does not favor the process of European integration. We refer, first, to the separation between monetary policies (assigned to the ECB) and the economic and accounting policies (assigned to the competence of the various Member States); which is a distribution model that gave rise to increasing divergences among the EMU Members. The above considerations ground the increase of the previous divergences, which resulted in increasing asymmetries within the European regional context;¹⁵⁴ hence the critical issues that, during the recent pathological events, have seriously threatened the 'single currency', also affecting within the EU the spirit of solidarity which should act as the glue holding the EU Members together.¹⁵⁵

More in general, certain structural problems of the Eurozone come to light, considering that they are linked - as was pointed out in the nineties of the twentieth century - to the institutional formula introduced by the Maastricht

Berlino, in *Milano Finanza* del 16 March 2012; ID., *L'Europa tradita*, Roma, 2014, *passim*; ID., *Così l'Italia può cambiare l'euro (e guadagnarci)*, interview published on January 19, 2014, in *ilsussidiario.net*.

¹⁵² See, *ex multis*, RINALDI, *Il fallimento dell'euro*, 2011, available at www.fallimentoeuro.it; ID., *Euro-pa kaput (S)venduti all'euro*, with a preface of SAVONA, Roma, 2013.

¹⁵³ See, e.g., PERONI, *La crisi dell'Euro: limiti e rimedi dell'Unione economica e monetaria*, Milano, 2012.

¹⁵⁴ See CAPRIGLIONE - TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, *supra* p. 130.

¹⁵⁵ See DONATI, *Crisi dell'euro, governance economica e democrazia nell'Unione europea*, in *Rivista Assoc. Ital. Costitut.*, 2013, n. 2, p. 2, available at www.associazionedeicostituzionalisti.it.

Treaty, since «an innovation so important ... (i.e. the single currency) ... was not accompanied by a convergent reinforcement of the political union ».¹⁵⁶ At the beginning of this millennium certain significant considerations concerning the need to find appropriate forms of coordination (between tax authorities and the ECB) in order to prevent excessive deficits, as well as to strengthen all the measures aimed at increasing the growth arose;¹⁵⁷ hence the increasing belief that the EU did not meet satisfactory results in terms of stability of the economic conditions.¹⁵⁸

Actually, while in the past several cases of misalignment from the limits imposed by the Treaty happened (involving also the most virtuous States),¹⁵⁹ in recent years we faced the weaknesses of public budgets and the inefficiencies of certain national governments (especially in the Mediterranean area). In a nutshell, the general context reveals that the constraints on the public debt/GDP and on the deficit/GDP to date have not responded effectively to the economic, social and financial need in the EU¹⁶⁰. Thus, the current situation is characterized by a substantial imbalance within the Eurozone, the causes of which have to be founded - in the opinion of an acute scholar - in the permanence of a dystonic relationship between 'centralization of monetary policy' and

¹⁵⁶ See TIZZANO, *Qualche considerazione sull'Unione economica e monetaria*, in *Il diritto dell'Unione Europea*, 1997, n. 3, p. 457, who pointed out that the system «did not suffer real adaptations to deal with this innovation, in the sense that an acceptable parallelism between the intensity of integration expected in the economic and monetary integration and the level expected for the EU has not been achieved ».

¹⁵⁷ See UHLIG, *One Money, but Many Fiscal Policies in Europe: What are the Consequences?*, paper written for the European Commission Workshop on "The Interaction between fiscal and monetary policies in EMU," which took place in Brussels on March 8th, 2002, available at www.papers.ssrn.com.

¹⁵⁸ See BILANCIA, *La nuova governance dell'Eurozona e i "riflessi" sugli ordinamenti nazionali*, in *federalismi.it*, p. 15, in which he underlined that «the development of integration in economic governance is not yet satisfactory from the point of view of its democratic legitimacy and is likely to repeat and amplify the long standing problem of the EU's democratic deficit».

¹⁵⁹ See LOPS, *L'Ue bacchetta la Francia sul deficit/Pil. Ma chi rispetta questo parametro? Dal 2009 quasi nessuno mentre l'Italia è stata tra i virtuosi*, published in *Il Sole 24 Ore* April 6, 2014, in which he stated that «in 2013 (although the data are updated to the third quarter), the number of Countries which do not comply with the parameter would have been less than 13 (according to the IMF Italy would have closed to 3.2% returning to overcome it, albeit slightly). In 2009-2010 the number of those who have not respected such parameter amounted to 14 out of 17 (Latvia had not yet entered). During these two years it was also breached by Germany».

¹⁶⁰ See CAPRIGLIONE - TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, *supra* p. 132.

‘decentralization of economic, financial and budgetary policies’.¹⁶¹ Undoubtedly, this thesis well identifies the reasons for the *illness* that now afflicts the Euro-system, which are due - as we tried to point out in the preceding pages – to the lack of proper interrelationship between the economies under the single currency, and to the insufficient capacity of the intergovernmental method to activate processes apt to achieve an effective fiscal integration, the latter an essential step towards the establishment of a European federal construction.

Without prejudice to the above observations, we consider exaggerated the conclusions which, in that logical order, see a negative future for an Euro-zone «born bad», such future being distinguished by a leading role of Germany, taken to replace the absence of an institutional leadership. We should remember that the European Union is composed of a set of States that have voluntarily decided to «share» their destinies, aware of the difficulties related to «be united in diversity». Therefore, any form of respect for the greater economic importance of a single State compared with the other should not result in the recognition of a position of politic supremacy, which is in conflict with the ‘democratic principles’ on which the EU was originally based. Thus, any attribution of a ‘leading role’ to a Member State (linked to the materiality of its dimension) must be limited in time and limited in content. Otherwise, the EU Member will give up a common strategic action aimed at defining an institutional renewal; and such consequence will inevitably slow-down the process of Europeanization and present possible events of conflicts that history has already condemned.

¹⁶¹ See FABBRINI, *L’eurozona nata male e quel vizio franco tedesco*, in *IlSole24Ore* March 31, 2015, in which the Author states that such a current European context results from a political compromise between Germany and France.

10. The structural nature of difficulties encountered in the process of European integration¹⁶² leads to critically look not only at the excessive rigidity of certain provisions of the Treaties,¹⁶³ but also at the bedrock of the same EMU, represented by the *euro* itself. We have shown in the previous paragraph the limits of a structure based on a 'single currency', which changed – in a particular context of time – the traditional model based on the «political unity» that represents the essence of a modern State. It is now time to verify if the antinomies originated by the aforementioned construction - which seem to deny «the paradigm of unity of the European integration» moving from the observation of a «conflict of interest» in place between the two Europes which are now forced to live together (or rather: to coexist) in the EU ¹⁶⁴- lead to a withdrawal from the project at the basis of the *euro*.¹⁶⁵

Such an analysis should be oriented to verify, on the one hand, how the single currency is connected to the process of Europeanization, and, on the other hand, taking into account the comments of outstanding scholars, such as J. Stiglitz, and of technical bodies, in which they stressed that «the monetary Union is terribly behind the original timetable. Now more than ever an effort of imagination and political will should be required».¹⁶⁶ Therefore, among the benefits linked to the 'single currency' (such as the negative consequences of a possible return to national currencies) we should also consider the «political and civil challenge » represented by the preservation of the euro, which assumes the adoption of all the necessary reforms to avoid a disintegration of

¹⁶² See, e.g., KRUGMAN, *Fuori da questa crisi, adesso!*, Milano, 2012, *passim*, in which the Author identifies the causes of the financial and political crisis of Europe and suggest certain devices to overcome the crisis such as public support plans and elimination of *austerity* policies.

¹⁶³ Please see in particular the widespread difficulties to comply with the parameter of 3% ratio between deficit in public accounts and the gross domestic product (GDP), which needs to be reviewed from time to time according to Romano Prodi, one of the leaders at the time of Maastricht; In this respect see LOPS, *L'Ue bacchetta la Francia sul deficit/Pil. Ma chi rispetta questo parametro? Dal 2009 quasi nessuno mentre l'Italia è stata tra i virtuosi*, in *IlSole24Ore* del 6 April 2014, available at www.ilsole24ore.com.

¹⁶⁴ See FABBRINI, *I tre pilastri per rifare l'Unione*, published in *Il Sole 24 Ore* May 7, 2014.

¹⁶⁵ See in this respect the article "Stiglitz: euro unico grande errore dell'UE, non ha funzionato. Esperti Troika da bocciare", published in *il Sole 24 Ore* May 6, 2014.

¹⁶⁶ See VISCO, *Guido Carli e la modernizzazione dell'economia*, speech held at the meeting to celebrate a century from the birth of Guido Carli, Roma, March 28, 2014, p. 5.

Europe, that could be caused by its obstinacy in «not finding its own way of exit». ¹⁶⁷

Undoubtedly, the introduction of the single currency marked a time of great cohesion within the Union, revitalizing its integration process, which fell into a stalemate position since the second half of the eighties of the twentieth century. After the Single European Act (entered into force in 1987) - which introduced some significant changes in the Community, removing the obstacles to the freedom of establishment and to the freedom to provide services in the financial field¹⁶⁸ - was adopted Directive No. 1989/646, which integrated certain further provisions all responding to the logic of liberalization of the market¹⁶⁹ and, thanks to the principle of *mutual recognition* (which requires Member States to have trust in banks already authorized in other Member States) significantly promoted the competitive logic in the financial system.¹⁷⁰

Because of the above mentioned provisions, which were intended to deeply influence the European financial system, the European leaders were ready to make a further step towards integration, waiving the monetary sovereignty of the single countries, in a way that, at the time, seemed to concretely realize the beginning of a new program aimed at the unification.

The particular framework designed by the Maastricht Treaty - in which, as said above, the monetary sovereignty is not accompanied by a political union - makes the model of 'government of the coin' atypical, being referred to a government body purely technical. Legal scholars have offered, from time to time, many interpretations of such framework. Notwithstanding all the analysis stressing the fact that the replacement of national currencies with a single cur-

¹⁶⁷ See DI PILLO, *Europee: Squinzi, votare per l'Europa, da sua fine costi altissimi*, published in *Il Sole 24 Ore* May 6, 2014.

¹⁶⁸ See PADOA SCHIOPPA T., *Verso un ordinamento bancario europeo*, in *Bollettino economico* of the Bank of Italy, n. 10, 1988, p. 57 ff.

¹⁶⁹ See Directive No. 1983/350 concerning the «consolidated supervision on the credit institutions»; No. 1986/635 on the «annual and consolidated accounts» of credit institutions and other financial intermediaries; No. 1989/299 on «the own funds» of credit institutions; No. 1989/647 on the «solvency ratio» of the credit institutions.

¹⁷⁰ See CAPRIGLIONE, *La finanza come fenomeno di dimensione internazionale*, in AA.VV., *Manuale di diritto bancario e finanziario*, Padova, 2015, p. 78 ff.

rency constituted a significant milestone in the process for the integration of the European market¹⁷¹, there are certain minority opinions either asserting that the circumstance at hand was only a «rational redistribution of powers»,¹⁷² or distinguishing between ‘transfer’ and ‘renounce’ of sovereignty, proposing a theory that does not allow a full understanding of the phenomenon under investigation.¹⁷³

Although after a few years, we still believe that the reason for the European construction under discussion seemed to be related to the definition of closer economic ties in view of a more intense form of European integration; being the latter a perspective that should have been followed – from a legal point of view – a decrease of sovereignty (in order to remove hurdles in the institutionalization process of the monetary authority).¹⁷⁴ In this context, the States were comforted by the consolidated academic view according to which the principles of international law allow States - in order to facilitate trade and economic activities with other countries - to take decisions aimed at overcoming any obstacle to the objectives pursued¹⁷⁵; such a trend moved from the acknowledgment of a «progressive crisis of traditional sovereign functions of States in the field of management and control of economic processes» and concluded for the need to reach a «verticalization and internationalization of such functions».¹⁷⁶

From a theoretical point of view, the considerations just illustrated do not seem to conflict with the logic-cognitive systematic followed by Kelsen in

¹⁷¹ See, e.g., GUARINO, *Verso l'Europa ovvero la fine della politica*, Milano, 1997, *passim*, in which the Author wisely describes the progressive importance of the role covered by the technique in the definition of the conditions apt to support integration processes in the European context.

¹⁷² See MARZONA - CALDIROLA, *Politica economica e monetaria*, in *Trattato di diritto amministrativo europeo*, directed by Chiti and Greco, t. 1, Milano, 1997, p. 901.

¹⁷³ See DONATI, *Diritto comunitario e sindacato di costituzionalità*, Milano, 1995, p. 299 ff.

¹⁷⁴ See CAPRIGLIONE, *Moneta*, *supra*, p. 758.

¹⁷⁵ In this respect please see the well-known work of ROEPKE, *Economic Order and International Law*, in *Recueil des Cours de l'Academie de droit international de la Haye*, 1954, II, p. 204 ff.

¹⁷⁶ See PICONE, *Diritto internazionale dell'economia e costituzione economica dell'ordinamento internazionale*, in AA.VV., *Diritto internazionale dell'economia*, Milano, 1982, p. 38.

addressing the problem of sovereignty.¹⁷⁷ Indeed, the image of a *sovereignty* as a pillar of the modern concept of the «State of law» (*Rechtsstaat*) - and, therefore, its nature of «Basic norm» (*Grundnorm*) - has to be reconsidered now taking into account the phenomenon of 'regulatory pluralism' induced by the ongoing globalization. Therefore, the consequent dispersion of the fundamental features of the *sovereignty* concept, which now looks at a renewed vision of the conceptual unity («authentic and enduring core of all transformations » of the latter during the history).¹⁷⁸

In light of the above, making reference to the European solution represented by the single currency, the reality of the market, interacting with the traditional cornerstones of the State-building, seem to have innovated the basic elements of such a model, legitimizing changes in line with the intuition of a distinguished scholar who, in the past, criticized the traditional concept of a «sovereignty» strictly connected to a State origin.¹⁷⁹ Thus, we can state that the Eurocentric process contributed to review the traditional concept of sovereignty; in other words, the single currency became the premise of a new pluralistic context in which a «decentralization of the traditional sovereignty towards a polyarchy» happened.¹⁸⁰

The above considerations justify, in our opinion, the theoretical legitimacy of the institutional and legal framework arisen from the creation of the euro; although, in line with the indications of certain scholars, a reduction of the sovereignty of the Member States as a consequence of the EMU would have required - to avoid any doubt - the identification of an explicit legal source to legitimate that effect.¹⁸¹ However, according to the logic of the Treaty establish-

¹⁷⁷ See KELSEN, *Il problema della sovranità e la teoria del diritto internazionale*, Milano, 1989, *passim*.

¹⁷⁸ See KELSEN, *supra*, p. 8.

¹⁷⁹ See GIANNINI, *Sovranità*, in *Enc. dir.*, Milano, vol. XLIII, p. 224 ff.

¹⁸⁰ See CARRINO, *Oltre l'Occidente. Critica della Costituzione europea*, Bari, 2005, p. 174.

¹⁸¹ Doubts the possibility of a reduction of the sovereignty of States participating to the monetary union in the absence of an explicit legislative BARTOLE, *La nazione italiana e il patrimonio costituzionale europeo. Appunti per una prima riflessione*, in *Diritto pubblico*, 1997, p. 1 ss., who examined the Italian case and stated that Art. 11 of the Italian Constitution is not sufficient to justify the participation of Italy in the EU; for an opposite view see GUARINO, *Verso l'Europa ovvero la fine della politica*, *supra*, p. 74.

ing the 'single currency' - and, therefore, according to the expectations of those who (presumably in good faith) accepted and signed it - the latter should have been addressed to promote the further goal of a «union» more intense and significant, such as a political union. This goal has been realized inside the Eurozone through the decision to not include specific rules to enable an exit from the same¹⁸². In other words, while assessing the significance attributed to the euro, we must regard the fact that it was created mainly to *bridge* the 'past' (when the European Community seemed to have exhausted its lifeblood towards the road of integration) and the 'future' of a Union no longer only economic, but also opened to a federative integration of its people.

Properly understood, the lecture at hand appears focused on the central role of the politics which, in the itinerary planned at Maastricht, was entrusted with the task of designing and implementing the *reforms* needed to overcome gaps between adhering States (a fundamental prerequisite for being able to proceed in the path above mentioned). Such reforms aimed also at founding a participatory status based on 'sharing' and 'solidarity', both arising from the sense of a 'common belonging' to a unified national entity. Of course, the activation of mechanisms that, technically, have accompanied the introduction of the single currency - primarily the elimination of 'competitive devaluations' and of inflationary processes - should have been able to support such action intended to achieve the challenging goal of a «form of integration not feasible earlier in time».¹⁸³

By contrast, the inactivity of the European players, due to the reasons mentioned above, prevented the achievement in the European regions of the structural and functional changes necessary to align the different economic realities of the Member States. Such failure produced inevitable negative effects on the harmonization process in place, to which the creation of the euro, as it was pointed out earlier, was supposed to bring acceleration. Therefore, as already

¹⁸² See *infra* paragr. 14.

¹⁸³ See CAPRIGLIONE – TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, *supra*, p. 161.

pointed out, Europe lost a 'good chance' to benefit from the adoption of an «innovative institutional model» that, notwithstanding its original temporary nature, now presents all the features necessary to implement the project even if the latter has now become more evanescent than in the past.

In addition to the above, the financial crisis of 2007 found a Union populated by countries more distant than in the past, and therefore its impact on the Union further obstructed the achievement of the political integration. It caused, in fact, the deepening of the gap among the EU countries, some of which have been faced with a severe recession, whereas others have been just touched by it (taking, in some cases, even benefits from it). Even in such circumstances are found deplorable delays in the political actions, which for years - instead of promoting development programs (reducing the Maastricht constraints) and soliciting urgent structural reforms for certain national realities, as only recently seemed oriented to do (we make reference, for example, to the 'Juncker plan' for the revival of economic growth and investment in infrastructure)¹⁸⁴ - imposed on the States in difficulties unbearable *austerity* measures; hence the inevitable worsening of the situation of such States, which is giving space to the demagoguery of populist movements which - in order to oppose the forces of their national governments - contested the Eurosystem membership and support the abandonment of the single currency.

In light of such circumstances, the sense of responsibility of the *technical* authorities working at the ECB induced such body to intervene by activating a large and composite set of instruments to support the liquidity, as mentioned above.¹⁸⁵ On this background, the decisive action of Mario Draghi prevented the collapse of the Eurosystem: in fact, the President of the European Central Bank, realizing the possibility of such a potential risk, focused on the attitude of the *euro* to limit the negative effects of the crisis, hence its commitment, an-

¹⁸⁴ See, e.g., QUADRIO CURZIO, *L'agenda dei «Grandi» apre al piano di Junker*, in *IlSole24Ore* July 26, 2015, available at www.ilsole24ore.com.

¹⁸⁵ See *supra* par. 4 and following.

nounced in London on July 26, 2012, to do « everything necessary » to protect the integrity of the Eurozone.¹⁸⁶

Forced to act in the middle of effective difficulties (resulting from strict regulatory limits) and unjustified vetoes threatened by certain Member States (especially Germany, worried not only about having to fund the deficit of other States, but also about the impact on the spreads which would affect its ability to borrow money without any cost)¹⁸⁷ Draghi used the euro as the *glue* of a system that is showing clear signals of deterioration. And, therefore, looking at the actual effects produced by the 'single currency' (or rather: looking at its positive impact on the balance and stability of the European economic and financial systems) we understand the reasons why the euro should be irreversible.

In light of the above, we may conclude that a potential collapse of the euro would also affect countries that now appear to be only marginally interested by the financial crisis having their *finances in order* (such as, for example, Germany and Netherlands).¹⁸⁸ It becomes also clear the recent warning of Draghi in which he stated that such a potential failure would bear negative consequences that cannot be quantified and, however, produce an imponderable impact.¹⁸⁹

11. The accounting regulation played a prominent role in the European integration process since the origin of the single currency. Its beginning was the adoption in 1997 of the Stability and Growth Pact, aimed at implementing the

¹⁸⁶ See DRAGHI, *Speech at Global Investment Conference in London*, available at www.ecb.europa.eu. See also recently MERLI - MASCIANDARO – BUFACCHI, *La Bce decide sui fondi per salvare le banche greche. Pronto piano anti-contagio*, published in *IlSole24Ore*, June 28, 2015, available at www.ilsole24ore.com.

¹⁸⁷ See ZINGALES, *La scommessa di Draghi e il dovere dei governi*, in *IlSole24Ore* September 9, 2012.

¹⁸⁸ See DUSTMANN-FITZENBERGER-SCHONBERG-SPITZ-OENER, *From sick man of Europe to economic superstar: Germany's resurgence and the lessons for Europe*, available at www.voxeu.org. Indeed, such Countries – will face not only the losses deriving from the emptying of their credits towards States in trouble –but also a restriction of the recipients of their exports.

¹⁸⁹ See DRAGHI, *Hearing at the European Parliament's Economic and Monetary Affairs Committee, Introductory statement by President of the ECB*, Brussels, 15 June 2015, available at www.ilsole24ore.com, speech in which Draghi, making reference to the possibility of a Grexit, reminds that the economic and monetary Union is still an incomplete construction, and thus the exit from the Eurosystem of one of its members could produce unpredictable consequences «as long as we shall not have all the tools to ensure that all the Eurozone members will be able to be enough resistant from an economic, tax and finance point of view».

principle of multilateral surveillance on the public finances of the Member States - then reaffirmed by Article 121 of the Treaty which imposes the 'consistency of economic policies' with a 'draft for the broad guidelines of the economic policies of the Member States and of the Union' prepared by the Council on the recommendation of the Commission -and then it continued with the reform of such pact in 2005, focusing the above mentioned surveillance on the «structural balance» (*i.e.* on the government balance adjusted by cyclical component and by the temporary and *una tantum* measures).

Later, as a result of tensions in sovereign debt markets in the Euro area, the debate on the limits of the governance of the Economic and Monetary Union promoted a set of new regulations including also the Directive 2011/85/EU of the Council¹⁹⁰ - the so-called Six Pack - by which certain significant changes to the stability and growth pact have been introduced (*i*) providing for more effective and prompt sanctions, (*ii*) establishing a new procedure to reduce excessive imbalances in order to prevent and correct them and (*iii*) setting new requirements for the budgetary policies of the Member States.¹⁹¹

Lastly, on March 1, 2012, the EU Member States (except for the United Kingdom and the Czech Republic) signed the "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union", commonly referred to as '*Fiscal Compact*'. In this context, through the implementation of the above mentioned legislation, Member States intended to give effect to the parameters of public finances adopted by the Maastricht Treaty (deficit/GDP and debt/GDP). In particular, in addition to the provision concerning a more detailed penalty system (whose effectiveness and timeliness were already strengthened in 2011 with the so-called Six Pack) against countries that do not meet the parameters just mentioned, the «procedural rule on the budget (already existing

¹⁹⁰ We make reference to a set of rules composed by 6 acts, such as EU Reg. n. 1173/2011, EU Reg. n. 1174/2011, EU Reg. n. 1175/2011, EU Reg. n. 1176/2011, EU Reg. n. 1177/2011 and EU Directive n.85/2011, mentioned in the text.

¹⁹¹ See CAPRIGLIONE - SEMERARO, *Financial Crisis and Sovereign Debt. The European Union Between Risks and Opportunities*, *supra*, p. 60 ff.

in the Community)» has been joined by a « numerical rule much more stringent, having a more automatic and less discretionary application (compared to the limit established by Maastricht)», as duly emphasized by scholars.¹⁹²

A particularly significant ruling in the Treaty is the one that sets the “debt brake”, which is a measure according to which the Member States of the euro area must provide a structural deficit not exceeding the 0.5% of their nominal GDP (or at most 1.0% of GDP for States with debt levels within the 60%-limit) and must insert such provision into their national laws, preferably at the constitutional level. This should allow the Member States to «avoid excessive deficits before they occur rather than try to control them after their emergence. Prevention is better than cure», as authoritatively stated.¹⁹³ This rule essentially refers to a balanced budget in the current period. This explains why it was accompanied by a numerical threshold for the annual reduction of debt, aimed at the progressive elimination of the liabilities accrued in the past; in this logic, each of the countries adhering to the Fiscal Compact, whose public debt exceeds 60% of the GDP, undertook to reduce it to an annual rate of one twentieth (so-called “1/20 rule”).¹⁹⁴

Therefore, the importance given by the European Council to the regulation at hand was accompanied by a commitment (taken by the countries adhering to the Fiscal Compact) to introduce into national legislation the «balanced budget rule»; that happened by adopting specific constitutional provisions (or equivalent regulations) aimed at ensuring their binding nature (commitment that, as regards Italy, has been reflected in enacting constitutional

¹⁹² See DE IOANNA, *Fiscal compact tra istituzioni ed economia*, in *Riv. Giurid. Mezzog.*, 2013, n. 1-2, p. 23.

¹⁹³ See DRAGHI, *The euro, monetary policy and the design of a fiscal compact*, *Ludwig Erhard Lecture*, 15 December 2011, European Central Bank, Frankfurt am Main, available at www.ecb.europa.eu.

¹⁹⁴ Please note that Art. 4 of such treaty makes reference to the criteria indicated in the EU Regulation No. 1177/2011, according to which: «When it exceeds the reference value, the ratio of the government debt to gross domestic product (GDP) shall be considered sufficiently diminishing and approaching the reference value at a satisfactory pace in accordance with point (b) of Article 126(2) TFEU if the differential with respect to the reference value has decreased over the previous three years at an average rate of one twentieth per year as a benchmark, based on changes over the last three years for which the data is available», available at www.eur-lex.europa.eu.

law No. 1 of 2012 which has shaped the national legislation on budgetary matters to the criteria defined at European level).¹⁹⁵

Having said that, we cannot ignore the doubts that the application of the Fiscal Compact raises under a systematic perspective, given its difficult interaction with the reality of many States affected by the crisis and by the subsequent imposition of austerity policies. Consistently, we have already stressed that the restrictions arising from the Fiscal Compact may represent an additional burden due to the instability of the national frameworks.¹⁹⁶ The same conclusion has been proposed by certain scholars who showed that the use of political hardship produced a sharp deterioration of the welfare conditions in the community.¹⁹⁷ Hence the configurability of negative consequences with regard to the definition (by the European regulator) of appropriate regulatory guidelines to implement a gradual adjustment of the public finances of several countries.

Leaving aside here the procedural profiles under the construction of the Fiscal Compact, we need to stress that such regulation focuses on the 'structural component' of the accounting policies, which, considering its complexity, «cannot be measured by normal statistical tools, but requires the use of econometric

¹⁹⁵ The Italian constitutional law No. 1/2012 amended Articles 81, 97, 117 and 119 of the Italian Constitution, introducing significant amendments to the previous legislation. Please consider that the new art. 81 of the Constitution states that «the balance between revenues and expenditures» in the accounts of the State shall «take into account the negative and the positive phases of the economic cycle»; therefore «The borrowing is allowed only for the purposes of considering the effects of the economic cycle, previously authorized by the Parliament by the absolute majority of their members, in case of exceptional events ».

The above explains the reason why the accounts of the public administrations must not register a deficit higher than 0.5% of the GDP, since an exception to this limit is allowed only in exceptional circumstances; for a more in-depth analysis, see DECARO, *Integrazione europea e diritto costituzionale*, in *AA.VV., Elementi di diritto pubblico dell'economia*, *supra*, p. 90; GIUPPONI, *Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione*, in *Quaderni costit.*, 2014, n. 1, p. 51 ff.; BILANCIA, *supra*, p. 16 ff.

¹⁹⁶ See CAPRIGLIONE – TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, *supra*, p. 136.

¹⁹⁷ See BLANCHARD - LEIGHT, *Errori previsionali di crescita e moltiplicatori fiscali*, *FMI Working paper*, January 2013, in which they highlighted that the tax adjustment plans provided for by Europe produced a negative impact higher than the one originally estimated. However, the Authors believe that such impact was only one of the factors to be taken into account in order to determine appropriate recovery policies, since a rebalancing of the public accounts represent an essential priority for all the Member States economies.

techniques»¹⁹⁸. It has created, in fact, a mechanism based on estimates often volatile, subject to review, which have stimulated criticism concerning the methodology followed,¹⁹⁹ as well as, in particular, the limits of the «*output gap* mysterious formula, which calculates the difference between potential GDP and the GDP actually realized».²⁰⁰

More specifically, the Treaty provides that the «structural deficit» must be equal to the Medium Term Budgetary Objective (MTO), as defined in Art. 2, paragraph two, letter. e, of the above mentioned EU Directive No. 85 of 2011. Certain difficulties in calculating and monitoring such criteria will follow, considering that they must make reference to the difference between the balance of the consolidated account of the Public Administration (nominal net indebtedness) and the effects of the cycle (measured with reference to the actual GDP and to the potential GDP), taking into account the effects of the so-called *una tantum* measures).²⁰¹ Therefore, we face now a systemic framework according to which the structural deficit depends on the “estimate of the potential GDP”; a calculation which in itself leads to precarious results, given the evanescence of the formula called *output gap*, which results from the difference between the actual GDP (indicated by statistics) and the potential GDP (the determination of which is left to the competent authorities).

The context above described reduces the discretion of the national political authorities, who are not allowed to deal with the financial leverage highlighted by an economic crisis of particular magnitude and persistence. On the contrary, in order to overcome situations weighed down by austerity poli-

¹⁹⁸ See LANDI, *La nozione di saldo strutturale al centro delle nuove regole europee di finanza pubblica*, in speech *La legge di stabilità: le politiche economiche possibili fra diritto costituzionale e diritto europeo*, Roma, Università LUISS Guido Carli, March 17, 2015.

¹⁹⁹ See, e.g., BOITANI – LANDI, *L'Europa intrappolata nel labirinto delle regole*, 2014, e-book available at Lavoce.info; ARTONI, *L'arbitrio sotto le regole: il DEF e il prodotto potenziale*, in *eticaeconomia*, May 15, 2014, available at www.eticaeconomia.it, in which the Author pointed out that the hypothesis formulated to calculate such parameters are arbitrary and illustrated the effect against the expansionary policies connected thereto in a period of crisis.

²⁰⁰ See BUSSI, *La formula misteriosa del «Pil potenziale»*, in *ilsole24ore* November 17, 2014, available at www.ilsole24ore.com.

²⁰¹ See LANDI, *La nozione di saldo strutturale al centro delle nuove regole europee di finanza pubblica*, *supra*.

cies, an increase in the national governments' prerogatives in this field becomes essential; so as to enable them to search for appropriate measures apt to permit reconciliation with the constraints of fiscal adjustment.²⁰²

On the other side, the Member States are significantly different, each of them will have a 'medium-term objective' different from the others, since the debt/GDP ratio will be for each of them related to the specific impact of cyclical effects on the respective budgets. Then, complying with the MTO means an accentuation of the gap between the Member States, strictly subject attached to the Treaty at hand, leaving only the possibility to apply for exemptions and/or delays in its execution.²⁰³

The widespread criticism arising from the introduction of the Fiscal Compact - which was characterized by doubts concerning its ability to solve the problems of the crisis, thus foreseeing the possibility "that the ratification process (for instance the referendum in Ireland) and then its execution in certain countries (e.g. in France) should have been monitored very carefully"²⁰⁴ - must be considered also in light of the fact that (a) it does not «directly cover the financial statements of the States until the 2015 included», which is a provision introduced upon its approval,²⁰⁵ and (b) it presents certain contradictory elements in its content.

In sum, the Fiscal Compact on the one hand is based on the Stability and Growth Pact, which has not satisfied the expectations connected thereto since it has been violated several times during its application, without any sanction for the defaulting party, and, on the other hand, many of the measures contained in the *Fiscal Compact* imply the achievement of the United States of Europe ig-

²⁰² In this respect see ORLANDO, *Squinzi: rigore nefasto in Europa. Bene l'impegno del Governo sulle riforme. I corruttori non possono stare in Confindustria*, published in *Il Sole 24 Ore* June 9, 2014.

²⁰³ See DE IOANNA, *supra*, pp. 24-25, in which the Fiscal Compact has been defined as a «self-standing procedure, even at the level of the judicial monitoring, without the existence of a suitable structure of the legal framework apt to ensure its functioning».

²⁰⁴ See GROS, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (aka Fiscal Compact)*, 2012b, CEPS Commentary, Bruxelles 8 March 2012.

²⁰⁵ See ROSSI, *Audizione preliminare all'esame del Documento di Economia e Finanza 2012*, April 23, 2012, available at www.bancaditalia.it.

noring that «little... was built... (in that) ... direction»²⁰⁶. Thus, the Fiscal Compact set of rules is unrealistically based on a factual assumption that the recent events (such as, for instance, the case of Greece) seem to have contradicted. In addition – in light of the considerations of the previous pages – we cannot exclude that these measures will contribute to the configuration of the EU as a «composite continental empire characterized by a confusing mixture of bureaucratic centralism and autonomy (State) management», as authoritatively pointed out.²⁰⁷

12. An exhaustive assessment of the current European situation cannot ignore the different reactions in the various EU countries as a consequence of the financial crisis. Hence the need to investigate now the geopolitical situation in the EU, which reveal, on the one hand, the different reactions to the events above mentioned (and to the recession arising from them), and, on the other hand, an accentuation of the existing economic gap among the Member States; in sum, we see a downsizing of the participatory spirit that, in the past, had driven the integration process straining toward a unitary construction.

The crisis produced different implications. When it faced environments already deteriorated, in certain cases it aggravated the existing negative situation: sometimes there was a time delay in the recovery restart, in other cases it produced destructive results (which are threatening the survival of some populations). On the other side, existing conditions of good manufacturing capacity have been favored by the market conditions (which were positive for the countries at hand); thus fostering important perspectives for their development but, at the same time, broadening the gap among countries mentioned above.

Hence the scenario under observation, characterized by a Germany increasingly oriented to act as “locomotive” of the Union, accompanied by other members of the latter able to restrict and limit the negative effects of the crisis

²⁰⁶ See PANEBIANCO, *Dietro la scelta di un presidente*, published in *corriere.it* on June 7, 2014.

²⁰⁷ See PANEBIANCO, *supra*.

(the Netherlands, Austria, Slovakia, Finland) and a set of other countries, mainly in southern Europe, where the recessionary impact of the crisis has produced increasing difficulties. Actually, the different conditions just mentioned are jeopardizing the possibility of reaching a convergence of intentions, which represent the unavoidable premise for a desirable « political union»; this, despite some countries adopting specific measures of “internal reorganization” (Italy) or other measures to remedy the failure of a banking system that fueled speculative bubbles (Spain). However, we should appreciate the common intention to remain *in any case* within the EU; hence certain commitments to terminate repeated practices of maladministration and to accept drastic austerity measures imposed by the European ‘security program’ (in the case of Greece).

In other words, in the context described – moving from certain justified doubts concerning the future of the unification process started by the Treaty of Maastricht – we are also seeing initiatives aimed at reaffirming the national *identities*. More in particular, while such initiatives are aimed, in Germany and in some Northern European countries, at preventing the ‘risk from contamination’ (and, therefore, at avoiding any dispersion of national wealth in favor of different pollution having debts to be repaid);²⁰⁸ on the contrary, in certain Mediterranean States, such initiatives are promoted by certain political parties that, underestimating the catastrophic effects of a reversion to the national currencies, pursue exit strategies from the single currency since they do not want to implement the required reforms.²⁰⁹

In sum, the above mentioned context is characterized by an unequal perception of economic and financial events that have taken place since 2008. Of course, that diversity is related to the different impacts produced by these events, which in some areas of the Eurozone (unlike others) have brought un-

²⁰⁸ See the cover of the German newspaper *Bild* of June 18, 2012, in which we can see the pictures of Mariano Rajoy, Barack Obama, José Manuel Barroso, François Hollande and Mario Monti under which was written “Diese Fünf wollen an unser geld!”.

²⁰⁹ With reference to Italy see the considerations of Roberto Maroni (in 2012 leader of the political party called ‘La Lega’) aimed at proposing a referendum on the euro in 2013, published in many newspapers; see, e.g., *Italia.co* August 15, 2012 «*Lega, Maroni: Un referendum per uscire dall’euro*».

employment, bankruptcy, closure of businesses, and in certain cases also poverty and suicide.²¹⁰ In this situation - aggravated by frequent protests of citizens (such as, for example, in Spain and in Greece), by political uncertainties and by stiffening in the relations among the Member States – defining common programs towards a renewed convergence of the involved parties becomes more challenging. Therefore, the goal of a desired “spill” of the crisis has inevitably ended up being delayed in time, despite promises made by *politics*! In addition, growing conflict between the possibility of realizing the recovery of the production system through appropriate reform programs and the compliance with the austerity logic imposed by the EU leaders is growing. As a consequence of the above, we note a reinvigoration of Euro-skepticism, never completely extinguished, supported by significant doubts regarding the ‘economic benefit’ arising from the participation at the EMU.²¹¹ Thinking of a united Europe, not only economically but also politically, becomes increasingly difficult!

In the context outlined, the difficulty of activating forms of cooperation of increasing intensity results in a gradual reduction of the cultural and social amalgam, which otherwise represents an essential basis for the creation of a harmonious union of the peoples of the ‘old continent’. The differences among EU Member States continue to show their negative effects; such divergences - that in the past caused bloody belligerency bearer of suffering and death - are now causing a problematic reconciliation of the different interests involved.

More specifically, the lack of a common political action limits the dialectic among the parties that should characterize the essence of such a common

²¹⁰ Consistently the news of the last two years, listing the sad effects of the crisis, have focused on the tragic consequences of the latter when it concerns people suffering from lack of jobs, unpaid debts, taxes payable and receivables uncashed. In these cases, we see a perverse circuit that can lead to depression and in some cases to suicide, see, e.g., *Corriere della Sera* May 3, 2012, «La catena dei suicidi Tre in un giorno a causa della crisi».

²¹¹ See, e.g., ARONSTEIN, *The Union Shall Respect Cultural Diversity and National Identities’: Lisbon’s Concessions to Euroscepticism – True Promises or a Booby-Trap?*, in *Utrecht Law Review*, 2010, Vol. 6, No. 3, p. 89; BRACK - COSTA, *The Role(s) of the Eurosceptic MEPs*, Université libre de Bruxelles and CNRS, 2011, available at ssrn.com; MATTHIJS, *The Euro Crisis and the Erosion of Democratic Legitimacy: Lessons from the Gold Standard*, APSA 2013, *Annual Meeting Paper American Political Science Association*.

political action for the purpose of sharing a common view aimed at renewal. This prevents, also, the *idem sentire* on the cornerstones of an effective cohesion, so that there remain differences of opinion and the erroneous belief that solidarity should compensate for the lack of responsibility. Indeed, we consider impractical situations where - as a consequence of losses due to bad management or to unsustainable welfare (wanted by the political class) which caused impoverishment of some countries - the virtuous States have to inject financial sources to balance a negative context (which has been caused by governments that have not been able to correctly interpret their role). The well-known fable concerning «the *Ant* and the *Grasshopper*» of La Fontaine again reminds us that such expectations are unrealistic, as well as easily contested! The above mentioned considerations explain why the process of harmonization of the rules was not able to create the conditions for a geopolitics osmosis, as targeted by the founding fathers of the Community. In addition, the uniformity function of the law failed to determine adequate technical forms to achieve a full economic convergence on the level of social and cultural homogenization; hence, there is still a gap among European countries, which is accentuated in relation to the different technical organizational models adopted by them, which affect their respective growth.

In light of the above, Europe now acknowledges its limits in pursuing certain objectives set by its Treaties. Maybe such limits have to be identified in the fact that the ability to successfully aggregate the different countries was linked too much to a 'common market'. In other words, the EU initiatives focused on economic interests, betting on the beneficial effect (on the relationship among States) that the liberalization of trade, capital flows and service performance should have produced.

On the contrary, the recent crisis - as we are trying to demonstrate in this work - has shown that the construction of a large 'common market' has not significantly improved the level of social cohesion within the Union. Furthermore,

the integration process lacked the awareness that only by a *political* action aimed at reducing the internal imbalances could realize the achievement of a substantial *equality* among Member States. The latter represents the goal to look at, being the main way to reach a profound innovation of the different social models existing today; hence the need to activate mechanisms of co-determination that only the politics, felt and lived in a unity of purposes, is able to set. The above mentioned reasons explain why, at today, the construction of a political union should be considered very unlikely to be realized in a short time!

Indeed, the scenario under observation appears characterized by two different gaps: one within the Eurozone (since there are countries characterized by deep differences) and the another one outside the Eurosystem (where there is a sense of progressive detachment from the problems of the EU). The different reactions to the crisis events and their different incidence in the EU show sharp contrasts, deriving from the fact that there are certain countries in serious difficulties (unemployment, bankruptcy, closure of companies, etc.) and other countries able to restrict and limit the negative effects of the crisis.

A generalized climate of uncertainty inevitably follows, leading to a sort of hardening of relations among the Member States. The intrinsic difficulty of the aggregation process is accompanied, among others, by a sense of *skepticism* with regard to the main decisions (often coming from the economically stronger countries) taken by EU leaders. In a nutshell, we see a general context in which the intent to bring together all the forces at work toward an economic recovery is accompanied by the need to establish joint programs for stabilization of the system.

13. A) This is not the place to go into the cultural roots of a way of living, of relating to others, typical of the German people, which from ancient times is commonly recognized as characterized by rigor, which often borders on rigidity

and, therefore, in attitudes that may sometimes lack the flexibility to manage complex relationships in a balanced way.

Making reference to the social and psychological perspective of the current political and economic events, the line of action of such State maybe has been influenced by the impact of the so-called *sonderweg* («special path») on the formation process of German democracy. Certain studies have stressed the specific nature of some policies and operational choices made over time by Germany, apparently influenced by a general and common conviction to 'follow a particular path'.²¹² Indeed, the specificity of Germany, since the time of the Lutheran Reformation, find forms and manifestation in different directions: from the well-known principle 'the duty is the expression of a moral necessity', as set out by Kant in 'Groundwork of the Metaphysics of Morals' (*Grundlegung zur Metaphysik der Sitten*), to the romantic ideal of Novalis (*Friedrik von Hardenberg*) «the more just, more powerful».²¹³

Duty then as *virtuous* ordering criteria, which is expressed essentially in a « behavioral rigor», which does not allow exceptions and often overflows - as just observed - in *inflexibility*. Thus, in that conceptual order, a lack of openness to solidarity, many times considered only in terms of "donation".

Such a rigid sense of duty does not exempt us, however, from considering sometimes the «other side» of the German coin, which is not always focused on the identification of the *rigor* with *virtue*. First, we make reference to the well-known infringement, by that State, of the budgetary regulation imposed by the Stability Pact (introduced with the Amsterdam Protocol in June 1997) which happened in 2003, when Germany overcame the limitations set forth by such regulation.²¹⁴ Then, we refer to the strong aversion of that State to the creation

²¹² See, lastly, PONSO, *Una storia particolare. "Sonderweg" tedesco e identità europea*, Bologna, 2011, *passim*.

²¹³ See also ABBAGNANO - FERRERO, *Protagonisti e testi della Filosofia*, 1996, vol. 3, p. 28.

²¹⁴ In 2003 the European Commission had opened an infringement procedure against Germany and France, but the sanctions proposed by the Commission were blocked by the Ministers participating at the Ecofin Council, which granted to Germany a one year of extension with respect to the repayment plan originally expected. The breach lasted over several consecutive years, between 2003 and 2006; see COL-

of Eurobonds, which represents a decision certainly questionable if considered in light of a logic of integration among European countries. In addition, we also consider the approach held by Germany at the launch of the «European Banking Union», not fully shared by that State, which - in relation to the specific nature of its federal structure - seemed intentioned to maintain forms of “national control” over several local and regional banks (*Landesbanken, Sparkassen*); hence the resistance to the introduction of the «single supervisory mechanism» justified both by the tendency to downsize the logic that relies on the autonomous ability to manage crisis and by the idea that only the supervision over large banks, subject to systemic risk associated with cross-border operational forms, needs to be transferred to Europe.²¹⁵

Significant, for the purposes of a full analysis of the presence of Germany in the EU, must be considered the orientation of the *BundesVerfassungsGericht* (i.e. the German Constitutional Court), which, on several occasions, clarified the terms of the participation of that Country at the European integration process. Please consider, in this respect, the well-known decision issued on October 12, 1993, in which the Court - reaffirming the German Parliament “functions of substantial political weight» - defined the goal of Maastricht in the identification of an «association of States” and not of a «single State founded on European people».²¹⁶

At the basis of the above mentioned position there is an individualistic approach, arising from the fact that this Country, being able to (financially) sup-

LIGNON, S. “The End of the Stability and Growth Pact?”. *International Economics and Economic Policy*, Vol.1, Number 1, January 2004.

²¹⁵ See ONNO RUDING, *The Contents and Timing of a European Banking Union: Reflections on the differing views*, CEPS Essay, November 30, 2012, p. 2, available at www.ceps.eu.

²¹⁶ With respect to the Federal Constitutional Court in determining the compatibility limits of monetary union with the Fundamental Charter and the basic principles of national law; see its text in *Giurisprudenza costituzionale*, 1994, p. 677 ff. and, critically, RESCIGNO, *Il tribunale costituzionale federale tedesco e i nodi costituzionali del processo di unificazione europea*, *ivi*, p. 3115 ff.; EVERLING, *Zur Stellung der Mitgliedstaaten der Europäischen Union als “Herren der Verträge”*, in BEYRLING - BOTHE - HOFMANNE PETERSMANN, *Rechts zwischen Umbruch und Bewahrung-Volksrecht- Europarecht-Staatrecht. Festschrift für R. Bernhardt*, Berlin, 1995, p. 1161 ff.; HERDEGEN, *Germany's Constitutional Court and Parliament: Factors of Uncertainty for the Monetary Union?*, in *European Monetary Union Watch*, XIX, 1996, p. 8 ff.

port all the potential difficulties which it may incur, does not intend to be involved in supporting actions that could be activated, at the European level, in favor of other Member States. In such scenario the convenience (or rather: the opportunistic interest) takes place of the virtue, since the latter has been set aside for the purpose of achieving economic advantages connected to a will to primacy. This context reflects the content of a plan to the recognition of a leading role within the EU for Germany, which the latter assumes to be entitled having achieved significant objectives in economic terms; such plan – being acceptable on the basis of a rational assessment of the economic merits of this Country - certainly reveals significant deficiencies looking at its compliance with the principles of sharing, tolerance, solidarity, which are essential for a program of «union» (to be prospectively achieved also in political terms).

The reference to this “cultural” position helps to understand the behavior of such State in the affairs of the Eurozone after the financial crisis. The *vetoes* (or more exactly certain *dictates*) often expressed by Germany, as well as the constraints which it subordinated (and still subordinate) to the applicability of measures to assist troubled countries (subject to the interventions of the special safeguard mechanisms pursued by Europe and ECB), can be explained only considering the particular *Weltanschauung* that characterizes the culture of that Country. Consistently certain scholars, analyzing the strategic role of Germany, pointed out that «it appears that the goal of German participation in the EU aims to promote the way to the adoption of policies characterized by austerity, that seem to be the only instrument to guarantee the stability of the social wellness of the citizens».²¹⁷

Therefore, we are quite surprised that Angela Merkel - a champion of rigor and austerity necessary to balance the economy of the EU - in order to face the drama of the exodus out of Africa and Middle East pledged to take in Germany 800,000 refugees. This is a decision of great political significance,

²¹⁷ See HAIDER - LEMMA, *The difficult journey towards European political union: Germany's strategic role*, in *Law and economics yearly review*, 2012, I, p. 409.

especially in view of the restrictive position taken by many European countries (in particular UK, Slovakia and Hungary) with regard to the problem of migration; such a decision marks a turning point - more precisely a «redemption» - in the line held by Germany during the recent 'negotiations' for the Greek bailout. Germany shows, therefore, a great sense of responsibility in facing and solving (together with its most important partners: France and Italy) the issues of a waver- ing Europe, which needs to 'speed up', through new strategies, to avoid its implosion. At the same time, this sense of responsibility enables those who still believe in the European project to keep that hope and dream alive.

B) France, a founding Country of the European Community was, since the beginning, forerunner of unity among the Member States, knowing that this objective - essential for the achievement of a 'peace' – can be obtained through plans moving towards cohesion and solidarity. Therefore, France promotes the construction of a building in which contrasts have to be eliminated, including those that, for centuries, have seen it opposing Germany.

This spirit induced that State to create a Franco-German axis that has a central role in shaping European policies. To better understand the events of the Union, we need to take into account that France, which is an essential part of the hard core of the EU, does not have the same economic power of Germany; thus, France tried to redress the imbalance between the positions of the Member States at hand, with the consequence that, in general, its growth was in any case lower than the German, with the exception of the exploits of its GDP (+ 0.6%) registered in the first quarter of 2015.²¹⁸ In this context, we understand why France decided to act as a primary guarantor of the autonomy and rights that characterize the development of liberal Union; attitude that seems to compensate, by an influential political action, the lower economic strength with which, in essence, it participates in the process of European integration and development.

²¹⁸ See the editorial «*Pil Eurozona sotto le attese: Francia ok, delude la Germania*», published in *Firstonline* , 13 May 2015, available at www.firstonline.info.

However, such a *check and balance* strategy encountered significant difficulties at the onset of the euro crisis, when France was unable to manage a European economic policy alternative to the *austerity* imposed by the need to contrast the negative effects of the current recession. More precisely, such State, on the one hand, with difficulty can maintain levels of productivity and financial stability allowing it to be included among the «*core countries*» in a position to lend to banks in «*non-core*» countries, contributing (along with Germany) to the increase in cross-border capital flows,²¹⁹ but, on the other hand, asked the Commission «more time to reduce its budget deficit».²²⁰ Similarly, it is clear the contrast between the well-known violation of the Stability Pact by France, happened in 2003 (hence the opening of an infringement procedure against France by the European Commission, then blocked by ministers that participate in Council Ecofin),²²¹ and the assumption of a leading role, together with Germany, in the negotiation of a peace agreement with Vladimir Putin in Minsk in February 2015 or in listening to the pleas of Tsipras in Brussels.²²²

Such strategy could be explained by that sense of grandeur - «une certaine idée de la France», to use a concept dear to General de Gaulle and the Gaullists²²³ - that induces this Country to hold a behavioral line aimed at achieving a leading position in all fields: from politics to the economy, including culture and war. The above situation boosts its strong nationalist spirit, which must be

²¹⁹ See YIFU LIN - REICHEL, *The Crisis in the Euro Zone – Did the Euro Contribute to the Evolution of the Crisis?* in *The World Bank – Policy Research*, Working Paper 6127 July 2012, WPS6127, p. 5.

²²⁰ See the editorial «*In Germany's shadow*» in *The Economist*, March 28, 2015, available at www.economist.com, in which it is stated that such a decision has been taken after that «the French government insisted that this was not the time to close off its fiscal space».

²²¹ See COLLIGNON, *The End of the Stability and Growth Pact? International Economics and Economic Policy*, vol. 1, n. 1, January 2004; see also the speech of Mario Monti in November 2011 in Strasbourg, in which he reminded the mentioned violations of the Stability Pact by France and Germany, remained not sanctioned thanks to the mediation role played in 2003 by the Italian Presidency, See the editorial «*Sostegno all'Italia di Merkel e Sarkozy. Ma il vertice lascia insoluta la crisi dell'euro*», published in *Corriere della Sera*, of November 24, 2011, available at www.corriere.it.

²²² See the editorial «*In Germany's shadow*» of *The Economist*, *supra* in which it has been stated: «Indeed, after several rocky years Franco-German relations are warming. François Hollande was by Mrs Merkel's side as she negotiated a peace deal with Vladimir Putin in Minsk last month, and listened to Mr Tsipras's entreaties in Brussels last week».

²²³ For an analysis of de Gaulle's diplomacy, see MORAVCSIK, *De Gaulle Between Grain and Grandeur: The Political Economy of French EC Policy, 1958–1970*, in *Journal of Cold War Studies*, vol. 2, n. 3, Fall 2000, p. 4 ff.

continuously raised mainly because of the difficulty of being able to achieve in Europe the goal of a role of primacy; a position currently contested by other 'powers' and, in any case, contrary to the Community approach, notoriously geared towards equality (with different weights) among Member States. Hence the reason that has allowed Marine Le Pen, daughter of Jean-Marie, an unconditioned success, which seems to foster an expansion of the nationalist areas of political extremism characterized by xenophobia and anti-European spirit. More in general, we note that both France and Britain are in some ways in a similar position, being both imperial and world powers that, with the end of World War II, suffered a loss of influence and prestige. However, they have pursued a political line of opposite signs, since the former (France) wanted to preserve an image of authority (not separated by a clear sense of self-determination) by performing in the European regional context a potestative function, whereas the second (UK) has sought to preserve adequate levels of powers in adopting a policy aimed at consolidating its alliance with the United States of America.²²⁴ It led to a reality that sees France placed far from UK regarding relations with the EU, which of course are particularly intense in the case of the first (France), and significantly little for the second (UK).

C) As part of the diversities that characterize the EU, the UK - for cultural characteristics and attitudes frequently reflected in its determinations concerning the Community policies - has often shown a *distance* from the rest of the continent, or more exactly, the intent not to get involved fully in the affairs of a Europe whose reality is, perhaps, perceived by UK as alien, too far away from the home, which is instead considered a priority. Notwithstanding the above, the UK, after the Second World War was among the first European countries to

²²⁴ In this respect see KENNETH HEIN, *Preserving the Myth: British and French Relations with the United States Following World War II*, available at ssrn.com.

recognize the need to act upon a European constituent, raising movements oriented to the gradual integration of the continent.²²⁵

In the second half of the twentieth century, the political approach of Britain to Europe gives context to a long and animated discussion which assumes particular importance the role of the conservative leader Harold Macmillan and of the labourist leader Harold Wilson. The application for admission to the European Economic Community, it has repeatedly made, and the vetoes from France to his entry denote the difficulties encountered by UK in overcoming obstacles underlying the transition from a global view (which traditionally characterized its politics) to a regional one (of which decision-making processes intends to become a participant).²²⁶ The fall of French vetoes (with the advent of Pompidou, who succeeded de Gaulle in 1969) marks the start of negotiations which culminated in 1973 with the entry of UK into the «common market».²²⁷

The 'choice for Europe' (formalized by a referendum) did not happen, however, in an atmosphere of great empathy for the rest of the continent, not linking the economic integration to a political view. The *favor* for the latter remains tiny in the time, while is still prevailing the intent to benefit from the

²²⁵ In this respect, the important speech of Winston Churchill in Zurich on September 19, 1946 should be recalled, in which the distinguished Statesman, speaking in a time of great uncertainty in international relations, called for the reconstruction of the "European family" in a kind of United States of Europe as a guarantee against the danger of a new, terrible worldwide conflict. He gave no indication on the institutional form of such a supranational organization, but stated that both the United Kingdom and the Soviet Union should have promoted, but not participated at, this new Europe, for whose realization Winston promoted the creation of a Council of Europe, which - as we know - would have been established many years later; see *Churchill Commemoration 1996. Europe Fifty Years on: Constitutional, Economic and Political Aspects*, edited by Thürer and Jennings, Zürich, Europa Institut-Wilton Park, Schultess Polygraphischer Verlag, 1997; *Winston Churchill, His Complete Speeches 1897-1963*, edited by R. R. James, New York-London, 1974, vol. VI; FONDAZIONE EUROPEA LUCIANO BOLIS, *I movimenti per l'Unità Europea 1945-1954*, International congress held in Pavia on October 1989, collected by Pistone, Milano, 1992.

²²⁶ See PARR, *Britain's Policy Towards the European Community. Harold Wilson and Britain's World Role, 1964-1967*, London, 2005; TOOMEY, *Harold Wilson's EEC application: inside the Foreign Office 1964-7*, University College Dublin Press, 2007.

²²⁷ See, e.g., GOZZANO, *L'ingresso dell'Inghilterra nel Mercato Comune Europeo*, available at www.cvce.eu, where that adherence was viewed as a factor of strengthening the Community, such as to allow a prospect of being able to contrast the US and the Soviet Union.

Community mechanisms based on intergovernmental methods.²²⁸ A traditional attachment to national *sovereignty* (in its various components) is the basis of a behavioral line that if, on the one hand, seems to be understandable (due to the improved economic trend: exports, employment, etc.), on the other hand seems contradictory, looking at the fierce contrasts of Eurosceptics (including, in the 70s of the twentieth century, certain influential politicians such as Sir Teddy Taylor, who resigned as Minister of the Heath government as soon as he learned of the decision to sign the Treaties of Rome).²²⁹

UK, therefore, did not adhere to the «single currency» and its political approach towards European Affairs, since 1992 (i.e. by the Maastricht Treaty) appears geared to the protection of national interests. This implies, of course, frequent requests for adaptations (or rather: changes) in the proposed EU regulations, as well as taking positions that are inconsistent with the intent of a membership encompassing, which is instead necessary in a logic of integration where the common interest should prevail over the particularistic interests of the various participants to the Union. Not by chance certain scholars observe that such a background produce either an action of «*gatekeeping*» by the British central government towards the European Community (to safeguard UK national sovereignty) or a «semi-distant» approach of the UK vis-à-vis the European construction.²³⁰

The above mentioned context explains certain positions taken by the UK with reference to the most significant issues related to the measures concerning the EU economic and banking policy coordination. In particular, we make reference to the report drafted by the 'Upper House' on the Eurozone crisis and, in

²²⁸ See CHARTER, *Au Revoir, Europe: What If Britain Left The EU?*, London, 2012, in which it has been stated that "The organisation that Britain joined in 1973 was very different from the European Union of today and therefore, at that time, the true political and constitutional implications of the Treaty of Rome were not clear".

²²⁹ See CACOPARDI et al., *Ingresso del Regno Unito nella CEE. La Gran Bretagna nella CEE/UE*, available at www.geocities.ws.

²³⁰ See, e.g., GEORGE, *Britain and the European Community: The Politics of Semi-Detachment*, Oxford, Clarendon Press, 1992; MORAVCSIK, *Preferences and power in the European Community: a liberal intergovernmentalist approach*, in *Journal of Common Market Studies*, 1993, n. 4, p. 473 ff.

particular, on the proposed *fiscal compact* (and its consequential measures).²³¹ The clarification, made in that document, that in December 2011 «the United Kingdom indicates it would stand aside», together with the classification of the proposal examined as alien compared with the architecture set forth by the EU Treaties, show the intention of the UK to avoid every form of responsible involvement in the events of the Euro-system. Further confirmation of the detachment (or rather: of the substantial separation) of UK from the rest of the continent - or, more exactly, to the processes aimed at achieving a more stable economic and financial conditions in the EU countries – arises from the statement issued by UK with regard to the amendments to the rules on bank capital requirements (CRD IV). Indeed, in support of the rejection expressed in such a context of a legislative package aimed at ensuring financial stability (and the compliance with the EU international commitments in the field of banking regulation)²³² the arguments adduced by UK were not precise, appearing, actually, indeterminate.²³³ A similar behavioral logic is found in the determination not to join the EBU. In fact, despite some analysis - conducted making reference to criteria based on the cost/benefit ratio - have shown that UK and Sweden can be counted among the main beneficiaries of accession to the EBU,²³⁴ this adherence was not required by UK and thus there is serious doubt that it can be advanced in the future in compliance with certain initial reactions in those countries raised by the proposal made by the Commission on this field.²³⁵

In sum, we see an approach that appears focused on *defending* a position of self-determination in the financial field, typically followed by the UK. Indeed,

²³¹ See HOUSE OF LORDS, *European Union committee, 25th report of session 2010-2012, The euro area crisis*.

²³² That is the proposed regulation on “prudential requirements for credit institutions and investment firms” and on the “access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms” (amending the Directive 2002/87 / EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in financial conglomerates).

²³³ See EU COUNCIL, April 2, 2013, 7748/13, ADD2 (Addendum 2 to the note point “I”).

²³⁴ See, e.g., SCHOENMAKER – SIEGMANNB, *Efficiency Gains of a European Banking Union*, Duisenberg School of Finance – VU University Amsterdam, January 31, 2013, p. 17.

²³⁵ See ONNO RUDING, *supra*, p. 4, in which it has been stated that «the UK has already declared its intention to opt-out», even if «its first signal was that it would not block the proposal as such».

such approach seems to be justified by the assumption that the separation of supervisory mechanisms fosters the role of primacy of the 'financial center of London', always expression of a context of full operational freedom without real competitors.²³⁶

Recent political events that saw the winning of the conservative party in the UK could aggravate the conditions at the base of the described *ambivalence* that characterizes the relations of this Country with the EU. In fact, despite the significant signs coming from the German Chancellor Merkel and from some senior members of the Union to intensify cooperation (or rather the relationship) between Europe and UK, the prospect of a possible change in the above mentioned approach depends, first, by firmness which characterizes Prime Minister Cameron's «demand for restrictions on freedom of movement within the EU», as pointed out by British press.²³⁷ Adherence to the requirements just mentioned - which, among other things, highlight an approach clearly contrary to the European decisions on migration ²³⁸ - should cause amendments to the EU Treaties, which seem to be unlikely in this historical moment characterized by uncertainty and economic imbalance. The complexities illustrated are enhanced by the latent threat of a permanent separation potentially produced by the "in/out" referendum, promised by Cameron in 2013 and just confirmed by him after the recent victory of the Tories.²³⁹

Let the truth prevail! The words of the President of the European Central Bank concerning the «political debate surrounding Britain's EU» come to mind;

²³⁶ In line with this approach is a tendency to block the EU directives that could be considered contrary to the protection of the English interests in the financial sector, see in this respect CAVALLITTO, *Mercati finanziari, il muro della vigilanza britannica contro le riforme UE*, available at www.ilfattoquotidiano.it.

²³⁷ See the editorial «EU referendum: Merkel will work with Cameron on EU – but will Tories let him?», published in *The Guardian* of May 9, 2015, available at www.theguardian.com.

²³⁸ The press has highlighted that the EU Commission president, Jean-Claude Juncker, urges the creation of an "emergency mechanism" for the definition of a distribution plan among the Member States of migrants requiring international protection, See the editorial «Mogherini all'Onu: ecco il piano UE sui migranti», published in *la Repubblica*.it, available at www.repubblica.it. To this project, strongly backed by the President of the EU Commission Jean Claude Juncker, the harsh British position followed, as evidenced by the editorial «Cameron chiude all'immigrazione: insorgono i Paesi est europei», published by *ilGiornale.it* dated May 11, 2015, available at www.ilgiornale.it.

²³⁹ See the editorial «Cameron plant EU-Referendum schon für 2016» published in *Frankfurter Allgemeine Zeitung*, on May 12, 2015, available at www.faz.net.

and, in particular, the following statement «I cannot say which of the two sets of arguments is stronger, the economic or the political ones, neither am I going to enter into a domestic policy debate, but what I can say is that Europe needs a more European UK as much as the UK needs a more British Europe».²⁴⁰

D) In a composite picture of a Europe characterized by different speeds in finding remedies that can contrast the recessive phenomenon determined by the financial crisis, Italy occupies a particular position, which reflects, at the same time, the typical virtues of this Country as well as the limits characterizing its story. The Italian background denotes a kind of basic ambivalence that sees, on the one hand, a prompt reaction to the crisis characterized by serious sacrifices and renunciations, while, on the other hand, a behavior reluctant to abandon certain forms of individualism, slyness, carelessness, all defects that prevent the politics from playing its role.

The Italian context is therefore outlined by both certain inherent abilities (found in several sectors: such as the industrial production of high quality goods, science and arts) and certain endemic deficiencies, such as irresponsibility of the political class and corruption (which discredit the Country and, because of the malpractice of few people, overshadow the commitment and goodwill of many). In other words, the Italian socio-political framework was not able to comply with modernity, nor to prepare a *fertile ground* necessary to rapidly adopt appropriate measures to promote a sustainable development; in addition, Italy is suffering the negative implications of a bureaucracy that hinders, delays and makes difficult any form of initiative, in light of a «modest culture of rules» marking out a system in which the «information is considered by most politicians a necessary evil», as recently was written.²⁴¹

Hence the need for a renewal, strongly felt by the population, which aims at returning to order, transparency, and proper exercise of official authority, po-

²⁴⁰ See STEEN, Mario Draghi in *City of London call for 'more European UK'*, in *Financial times*, May 23, 2013.

²⁴¹ See the editorial «*Il saluto di Ferruccio de Bortoli ai lettori del Corriere della Sera*», published in *Corriere della Sera*, dated April 30, 2015, available at www.corriere.it.

litical structures that cease to disappoint people exposing the country to a growing populism (which takes advantage of the discontent and often is successful leveraging reprehensible racist feelings as well as the lack of broad cultural knowledge of the electorate).²⁴² This background clarifies why, in the second half of 2011, a *technical* government, having an international reliability, has been established in Italy by the President of the Italian Republic.

The emergency legislation adopted in late 2011 and early 2012 was intended to combine *austerity* and *fairness*.²⁴³ Notwithstanding the above, the measures adopted met significant limits, as later showed up in particular with regard to the suspension of the automatic revaluation of pensions (improperly confused with the “pension reform” implemented by the same law) that has been rejected by the Italian Constitutional Court.²⁴⁴ However, it is important to point out that such reforms, after a few years, proved to be modest, having produced only minor effects as in the case of *liberalization* (essentially implemented by administrative simplifications) and the review of public spending (*spending reviews*) which regarded only very limited areas.

The technical government chaired by Monti was then followed by a little revaluation of the politics: however, we still face a context characterized by contrasts not only between opposite forces, but also within the same parliament majority. Therefore, Italy is still facing conditions of severe instability, likely to negatively affect its ability to relaunch a real growth process after the long recession. Something new seems attributable to the current government, which -

²⁴² The situation described in the text is illustrated also by SPINELLI, *L'analisi. La latitanza dei partiti*, published in *laRepubblica.it* October 3, 2012. Consistently see GUZZETTI, *Relazione alla 88° Giornata mondiale del risparmio*, Roma 31 October 2012, p. 9, who observed that «the international crisis in Italy amplified the already existing weaknesses and never dealt with reasonable due diligence. Tax evasion, corruption, public bureaucracy are evils to be defeated if we want an economic recovery and protection of savings ».

²⁴³ On this argument see the first *dossier* on the government activities, published on the website *governo.it* upon the expiration of the 100 days from the establishment of the government chaired by Monti; such a *dossier* focused on the 3 main areas on which the government concentrated its efforts (austerity, fairness and growth).

²⁴⁴ See ITALIAN CONSTITUTIONAL COURT, decision n. 70 of 2015; see, in this respect, e.g., «*La Consulta boccia il blocco delle pensioni della Fornero: lo stop pesa 5 miliardi*», available at *www.repubblica.it*, where the negative impact of this ruling on ‘public accounts’ has been underlined.

by proposing a ‘factual political action’ - launched a comprehensive plan for institutional reforms (some of which were promptly realized)²⁴⁵ which seem capable of supporting the economic recovery that, albeit in a contained mode, we see at the beginning of 2015.

This innovation in Italian politics seems to be welcomed, as it aims at operating a turning point compared with a past characterized - among others - by inaction, inefficiency, waste. Such new approach seems indicative of a desire to build, believing in the values of a ‘modern society’, that wants to progress without denying its own traditions, its history.

On that premise, we share the reasons underlying the new measures adopted to defeat corruption, as referred to in the law No. 190 of November 6, 2012, which contains provisions for the «prevention and suppression of corruption in public administration»; that legislation, although it cannot be considered to be «by itself ... decisive, ... is a step forward compared to the immobility of the past, launching a political process that now it must be implemented, continued and strengthened».²⁴⁶ In another area, it is given the opportunity to link the changes to Title V of the Italian Constitution - under development in the competent parliamentary seat²⁴⁷ - with the prevention of *abnormal* situations, found in some Italian regions interested by judicial actions. This tailors forms of decentralization to the actual structural and functional conditions of the local authorities at hand, as underlined by scholars.²⁴⁸

Only following the implementation of an appropriate program of institutional reforms, can we seriously believe that the technical and financial measures, adopted to reach a full economic recovery, could also produce posi-

²⁴⁵ We make reference, in particular, to the law on the fiscal simplification (legislative decree dated November 21, 2014, n. 175), to the labour reform (legislative decree March 4, 2015, n. 23), so-called *Jobs Act*, to the reform of the banks organized as *banche popolari* (law dated March 24, 2015, n. 33) and to the electoral reform (law dated May 6, 2015, n. 52), so-called *Italicum*.

²⁴⁶ See GAROFOLI, *Politiche di prevenzione della corruzione e crisi finanziaria, politica e istituzionale*, Speech at the Seminar "La prevenzione della corruzione, pratiche a confronto", organized by *Scuola superiore della P.A.*, March 11, 2013, available at sna.gov.it.

²⁴⁷ See law proposal, Senate Act n. 1429, XVII Legislation.

²⁴⁸ See in this regard LEMMA, *La riforma della finanza di progetto*, Torino, 2011, p. 192 ff.

tive effects at the level of the system. At the end of this process - on the basis of new rules and in a long-term perspective - we believe that it will be possible to rethink the «relationship between State, banks and enterprises» adapting it to the time evolution.

14. The recent events in Greece, the problems relating to the pathological public debt of that State, the serious difficulties suffered by its population as a consequence of the austerity policies imposed by the EU leaders to contrast the crisis, the deplorable reactions of the Greek political class, are all facts certainly enrolling in one of the darkest pages of the European history. The complex situation of financial instability that Greece is facing in the recent years has originated from a relaxed management of fiscal policies (unrelated to the constraints imposed by the Stability and Growth Pact), conducted hiding the real economic and financial conditions of the Country²⁴⁹. Such background produced a deficit not sustainable; hence a deterioration, which has caused a sad sequence of negative judgments by the rating agencies, as well as the triggering of credit default swaps (covered by Greek government bonds) enormously risen (not only in price but also in volumes), then accompanied by «massive speculative actions with inevitable negative repercussions on the euro».²⁵⁰

Such difficulties led Greece to seek remedies of various nature, ranging from minimalist measures (such as, for example, the execution of bilateral loans), to wider measures related to the PSI (Private Sector Involvement), to the benefit from the non-conventional measures of the ECB, emergency management through the sources coming from the European Financial Stability Facility, acceptance of the Economic Adjustment Programme (with the consequent submission to the requirements of the Troika, consisting of the IMF, the ECB and

²⁴⁹ See, e.g., the editorial *‘Incredibile: Prodi accusa la Grecia di avere truccato i conti per entrare nell'euro*, available at www.italiaoggi.it; DI TARANTO, *Il salvataggio temporaneo di Atene? Vantaggioso solo per Berlino*, in *Milano finanza*, March 16, 2012.

²⁵⁰ See CAPRIGLIONE – SEMERARO, *Crisi finanziaria e dei debiti sovrani*, Torino, 2012, p. 34.

the EU Commission). In such context some European States (primarily Germany) have a financial interest in preventing the collapse of Greece, which will result in losses for them, but, from a legal point, the provisions of the EU Treaty hinder the possibility of solutions to the Greek problem reached by the mere and easy granting of loans.²⁵¹ This situation is exacerbated by the *contradictions* that characterize this Country, which - instead of proceeding to the necessary implementation of measures (or rather: reforms) appropriate to restore a “proper management” of the *res publica* - is characterized by an uncontrolled tax evasion, by unjustified tax exemptions (particularly for ship-owners and the islands), and by a pension system marked by anachronistic logics of welfare, that is now unacceptable and unsustainable.

The analysis of the Greek case and the search for possible solutions to the same must take into account the background above illustrated, which certainly, on the one hand, limits the initiatives permitted to the European bodies and, on the other hand, explains certain constraints that the European leaders have placed in the negotiations with the political bodies of Greece. Actually, even if the recent evolution of this Country is influenced by events mainly attributable to multiple, obvious dysfunction of the latter, we also critically underline the behavior of those Member States whose actions were able to impact on the choices made so far in this respect within the Euro-system.

Because of the structural deficiencies previously mentioned, Greece is among the EU countries suffering the most detrimental impact of the financial turmoil which hit the planet in the past decade. Therefore, we witness a growing indebtedness of such Country, its screw into a regressive process that leads to a recession, which produced a devastating effect on the fragile consistency of the Greek economy. The remedies to the crisis triggered by European leaders

²⁵¹ Indeed the provisions of Articles 123 and 125 of the Treaty are an obstacle to the granting of financial support to a Country in crisis; the first of these rules, in fact, prohibits credit facilities (in particular: the purchase of government bonds) by the ECB and the NCBs for the benefits of Member States, while the second provides for the so-called “no bail-out”, *i.e.* a veto for a Member State to assume the debt of another State.

and bodies - being represented by the request to countries in difficulty to proceed promptly to the restoration of internal situations often severely impaired – caused the imposition of a penalty regime that increases the difficulties arising from the crisis.

We see a climate of degradation which - in the absence of good efforts to combat it by a policy increasingly in trouble - gives space to *discontent*, to *indignation*, to *protest*! In that Country (and not only there) many observers identify the causes of the current economic difficulties in the careless EU policies of strictness (promoted, frequently, under the pressure of an hegemonic Germany) supporting the growing criticism that (in Europe) is referable to the Treaty of Maastricht, considered the origin of the current Greek instability. Therefore, a careful examination of the situation under observation must take into account the fact that the application to the bitter end of a policy of austerity, creating serious impediment to the growth of Greece, represented a factor of primary importance in the identification of the causes of the current decay of this Country, as pointed out by Paul Krugman²⁵².

In addition, from a legal perspective, the EU intervention collides with the *counter-limits* criteria, which is a founding principle of democratic systems, according to which, in the international agreements, are prohibited forms of interference (against individual States) from which a sacrifice of their sovereignty can derive. This suggests that, in the face of an ‘humanitarian issue’, which today characterizes the Greek context, the cost/benefit analysis cannot continue to address the political decisions. Such parameter causes instability and allows countries economically stronger of the old continent to take advantage to the detriment of those countries subject to a system of penalties and further austerity. In this regard, it has been stressed that austerity allows Germany «in the storm started seven years ago as a consequence of the foolishness of the pri-

²⁵² See the editorial *Mad as Hellas* published in *New York Times* on December 11, 2014.

vate U.S. finance... (to inflict on its) ... partners lessons of rigoristic orthodoxy characterized by a strong ideological taste».²⁵³

Faced with such a reality - without denying the responsibility of Greece - certain clues suggest that behind the policy of austerity promoted by many supporters of the Union will be the intent to pursue *other interests*. One wonders what are the limits within which the technocratic logic may validly impose *sacrifices* to a “sovereign State” in the name of an economic integration that (for a large part of the population of the latter) seems to result in misery, despair, death, denying therefore a real possibility of recovery, of exit from a situation caused not only by the Country directly involved. The above outlines a scenario characterized by uncertainty and complexity in which the same consistency of the Euro-system is under discussion. In order to preserve the latter, politics will have to find an alternative way to the rule of sole strictness, in case changing, if necessary, the European treaties. In the meantime, our thoughts turn to the teaching of Homer; in the Iliad, a war book, the reader is led to side with those who have fallen and at the end of the poem, feeding greater empathy for Hector than Achilles!

The history of Greece within the monetary union is articulated into a succession of European interventions made to address the difficult situation of that Country. In addition to the ‘bilateral loan plans’, directly granted to the Country by individual States, Greece benefited from purchases (in May 2010) by the ECB of Greek bonds and later (from March 2012) by the intervention of the European Financial Stability Facility, which in recent years has been often activated by this Country.²⁵⁴ However, the technical forms used to implement the European measures in favor of Greece show that, despite the apparent traceability to solidarity mechanisms, such initiatives are structured in ways designed to reduce the commitment assumed by certain countries. More specifically, certain na-

²⁵³ See CARACCILO, *Ma il rigore tedesco e le nostre debolezze rischiano di liquidare anche l'idea di Europa*, in *laRepubblica*, July 7, 2015.

²⁵⁴ See CAPRIGLIONE – SEMERARO, *Financial Crisis and Sovereign Debt. The European Union Between Risks and Opportunities*, in *Law and Economics Yearly Review*, 2012, I, p. 23 ff.

tional central banks purchase Greek government bonds (in order to finance this Country) to be reimbursed at par value. This implies the possibility to accrue a capital gain (represented by the difference between the [facial] value of the redemption compared with the purchase price paid), which, contributing to the result for the year, contributes in the revenues registered by such central banks. This increased amount, for the portion exceeding the distributable amount to borrowers, returned to the relevant Treasury that uses those funds to reduce the rate of interest at which the credit was granted to Greece.

In February 2012, the Eurogroup puts in place a new bailout which constituted the largest operation in the history of debt restructuring (concerning 200 euro billion in securities). The Eurozone countries (via the EFSF)²⁵⁵ and the IMF granted to Greece loans for more than euro 138 billion. Part of this plan was made by the *private sector involvement* (PSI) – as previously said – according to which private holders of Greek debt accepted a reduction in value (haircut) equal to the 53.5 per cent of the nominal value of their securities, with a overall loss of 75 per cent.

However, the favorable outcome of the intervention just described was not sufficient to redress the situation in Greece, since the prospect of a recovery after the fiscal consolidation became increasingly difficult. Therefore, the existing conditions suggest that Greece is still facing an unsustainable economic situation, so that compliance with normal debt dynamics based on payments at the maturity dates agreed is far from being achieved. Indeed, this Country is still very vulnerable to shocks, despite having received a net cash inflow of funds (approximately 91 euro billion) from 2010 to 2013;²⁵⁶ This is because the measures imposed by the Troika were particularly drastic, resulting in a loss of

²⁵⁵ For every 100 euro in Greek government bonds exchanged, investors receive 15 Euros in securities issued by the EFSF and 31.5 in new Greek government bonds. The accrued interest will be paid in the form of securities of the fund EFSF.

²⁵⁶ See BULOW – ROGOFF, *The modern Greek tragedy*, in *VOX CEPR's Policy Portal*, June 10, 2015.

about a quarter of GDP from 2011 to 2014 and in a further increase of the unemployment.²⁵⁷

In 2015 the efforts for the financial recovery of the Country implemented by the conservative leader Samaras suffered a setback as a consequence of the victory of the party of Syriza in the elections won earlier this year. A policy of national recovery has been replaced by demagogic proclamations in which the current leader Tsipras promises the end of the «vicious circle of austerity», the reconstruction of the Country, the presentation of «true proposals to the EU, a radical new plan for the next four years»²⁵⁸. Desperation, a renewed sense of dignity or, perhaps, simply the remodeling of a leadership based on an old-growth formulas animate the statements of the new head of the Greek government. It is, however, a political program that, given the conditions of the country, seems inherently unworkable; it appears, in fact, destined to clash with the Greek contradictory reality, characterized by economic and financial shortcomings mentioned by the anachronistic presence of an unjustified welfare.

In the months following the election of the new Premier the Greek situation did not change, indeed there has been a deterioration compared with the previous year.²⁵⁹ Collaboration «with our European friends», announced by Tsipras, results in meetings, promises, discussions, deadlines missed and postponed to a new date. A sad and painful pilgrimage to the European chancelleries by the head of the Greek government gives context to the attempt to deal with the emergency in a Country close to its default. And in June 2015, the evolution here described seemed to arrive at its conclusion. When Tsipras finally understands the actual severity of the events going on, being impossible

²⁵⁷ See IMF, *Greece. Preliminary Draft Debt Sustainability Analysis*, Country Report No. 15/165, June 26, 2015, where are the macroeconomic data of the Greek debt and their significant changes, foundable in the past year, which are bringing to an increase of financing needs.

²⁵⁸ Such declarations are reported by the editorial “*Elezioni Grecia 2015, vince Tsipras: “Popolo ha scelto la fine dell’austerità”*” published by *IlFattoQuotidiano.it* dated January 25, 2015, available at www.ilfattoquotidiano.it.

²⁵⁹ See HATZIS, *Greece needs broader structural reforms than Syriza has proposed*, published on *The New York Times*, January 29, 2015 and available at www.nytimes.com.

to postpone further the acceptance of the “proposals” made by the Eurogroup, he breaks off the negotiations in place announcing a referendum of the Greek people, called to vote on these proposals.

From a legal point of view, this strategy was consistent with the intent to empower the citizens with such decisions, in compliance with the decision-making methods recognized in modern democratic systems. However, from a substantive perspective, it appeared oriented to avoid the assumption of responsibilities for agreements definitely uncomfortable and, therefore, to reduce the negative consequences of such agreements for the government. This reading of the events is confirmed by the conflicting behavioral of Tsipras, who - after having supported a hard line contrasting the conditions imposed by Europe - immediately after the victory at the referendum «changed direction, and strongly supported by the opposition to his government solicited by the President of the State, proposed to creditors a plan for reforms harder than that proposed by the creditors before the referendum», obtaining also the approval of the same by the Parliament.²⁶⁰

Therefore, a page of European history was written, that certainly does not shine for political clarity, for compliance with democratic rules, for its repercussions on the definition of the future of the EU. The Greek events - after the parliamentary consensus on the Greek “reform proposals” presented by Tsipras - meet now the most difficult time of their troubled history since they are subject to the critical judgment of the governments of the EU countries. The lack of confidence in that State is at the center of the debate concerning the setting of the implementing measures to be adopted. A large part of the EU seems determined to not entertain further relations with a Country which used its referendum to shirk its responsibility, entrusting an act of gambling its permanence in Europe.

²⁶⁰ See FERRARI, *Grecia, l'audacia di Tsipras*, in *Corriere della Sera*, 11 July 2015, available at www.corriere.it.

The opposing factions converge on the vexed question of a possible Grexit. Hence the revival of an issue already addressed in the past by the doctrine, but now revived in new ways. At the political level we are witnessing a fight between the Member States, from which emerge all the contradictions of the process of European integration: such as certain attitudes of hard intransigence (that confirm the lack of cohesion and solidarity within the EU) or the contradictions characterizing the historic partnership between Germany and France, or again the low value of mediation carried out by countries deemed susceptible of “contagion”, or finally the national character of the European democracies (sometimes not yet adequately integrated within the individual States).

The EU is divided and, as pointed out, not able to overcome «the orthodoxy of technocrats and to negotiate a process for reconciling the legitimate requirements of 28 national democracies».²⁶¹ The provocative proposal submitted by Schäuble to release Greece from the Eurozone for five years (project reported in the specialized press, but without any traceability in the Treaties) shows the intent to inflict punishment (or rather: an humiliation) used as fearful “pillory”, with obvious deterrent effects against those who have forfeited.²⁶² In contrast, there is the responsible opposition to this proposal by some countries (France, Italy) and by the EU Commission, realistically concerned about the negative effects of the same on the stability of the single currency. The events illustrated above show a European context in which the political decisions are principally influenced by Germany (supported by certain northern European countries, which also promote an unconditional austerity).

Therefore, we understand the dramatic atmosphere in which the negotiations took place, which ended with an *agreement* in which prevails the will to preserve the principle of the irreversibility of the euro, which is the foundation value of the EMU structure. Saving Greece is subject to acceptance by the latter

²⁶¹ See GARTON ASH, *Quel conflitto tra democrazie che ancora divide l'Europa*, in *la Repubblica*, July 10, 2015.

²⁶² See the editorial *Schäuble ipotizza un'uscita della Grecia dall'euro per 5 anni*, published in *Il-Sole24Ore*, July 11, 2015, available at www.ilsole24ore.com.

of harsh conditions (with tight deadlines and very strict procedures) for the implementation of reforms, which is accompanied by the expectation of a return of the Troika (ECB, IMF and EU Commission) whose control is configured preordained to play a role which, going beyond a “technical assistance”, seems to play a leading guidance «to improve the implementation and monitoring of the program».²⁶³

The complex (or rather: tragic) story of that Member State requires, as mentioned above, a renewed reflection on the problem of Grexit. Significant in this regard must be considered the fact that, although art. 50 of the Treaty on the right of exit (voluntarily, unilaterally or negotiated) by the “European Union”, this right is not practicable with regard to the sole EMU;²⁶⁴ hence we adhere to the argument that «there are nomechanisms of the new Treaty that allow for the expulsion (forced exit) neither from the EU, nor from monetary union ».²⁶⁵

Indeed, the entire regulatory framework designated in Maastricht is focused on a principle of «non-regression», as criterion for an integration (among Member States) which aims at reaching higher and higher levels. In this perspective - failing a provision allowing an exit from the monetary union - any breach of obligations by members of the EMU (and, in particular, the non-compliance with budgetary regulation and the failure to meet its implementing requirements provided therein) is addressed by the measures (essentially penalties) set forth in Art. 126 of the Treaty, which do not provide for the expulsion of the defaulting Country (nor, consequently, its temporary exclusion from the Euro-system). This suggests the conformity of the interpretative thesis formulated

²⁶³ See EURO SUMMIT, July 12, 2015, *supra* p. 5.

²⁶⁴ See CAPRIGLIONE – SEMERARO, *Financial Crisis and Sovereign Debt. The European Union Between Risks and Opportunities*, *supra*, p. 24.

²⁶⁵ See MASERA, *La crisi dell'eurozona e l'Italia*, report at the congress “*Può l'Italia uscire dall'euro?*”, Fondazione Roma, November 11, 2011; theory recently affirmed also by other Authors, see in particular ROSSANO, *Ancora in tema di crisi dell'euro. Il caso “Grecia”*, *cit.*, p. 14, who stated that: «in the event that Greece intends to leave the euro but remains in the EU, it would have no alternative than to conclude the procedure of exit set forth by the applicable legislation and then to start again a new procedure according to Article. 50, last par., of the Treaty»

in the past with regard to the regulatory standards at that time set to protect the objectives pursued by the European regulator, although, at today, we can consider unrealistic a legal construction that, in case of extreme situations, precludes the application of appropriate remedies for their removal.

In light of the above, we consider not feasible the argument, which appeared in the press,²⁶⁶ according to which a legal solution to the problem of Grexit could be found in Art. 352 of the Treaty; *i.e.* in a provision stating that «If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures ».

In this regard it is worth pointing out that the «flexibility clause» introduced therein, being related to the pursuit of the policy objectives of the monetary union, works only to complement and enhance the interventional mechanisms of European bodies (so-called implicit power) and not even to resize the euro area. Hence, such a provision is not applicable to the present case since, according to the «the experts of Community law ... the article at hand seems to have been designed ... to manage the evolution of the internal market, of which all Member countries take part ».²⁶⁷

15. The events that, in the mid-2015, shocked the Greeks, significantly affected also the entire European Union, having represented a tough 'test' for the European integration endurance. What emerges from the above is a reality characterized by divisions, full of contradictions and, in particular, unwilling to pursue cohesion processes, based on sharing and solidarity.

This creates a situation in which, according to many observers, the premises of an integration process - and thus of a political union - seem to have

²⁶⁶ See CHIELLINO, *L'opzione giuridica di Grexit*, in *Il Sole 24 Ore*, June 30, 2015.

²⁶⁷ See CHIELLINO, *L'opzione giuridica di Grexit*, *supra*.

failed. The words of an Italian Author described such a feeling: «I do not recognize myself in the Europe born between July 12 and 13. It seems that the Union has given up the ambition to build his people. This should be understood by those who have a lot invested in a united Europe as a great political project, and that now, starting from these realistic considerations, may still hope to cultivate an extreme attempt to retake a thread that seems broken»²⁶⁸.

One wonders, then, what happened! How is it possible that the design of a «United Europe» in recent years have revealed many cracks, showing, instead of a path of development toward the goal set by its 'founding fathers', its possible implosion!

To answer these questions we need to reflect on the modalities followed, in the evolution of the Community and in the transition to the EU, to solve problems arising from an obsolete diversity of cultures (which is emphasized by a generalized lack of a sense of belonging to the same population). In addition, we have to understand the reasons why, despite the care taken in Europe in searching for mechanisms and tools to ensure equal levels of "growth", the consolidated economic gap among Member States has been gradually increased, accentuating the differences among them, with consequent delays in the unification processes and, therefore, in the acceptance of logics of cooperation and solidarity.

We face questions that, again, involve the 'relationship between finance and politics', the need of a substantial balance between them. The politics failed to pursue its vocation, to ideologically implement the fundamentals values which its *power* incorporates, becoming a 'social technique' aimed at overcoming diversities and at reaching balanced convergences between conflicting positions. In other words, it did not exercise the *constituting power* which defines its rational justification; hence the preservation of a 'primacy of finance' not only limited to the economic choices, but also extended to the identification

²⁶⁸ See RODOTA', *Il filo spezzato dell'Europa*, in *la Repubblica* del July 16, 2015, available at temi.repubblica.it.

of the modalities through which the ultimate goal of a union of States should have been reached.

In light of the above, we can conclude that the reasons justifying certain political options followed by the Maastricht Treaty are now obsolete, given that such Treaty attributed to the 'single currency' also an aggregation value in order to pursue further goals compared with those that are traditionally linked to the introduction of a monetary strategy. Hence the clear limits of the action put in place by the European leaders in order to complete the integration process among Member States; process that would have to be extended to cover also a «political unification». These limits - implicitly inferred from the lack of a direct activation (by the competent bodies of the Community) in pursuing the goal just indicated – were perceived only after many years, with the onset of the financial crisis. Only the negative implications of the recent financial crisis, in fact, finally pointed out that - in case of a severe recession – common economic policies and fiscal unity are needed, as well as the possibility of a substantial pooling of national debts and the existence of a complete system of central banking (whose function must space from the “government of the monetary stability” to all the operations useful to integrate such activity).

Moreover, the situation described above shows that such measures are necessarily temporary, and aimed at achieving the objective of a political union. This is because they constitute a kind of “bridge solution” (based on an assumed aggregating role of the “single currency”) towards the desired goal of the United States of Europe. Therefore, the EMU cannot be considered the end stage of the evolutionary process started by the “founding fathers”; its limits, in fact, prevent, in case of contingencies such as those that happened in Greece, the preparation of the remedies required to overcome the difficulties which in turn can affect the Member States, exposing them to the risk of implosion of the entire Eurozone.

Consistently, as from Maastricht the Treaties made reference to the ‘technical nature’ of the intervention planned therein rather than on their political nature. In fact, the relational mechanisms there provided, while interconnecting the realities in comparison, do not go beyond the implementation of *models* aimed at ensuring the highest degrees of efficiency in the markets or of *tools* aimed at implementing (modifying them) existing procedural schemes. On the contrary, under a political perspective, neither a significant upgrade in the reciprocal connections nor the adoption of measures recognized to foster the ideals of community and solidarity have been achieved;²⁶⁹ actually, the EU institutional framework and the guidelines of the decision-making processes negatively affect the definition of a government expression of reciprocity and harmony.

The recent economic crisis once again enhances the political action! In front of the *financial turmoil*, causing a severe recession in the economic systems of many EU countries, the European summits adopted measures aimed at contrasting the adverse cyclical conditions. However, once again the remedies adopted took the form of technical measures and, more precisely, implemented the parameters of public finances adopted by the Maastricht Treaty (deficit/GDP and public debt/GDP, limits to the inflation rate). Such remedies failed to achieve coordination among national communities within the EU, which could justify the expectations of a common governance (based on collective decisions which are expressions of an *idem sentire* within the EU). Coming from an exceptional problem solving situation, the European governance seems to be inconsistent with the ‘collective interests’ of the communities involved; in other words, diversities still prevail since the line of common action failed (being substantially far from the specificity of the domestic realities interested), considering also that such a line should have been characterized by an inde-

²⁶⁹ An exception to that logic of substantial lack of solidarity (which means in political separateness) is the “European Parliament resolution of 20 October 2010 on the role of minimum income in contrasting poverty and in promoting an inclusive society in Europe”, process 2010/2039 (INI), text adopted P7_TA (2010) 0375, which has been adopted by all the European Countries except for Italy and Greece.

pendent decision-making process, necessary to ground supranational measures.²⁷⁰

In this context, we understand how the unifying force underlying the construction of Europe has been in many cases opposed by the intention of some Member States geared to delay in time the applicability of rules, felt as unfair imposition of unbearable burdens; similar consideration should be made with regard to the limited availability of other Member States to accept the logic of cooperation and union when they are considered detrimental to their interests (or, at least, restricting their profitability). We face, therefore, a reality in which politics conditioned the way to implement the goals pursued by the technical measures. Inputs coming from the virtuous States (especially Germany) impress strictness to the measures adopted. This resulted in a difficult reconciling of the need for austerity with the need to act upon a plan of reforms designed to restore growth. Such criticism is accompanied by a widespread *defeatist* attitude to the 'European dream', powered by an illusory and vague aspiration to return to the past; such attitude is supported by populism and anti-politics, as well as by reference to several episodes of intransigent opposition to solidarity openings (for instance, the resistance encountered by the «European plan on quotas for migrants» from France, Spain, UK).²⁷¹

As a consequence of the above, many contradictions of the construction at hand arise; in particular we are suffering the negative effects of the lack of a *political union* on the possibility of preventing conflicts between opposing interests and claims within the EU. Moreover, since 2011, the ECB - in order to avoid interferences with the integration process - has put in place an action constantly aimed at supporting the countries in trouble, and, supported by a broad interpretation of its functions, it was often able to contain the imbalances in the systems of the EMU Members; in sum, the current context seems characterized

²⁷⁰ See SCHAKEL - HOOOGHE - MARKS, *Multilevel Governance and the State*, in *The Oxford Handbook of Transformations of the State*, Oxford University Press., Final Draft, July 2013.

²⁷¹ See *Migranti, è scontro sulle quote nella Ue: Londra, Parigi e Madrid dicono no*, published in *Il-Sole24Ore* 18 May 2015, available at www.ilsole24ore.com.

by a *technical neutrality* which aims at playing a relevant role in determining the future European routes and in making its development plans.

Having said that, this analysis shows that *market, rules* and *democracy* constitute the elements of an 'institutional paradigm' which needs to find its rational basis in the politics.

Actually, the liberal vision - which, related to the process of globalization, in recent decades seemed to confer certainty to an upward trend from the borders increasingly large – in the absence of any support from the EU political action now seems destined to give way to a reality characterized by the growing risk of financial losses, by institutional dysfunctions and, more generally, by a sense of "emptiness and/or confusion" (which neither the principles of the "economy market" nor the State intervention can fill). More in general, Europe is now suffering an ethical-cultural decline, which arises from an erroneous interpretation of the capitalist logic. Hence the need to focus this reflection (*a*) on the *limits* of the market, (*b*) on the role attributable to the law in the market regulation processes, and, more generally, (*c*) on the possibility to propose a reconciliation of the 'relationship between politics and finance', in order to link the criteria of economic rationality to the basic principles of modern democracies.

Europe is now living an 'crisis of identity' deriving from the effort to identify a 'common destiny' of the peoples of the EU; The above analysis explains why, at today, there is a widespread feeling that, perhaps, the 'European dream' was too ambitious... so that the construction envisaged as realistic has few possibilities of success. Certainly, the hope of a different future - in which the «political union» will overcome the differences and generate greater equality - is now negatively affected by the current imbalances within and among countries. The benefits connected to the single currency show their limits. These benefits have not been able to offset the shortcomings that characterize some countries, nor to make others understand that taking a "leading role" in the

post-war Europe cannot be characterized by acts of *dominance* (which implies unacceptable positions of absolutism), but should be articulated as a final step of a democratic process (necessarily political) that recognizes and legitimates that role.

In conclusion, we can reasonably affirm that the prospect of a political union among the EU Member States is moving away in time; notwithstanding such goal finds a generalized, but tacit, approval, although hypocritically the European summits avoid to make clear statements on this matter; as a consequence of the above, we see an *indefinite* prolonging of the events able to worsen the situation. In terms of methodology - given a possible reconsideration of the European framework aimed at limiting the “political union” objective only to those countries that wish to achieve, without delay, such a relational upgrade - the players involved should take into evaluation other alternative organizational schemes, which could downgrade the integration process into a *mere economic agreement*, or into a *free trade association* (the latter being a participatory relationship already tested in the past by certain Member States, unfortunately unsuccessfully).²⁷²

This conclusion - presumably not appreciated by some readers for emotional reasons, deriving from the renunciation of an ideal long desired – suggest a reflection on the opportunity lost by Europe to play a role comparable with those of the major powers of the world (United States, Russia, China). Actually the EU, in terms of population and economic wealth, and also thanks to its geographic location (between America and Asia and, therefore, between the Western and Eastern blocks), can play a strategic role in the world, which gives it a geopolitical relevance destined to last in time. It is also true that such a mission goes far beyond the scope of a mere economic integration, based only on a

²⁷² We make reference to the EFTA (*European Free Trade Association*), founded with the Stockholm Convention in May 1960 as an alternative for those European States (Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom) that did not want to join the EEC, later followed by other (Iceland and Liechtenstein). The association currently consists of only four states (Iceland, Liechtenstein, Norway and Switzerland).

common market and on a single currency. The need to jointly address significant issues requires a strong participation of all the parties interested as well as a capacity of each of them to contribute in international negotiations. In other words, the ability of the EU to exercise a leadership function – apt to promote dialogue and able to propose adequate solutions for disputes involving issues such as freedom, security, humanitarian matters – could be adequately achieved only if the Member States would be able to express a powerful cohesive force (in addition to the economic integration). There is no doubt that such *cohesion* will be achieved only if a *political and institutional* unity will be reached, and thus only with the creation of the «United States of Europe».

In order to breathe new life, within the Union, into the relationship «man, law, economy», we have to consider the opportunity to remove one of the major obstacles met by the integration process as highlighted by the analysis conducted so far. We make reference to the fact that, in terms of methodology, the actions promoted by the EU leaders and bodies so far, in compliance with the objectives of the Treaties, were grounded on a sort of micro-economic 'Costs and Benefits' analysis, which usually is used to verify (through the due diligence of the elements emerging from the realization of an envisaged program) the quantitative data that have to be monetized and, as a result of this, if - under certain circumstances – a overall “net benefit” (which justifies the approval of the investment) would be achieved or not.²⁷³

However, in the case at hand the Cost/Benefit analysis seems to induce a short-sighted and narrow microeconomic vision, which does not carefully take into account *other interests* involved by the interventions planned or realized, which inevitably will be negatively affected if the common good is ignored; it is equally clear that a strict application of the ‘cost/benefit’ analysis often produc-

²⁷³ In this respect see, e.g., SEN, *The Discipline of Cost-Benefit Analysis*, in *Journal of Legal Studies*, 2000, pp. 931-952; CAGLIOZZI, *Lezioni di politica economica*. Napoli, 2001; CAMPBELL - BROWN, *Benefit-Cost Analysis. Financial and Economic Appraisal using Spreadsheets*, Cambridge, 2003; ADLER - POSNER, *New Foundations of Cost-Benefit Analysis*, Cambridge, 2006; BOARDMAN *et al.*, *Cost-Benefit Analysis: Concepts And Practice*, New Jersey, 2011; SINDEN, *Formality And Informality In Cost-Benefit Analysis*, in *Utah Law Review*, 2015. pp. 93-172.

es a 'denial' that offends the common sense of civilization, which instead is an unavoidable feature of the Old Continent. Therefore, it is now time to understand whether achieving the wealth through a balance between opposing interests could be compatible with a full acknowledgement of the 'liberal rights';²⁷⁴ hence the need to make reference to refer to the social guiding criteria (and, therefore, first to *solidarity*) to ensure the establishment of a democratic order based on the respect of human rights and human dignity.

Before accepting the idea of giving up the project of the 'founding fathers' (interrupting a path started more than half a century ago by some European countries) we must check whether an alternative is possible; although, at present, it appears confused, not well determinable and, therefore, yet to be defined. What should be the configuration of the «alternative Europe» is a constructive hypothesis still in the womb of Jupiter! Similarly, the identification of the order of priorities to be followed (in promoting such a change) is a difficult mission. Rethinking a «united Europe» should mean willingness to re-establish the EU in the awareness of having to change the existing. This requires a rational conviction that it is possible to lessen the gap among the EU countries and to overcome the dystonia that currently characterizes the regional integration project. In this logic the 'reforms' mentioned above represent a driving force in the implementation of a systemic rebalancing, which is a condition to promote the progress, and so to give substance to a balanced convergence process between heterogeneous realities.

Again the *affectio*, i.e. the desire, seems to govern our conclusions, if - as is clear from our last considerations - we have finally described a perspective institutional picture which could be considered in conflict with certain analysis illustrated in the preceding pages of this work. Therefore, from a rational point of view, we cannot remove the doubts about the feasibility of such a project,

²⁷⁴ See widely SEN, *The Impossibility of a Paretian Liberal*, in *Journal of Political Economy*, n. 78, 1970, pp 152-157, in which the distinguished economist asserted the difficulty to identify a social criterion to satisfy - at the same time - the *utility-based* principle set forth by Pareto and the affirmation of the individual liberties of the individuals.

knowing that such a vision could easily be contradicted by the reality at hand. Actually, the process of involution of the Union - in undermining the expectation of a 'common home' - shows that the intensification of economic relations among the EU countries was not enough to create a *common identity* required to achieve an integration among the people of those countries. The conditions for the success of a *sense of belonging* to a single social political experience, such as to characterize and justify the presence of a State/nation, have not occurred. Maybe this is the real reason why today we are facing the «in or out» dilemma in the EU, which is threatening the *dream* of seeing realized the 'United States of Europe' since such a dream seems to give up as a consequence of a dark preservation, based on the 'primacy of the interests' and far from the 'values' which are placed at the foundation of advanced civilizations.

Rediscovering the founding values of a *meeting* of countries which are linked by a common history, by a religion prevalently attributable to Judeo-Christian roots, by a shared aspiration to equality and freedom (understood in its broader scope) seems to be the inescapable assumption of any future action aimed at resolving the current difficult situation (by which the relations among EU countries are strongly penalized). We do not see alternative ways to overcome the deep embarrassment which now is felt by a large part of the population living in the 'old continent'. Therefore, only finding again the identity of a «European citizenship» the *inertia* of the 'geopolitical crisis' which has shaken the EU does it becomes possible to get out the causes that, for many years, brought imbalance and disasters become removable.

To be united in diversity! Aiming at the achievement of a unity without distinctions among the peoples of Europe, looking at a 'new humanism' without prejudices and ready to abandon the previous and consolidated negative comparisons between the different countries: these are the categorical imperatives required to continue to believe in the European dream, having in mind all the difficulties connected with a move towards a real convergence. The latter can

achieve the creation of an effective *osmosis* within Europe, where its Member countries could abandon critical attitudes, dictated essentially by *auto-referentiality* and/or by *hegemonic attitudes*.

In this perspective, doubts and misgivings are replaced by certain events that mark the history, shake consciences, approach people in a renewed sense of brotherhood, which drive them to ease the pain by researching reactive common strategies to defend their freedom. In particular, we make reference to the sad event of the barbaric terrorist attack happened at the beginning of 2015 in the capital of France, which injured not only the city of Paris, but the whole Europe.²⁷⁵

The violent massacre that has caused anger and pain throughout the western world was followed by a response by all the citizens of France and other EU countries that shows great maturity. The *vigils* that have been made in several European capitals (from Paris to Berlin, from Rome to London), the words '*Je suis Charlie*' appeared on many walls and on thousands of posters in the streets of many cities, the *march* (held in Paris on January 11, 2015) in which a massive representation of heads of States and prominent members of Western policy took part, tell us that - as sometimes happens - in the presence of traumatic events conditions that stress unity, cohesion and solidarity occur. The 'sacrifice' of those who died to defend their freedom of ideas can originate an *idem sentire* within the EU. In light of the above, we see good ideological reasons to relaunch and complete the process of Europeanization that, for different reasons, now seems to have lost the propellant charge that is essential to achieve the desirable conclusion under a political perspective.²⁷⁶

²⁷⁵ See CAPRIGLIONE, *The «in or out» dilemma in the EU*, in *Law and Economics Yearly Review*, 2014, p. 401 ff.

²⁷⁶ See MAURO, *Una nuova stagione*, available at www.repubblica.it, in which the Author states: «And political Europe has been seen perhaps for once along the streets of Paris in this defense of democracy by citizens aware that they have something to fight for and to believe because it is something that is worth. Really, as said in Italian by the Prime Minister Valls in a boulevard dedicated to Voltaire, yesterday in Paris we saw a turning point for Europe, the beginning of a new season».

THE INFLUENCE OF POLITICS ON REGULATORY AND CULTURAL CHANGE IN THE FINANCIAL SECTOR AFTER THE FINANCIAL CRISIS: A UK PERSPECTIVE

Roger McCormick*

ABSTRACT: *This paper moves from the relationship between Finance and Politics to analyse the influence of the latter on the financial regulation, taking into account the cultural changes arising from the financial crisis. The analysis examines the political decisions adopted in the UK to face the financial issues, focusing on the Lehman and RBS cases as well as on the impact of the LIBOR scandal.*

In particular, this paper highlights that the mood and general attitude of the regulators - and even many of the market participants - has gradually, under the influence of pro-active political involvement, moved to be generally in line with what would appear to be the prevailing view of the majority of the public. There is a determination that, in future, bankers will not be as able to get away with poor, unethical conduct as they have in the past, that standards will improve and that slack supervision will be punished.

In sum, this research shows that politicians have played a valuable role in passing laws designed to make banks “safer” and now continue to serve the public by ensuring that the spotlight remains placed on conduct and morality.

SUMMARY: 1. Introduction. – 2. Perceptions of Politicians. – 3. Relationship between Politics and Finance. – 4. Political Responses in the UK to Financial Issues. - 5. The Aftermath of the Fall of Lehmans and RBS. – 6. The Impact of the LIBOR Scandal. – 7. Conduct Costs; Behaviour, Ethics and Standards. - 8. Conclusions.

* Roger McCormick is the Managing Director of CCP Research Foundation CIC (the “Foundation”): see ccpresearchfoundation.com. The author gratefully acknowledges the assistance of the Foundation's Research Director, Chris Stears, in the preparation of this article.

1. The period 2008-15 has been one of extraordinary turbulence in financial markets. Apart from the Global Financial Crisis itself, when many major financial institutions either failed or came very close to failing, needing state "bail-outs" to stay alive, we have seen ongoing financial crises in the Eurozone, particularly in relation to Greece, enormous fines and other conduct costs¹ being imposed on banks in retribution for various kinds of misconduct (including, in some cases, crimes) and sweeping changes in the regulatory environment at national and international levels. Banks and bankers, who are widely seen as being to blame for many of these events, have rarely been as unpopular as they are now. But, as ever, society needs a stable banking system and, as the unfortunate citizens of Greece have been discovering, everyone suffers if the banks cannot remain open and deliver the services we require from a financial "utility". The natural inclination for the public, and politicians in particular, to indulge in a little gratuitous "bank-bashing" from time to time therefore needs to be balanced with an understanding that, however much we may disapprove of certain banking practices, we do need our banks, we need them to be open for business and we need them to be financially strong and stable. Getting this balance right has been one of the most important political challenges that has had to be addressed this century. This article considers whether, in the UK, the politicians have responded well to that challenge, and the various forms the response has taken.

2. In Western democracies, the voice of the elected politician is, somewhat imperfectly, the nearest thing we have to the voice of the people he represents. As we all know, politicians frequently speak with little thought for

¹ The expression "conduct costs" is used to describe the direct financial consequences of misconduct (or more broadly still, of the manifestation of 'conduct risk'). This will extend beyond regulatory fines to include costs of customer remediation and/or incurred due to a commitment to unwind sales (such as repurchasing auction rate securities mis-sold to the market). The Foundation has published a working definition of "Conduct Costs", available at conductcosts.ccpresearchfoundation.com, accessed 5 July 2015.

what their constituents actually think on particular subjects and the sceptical observer may feel the politician's first concern is, generally, himself. Nevertheless, over time and especially where a significant group of politicians appears to have converging views on given matters, it is sensible to give due account to the fact that politicians are likely to be conscious of what the public expects, where public sentiment lies and, of course, what is likely to enhance their prospects of re-election.

So, notwithstanding the low esteem in which the public tends to hold politicians *en masse*, there is still an acceptance that, at least on the more technical, not obviously vote-seeking, attention-grabbing issues, their views, when delivered after evidently careful consideration, should be given some weight. Difficulties can emerge, of course, when the politician is drawn to express views on matters of a highly technical nature which are outside his realm of experience or expertise. But the need to do this, and public expectation that comment will be forthcoming, is ever-present. Thus, we hear the views of politicians on matters ranging from climate change, the large hadron collider, the spread of dangerous diseases and vaccinations against influenza to diet, drugs and dangerous dogs. The politician is much more at home, however, where the topic is less "black and white", concerning, say, how we should run the economy or perceptions of morality, ethics and what is right or wrong; here there is much more room for subjective opinion. The need is to "set priorities" and to decide on "the right thing to do". There is less chance of being "caught out" by an obvious mistake when every option can be debated at length.

3. The Financial Crisis -- and the Conduct Crisis that has arrived in its wake -- have provided opportunities for political interventions of both kinds. Some have been of a technical nature, often resulting in legislation, whilst others have, in effect, been the expression of forceful opinions on questions of ethics

and morality, with results that have, so far, been less easy to evaluate². Some have been a combination of the two. Some have been, quite simply, essential; some have been helpful and constructive (whether or not essential); and some have been, shall we say, opportunistic --using the crises to make party-political points or to "grandstand" and seek attention for personal, career-building reasons rather than because the public interest had required a contribution.

Instances of where politics and finance have mixed recently at an international level include:

- a) whether or not Greece should remain in the Eurozone³;
- b) whether the fines imposed by US regulators are discriminatory against foreign banks;
- c) whether a "financial transactions tax" should be imposed, with a perceived extra-territorial effect;
- d) whether it was right for the UK to use anti-terrorist legislation to freeze Icelandic bank assets in the UK;
- e) whether the UK's legislative moves to "ring-fence" investment banking from retail and commercial banking cut across the perceived continental preferences for "universal banking"; and
- f) whether, even after the Global Financial Crisis, some regulatory regimes pursue a "light touch" policy unfairly (and dangerously) in an effort to take market share away from jurisdictions like the UK and USA.

² In this article, the phrase "conduct crisis" refers to the crisis in confidence in bankers' honesty and fair dealing which was triggered, in the UK, by the LIBOR manipulation scandal (which broke in mid-2012 and led directly to the formation of the Parliamentary Committee on Banking Standards) and which had led many banks to insist that they are now anxious to "restore public trust". The evaluation of the "conduct crises" and looking at risk from behind the balance sheet of organisations who place public trust at the heart of their sustainability, marks the core research objective of the Foundation (for discussion on the Foundation's research, see STEARS, *Conduct, culture and people: introducing the CCP Research Foundation CIC, in Comp. Law. 2015, 36(7)*, pp. 193-195 and ccpresearchfoundation.com)

³ After the Greek referendum of 5th July 2015, Oliver Kamm, writing in *The Times*, 7th July 2015, observed: "Greeks have stared into the economic abyss and voted decisively to (a) have their cake and (b) eat it. As an economic judgement, that is hard to square. It's an example of how economic policy is rarely formed with an eye to economics alone. Politics intrudes".

By way of contrast, a list of the most significant ("domestic") issues on which the UK public has looked for political intervention in response to the Crises, would look something like the following:

- 1) Restore confidence in the banking system: make bank deposits "safe";
- 2) Avoid recurrence of "too big to fail" scenarios and stop banks being exemplars of "private profit" when things go well but "public loss" when things go badly;
- 3) Curb individual greed of bankers;
- 4) Make it more likely that miscreant bankers will face jail sentences;
- 5) Make senior bankers more directly responsible for misconduct of staff who report to them;
- 6) Bring mis-selling of financial products under control; and
- 7) Bring to an end the unfair treatment of small and medium-sized businesses (SMEs) who get into difficulties.

4. There has been a range of responses to the issues listed above from the politicians. Various mechanisms have been employed, including (a) direct equity investment by government in failing banks or explicit guarantees of deposits⁴ (b) legislation on many different topics, ranging from making banks "safer" to creating new criminal offences⁵ (c) significant changes to the regulatory "architecture"⁶ (d) setting up of new Parliamentary Committees and other

⁴ Taxpayer support for the UK bank and banking sector included *inter alia* the recapitalisation of Lloyds Banking Group and the Royal Bank of Scotland and full nationalisation of Northern Rock and Bradford & Bingley; financing the Financial Services Compensation Scheme (FSCS) to enable it to guarantee deposits; and lending to insolvent banks to enable those banks to repay the balance of deposits not covered by the FSCS; see NATIONAL AUDIT OFFICE, *Reports on taxpayers' support for UK Banks*, available at www.nao.org.uk.

⁵ See for example, the Banking Act 2009 c.1 UK (concerning the new Special Resolution Regime and stabilisation powers) and the Financial Services (Banking Reform) Act 2013 c.33 UK (on 'Ring-fencing' (Part 1), 'depositor preference' (Part 2), 'bail-in' mechanisms (Part 3) and reforms aimed at bringing about greater 'individual accountability' through the introduction of the Senior Managers and Licensing Regime and a new criminal offence for reckless conduct causing an institution to fail (Part 4)).

⁶ The Financial Services Act 2012 c.21 UK, significantly amended the Financial Services and Markets Act 2000 c.8 UK and the structure of financial regulation in the UK. The previous 'tripartite regime' of financial regulation (consisting of HM Treasury, the Bank of England and the Financial Services Authority) was replaced with the 'twin peaks' approach, ceding micro prudential regulation back to an authority within the Bank of England (the Prudential Regulation Authority), creating the Financial Policy Committee (with responsibility for macro prudential oversight) and replacing the FSA with the Financial Conduct Authority. See further below

political groupings⁷ to review law, practice and specific events and issues (and make related recommendations) (e) the appointment of independent commissions to report on policy options⁸ (f) the creation of a government owned development bank to aid the delivery of finance and financial services to small and medium sized businesses⁹ and (g) at a more mundane level, exploiting perceptions of the causes of the crises and various related phenomena for party political purposes and other political advantage. The political issues raised by the Crises have been many and varied, involving not only the immediate concerns suggested by the above list but also hugely important consequential issues such as the impact of bank failure or "shrinkage" on employment and taxation revenues, whether or not the UK can remain a leading financial centre (and/or whether its economy is too reliant on financial markets¹⁰), whether the regulatory system is fit for purpose and, at least in the minds of more left-wing commentators, whether there is a need to re-assess whether the "capitalist system" is working properly.

As regards the first item on the list, the response to the need to "make banks safe" was, of course, when the time came, a matter of great urgency. There was no question of being able to debate political and philosophical questions on the issue of whether it might be right to "let a bank fail" in order to avoid "moral hazard". The insolvency of Lehmans in September 2008 showed how difficult it is to assess the potential consequences of a major failure and there was no political appetite for experimenting with letting a big UK bank fail in the autumn of 2008. It is understood that Royal Bank of Scotland informed the then Chancellor of the Exchequer, Alistair Darling, in the morning of 7th Oc-

⁷ Such as the Parliamentary Commission on Banking Standards (see www.parliament.uk) and the All-Party Parliamentary Group on Interest Rate Swap Mis-Selling (see www.publications.parliament.uk) and its successor group, the All-Party Parliamentary Group for Better Business Banking. See generally www.gov.uk.

⁸ Such as The Independent Commission on Banking: The Vickers Report (September 2011) and the UK Government's response to the report (December 2011 Cm 8252) available at www.gov.uk.

⁹ The British Business Bank plc, is a UK-centric development bank owned by HM Government (reporting into the Department for Business Innovation and Skills), see british-business-bank.co.uk.

¹⁰ At the time of its rescue, RBS' balance sheet was almost the same size as the UK's gross domestic product.

tober 2008 (while he was at a meeting in Luxembourg) that it was only a matter of a few hours before they would, in effect, run out of money. The bank's share price had collapsed and dealing in the shares had been suspended. As Darling recalled in his memoir:

"When dealings in a bank's shares are suspended it is all over. I knew the bank was finished, in the most spectacular way possible. The game was up. If the markets could give up on RBS, one of the largest banks in the world, all bets on Britain's and the world's financial system were off."¹¹

Paul Tucker, then Deputy Governor of the Bank of England described the decision as follows:

"...in the circumstances in which we found ourselves, where on a Monday night a major bank, integral to our financial system, said that it could not get to the end of the day, I think it would have been an act of economic vandalism not to have stepped in and rescued it. But I think we have to design a framework which makes that very, very much less likely in the future."¹²

Following government intervention earlier in 2008 to keep Northern Rock and Bank of Scotland alive and to nationalise, or encourage take-overs of, struggling building societies, the problems at RBS brought financial, economic and political issues together in an explosive cocktail. If RBS had failed, others would soon have followed, so a government bail-out (by way of equity injection) was a genuine emergency. A few days after his Luxembourg conversation, Darling authorised the first major government injection of funds into RBS --£37 billion. More was to follow, and more banks and building societies were to need rescue in subsequent months.¹³

6. The emergency rescues (and of course the "non-rescue" of Lehman Brothers by the US Government on 6th September 2008) were followed by a

¹¹ See DARLING, *Back from the Brink*, Atlantic Books 2011, p.153.

¹² From his evidence to The Treasury Select Committee of the House of Commons, 26 January 2010

¹³ See, for a detailed account, McCORMICK, *Legal Risk in the Financial Markets*, 2nd edn 2010 OUP, at ch.7.22 et seq.

spate of legislation in the UK (and elsewhere) designed to make bank rescue easier (and, one hopes, failure less likely). The most fundamental changes, as regards failing banks, were in The Banking (Special Provisions) Act 2008 and the Banking Act 2009 which introduced "stabilisation" provisions for what we have come to know as the "resolution" of failing institutions.¹⁴ These involved, for example, the splitting up of banks in difficulty into "good banks" and "bad banks". Other "lessons learned" from the many problems encountered in the UK with the Lehmans insolvency were also addressed in legislation such as the Investment Bank Special Administration Regulations 2011. For good measure, the "regulatory architecture" was overhauled by the Financial Services Act 2012 (which, essentially, moved the UK to a "twin peaks" model and replaced the old Financial Services Authority with the Financial Conduct Authority and the Prudential Regulation Authority). In due course, and following the report of the Vickers Commission¹⁵, and the deliberations of the Parliamentary Banking Standards Commission, legislation would be passed to implement the so-called "ring-fencing" or "splitting" of investment banking from commercial and retail banking (and set the framework for the "conduct agenda" triggered by the LIBOR scandal).¹⁶ The politicians, advised by lawyers, insolvency practitioners and other technicians were now more open to the need to get the "legal plumbing" right in financial services by passing new laws to fix problems than perhaps they had ever been before.

Financial law reform was no longer a political backwater with no vote-winning appeal. Public interest in the need for change was only increased when the LIBOR scandal triggered the Conduct Crisis and politicians started to take a keen interest, not just in the safety and stability of the financial system but also the ethical and moral culture of our banks. Any politician who vociferously stood up against not just bankers' greed and recklessness but also fraud and de-

¹⁴ For a detailed account, see McCORMICK, *ibid.*, at Ch.8, 8.01-8.58.

¹⁵ The Independent Commission on Banking, chaired by Sir John Vickers.

¹⁶ See Financial Services (Banking Reform) Act 2013

ception was only going to win plaudits from the public at large. The key ingredient, however, was to be able to back up the relatively easy criticisms with a sound appreciation of the relevant technical issues and a considered and perceptive approach to the changes in law and practice needed to bring about the desired changes.

The impact of the LIBOR manipulation scandal was enormous. The public concerns were suddenly switched from "bank safety" to "bank conduct". We had known that bankers had behaved recklessly and foolishly, many of them apparently consumed by greed and self-interest, but we had not appreciated the extent to which lies, deception and fraud had entered bank culture. The scandal led to the formation of the Parliamentary Commission on Banking Standards ("PCBS"), a direct political response, and an ongoing saga of major scandals, swingeing fines and other "conduct costs"¹⁷ that has still not abated. The legislative response has included a new criminal offence of reckless mismanagement of a bank¹⁸ and a new "Senior Managers Regime" under which (with effect from March 2016) senior executives in banks will be held responsible for regulatory breaches in their areas of responsibility *unless* they can demonstrate that they took reasonable steps to prevent such breaches – a significant departure from the presumption of having to prove some level of guilt¹⁹

The change in the public mood, since 2012, in relation to banks and bank behaviour has been marked. The Global Financial Crisis was bad enough (and, back in January 2011, Bob Diamond (then CEO of Barclays) encouraged us to think the time for "remorse and apology" about that should be over) but the LIBOR scandal (that, amongst other things, brought about Diamond's downfall as

¹⁷ See fn 2 above

¹⁸ For a very perceptive commentary, see BLACK – KERSHAW, *Criminalising Bank Managers*, in *The LSE's Law and Financial Markets Project Briefing 1/13*; see also Black's and Kershaw's written evidence to the PCBS, 11th January 2013.

¹⁹ Objections to this change, typically from the banking industry, have been based on the apparent "reversal of the onus of proof" involved. Less colourfully, this new approach is said to involve a "rebuttable presumption" (that the executive should have prevented the regulatory breach occurring). In their evidence to the PCBS (see fn 19 above) Black and Kershaw make the point that there is a regulatory precedent for the "rebuttable presumption" approach in s.40 of the Health & Safety at Work Act 1974

Barclays CEO) and ensuing Conduct Crisis have proved to be even worse for reputational damage. And although many thought that 2012 might prove to be a watershed, as banks at last seemed to recognise that some fundamental changes would be needed to restore public trust, the ongoing conduct-related tsunami of scandal continues²⁰ and banks have not come close to re-establishing that trust. This is the case even though some might argue that although the fines just keep on coming they tend to relate to a bygone era. As recently as April 2015, at the bank's AGM, the outgoing Chairman of Barclays, Sir David Walker, was quoted (in the Times) as being frustrated "that we have those things from pre-summer 2012 still around our necks. It is a deplorable state of affairs." As the record fine for LIBOR manipulation (£ 1.7bn) imposed on Deutsche Bank (and announced on the same day as Barclays' AGM) showed, the albatross is still in place around bankers' necks.

7. At the CCP Research Foundation²¹, the Conduct Costs Project regularly compiles and publishes tables setting out data of bank "conduct costs" and the most recent table (see below) shows that these have now reached astronomic proportions. Bank conduct costs comprise various different heads of cost. The most common headline-grabbers are fines imposed by regulators for misconduct such as the manipulation of LIBOR or the foreign exchange market or breaching legal and regulatory requirements designed to counter money-laundering or impose sanctions on "rogue" regimes. However, other costs (apart from fines) might come in the form of requirements to pay compensation to customers who have been "mis-sold" financial products (such as Payment Protection Insurance) or to re-purchase (at par) securities that have been "mis-

²⁰ 2015 has seen major new scandals that include: alleged complicity in tax evasion by HSBC; appalling stories regarding the behaviour of Deutsche Bank in relation to the manipulation of LIBOR and other benchmarks; Clydesdale Bank being fined £20.7M in April for failing to handle PPI complaints fairly and then, merely two months later, Lloyds Banking Group paying a fine of £117M for the very same offence; and a very large fine (£126M) imposed by the FCA on Bank of New York Mellon (the world's largest global custody bank) for failure to protect customer assets.

²¹ See *ccpresearchfoundation.com*

sold" to the market (as with various "auction rate securities" ("ARS") sold on the US markets²²). The table set out below²³ shows the conduct costs of 16 major banks for the 5-year period ending 2014 (including provisions as at the end of 2014):

Banks	Total Costs 2010-2014 (GBP bn)	Provisions as at 31 December 2014 (GBP bn)	Grand Total 2010-2014 (GBP bn)	Grand Total 2009-2013 (GBP bn)	Relative Position to 2009-2013	Grand Total 2008-2012 (GBP bn)
BAC	55.80	8.25	64.05	66.40		54.00
JP Morgan Chase & Co	28.65	4.26	32.91	35.78		24.65
Lloyds Banking Group plc	12.24	3.38	15.62	12.72		9.24
Citigroup, Inc	12.17	2.58	14.75	7.57	(+2)	11.84
Barclays PLC	7.60	4.59	12.19	7.89		5.06
RBS	6.79	4.11	10.90	8.47	(-2)	4.24
Deutsche Bank	6.01	3.37	9.37	5.62	(+1)	3.95
HSBC	6.39	2.51	8.90	7.21	(-1)	6.25
BNP Paribas*	6.04	1.72	7.76	3.54	(+4)	1.89
Santander	3.87	3.07	6.94	3.57	(+2)	4.14
GS	4.05	2.08	6.13	3.65	(-1)	3.95
Credit Suisse	4.01	1.84	5.85	3.58	(-1)	3.00
UBS	3.42	1.99	5.41	4.18	(-4)	24.65
National Australia Bank Group*	1.83	1.00	2.82	2.34		n.a.
Standard Chartered Bank	0.96	0.05	1.00	n.a.	n.a.	n.a.
Société Générale *	0.08	0.86	0.94	0.70		1.28
Grand Total [GBP Bn]	159.93	45.63	205.56	173.22		158.14

Costs of this magnitude pose political questions of their own. Has the level of regulatory fines grown out of proportion? Do the various jurisdictions that host international market activity present a level playing field? Have governments started to see fines as a convenient, and regular, major source of revenue?

Whatever one may think about the surrounding political issues, it does seem clear that the punitive effect of conduct costs is, together with regulatory change, forcing a change of attitude amongst banks and bankers, with a growing acceptance of the need to embrace ethical and cultural change. Consultants

²² In September 2010, for example, Bank of America was required to repurchase \$4.5 billion of ARS from 5,500 customers.

²³ This table is reproduced by permission of the CCP Research Foundation CIC. The background research was initially carried out by the LSE Conduct Costs Project and is now carried out by the Conduct Costs Project at the Foundation.

abound who now profess to be expert in managing "conduct risk". Tables such as that shown above suggest, however, that it will take some time for cultural change to take effect²⁴.

A particular difficulty arises due to the need to establish a sense of "right and wrong" in an environment where public perceptions of acceptable conduct are constantly changing and have certainly changed considerably since the onset of the Global Financial Crisis. This has resulted in a number of "grey areas" as regards banking where there is no specific "rule" that tells the individual what he should (or should not) do, only general "principles" that, unfortunately, can be applied to a wide range of situations, in effect retrospectively, if the regulator comes under pressure from the media and/politicians to "take action". In order to address this, various bodies²⁵ have suggested, rightly, the need for a well-understood set of "standards" to be devised to assist bankers in understanding what is expected of them--almost as though banking was a profession.

8. How well have politicians responded to the Crises? As regards the influence of politics and politicians on financial markets and their regulation, the UK experience in the post-2007 period has been generally beneficial. One might point to the following as evidence of this:

- Despite the occasional hyperbolic outburst (especially during the 2015 General Election campaign) politicians have tended to respond to the issues presented by the Crises in a non-party political manner. As a result, the need for law reform and the need for cultural change in market practices are not identified with any particular political party and the issues are approached in generally a dispassionate and objective manner (although there have clearly been times when bad

²⁴ Depressingly, published data on misconduct such as the manipulation of foreign exchange markets show that serious conduct failure -at least in certain banks-- has continued into 2014.

²⁵ For example, the Banking Standards Board; see further below.

conduct and, perhaps worse, an unwillingness to take responsibility for it, have evidently tried the politicians' patience).

- The most important cross-party political grouping, the BCBS, together with the impressive Treasury Select Committee, have been effective and influential, gathering and collating well-informed evidence from many sources and making level-headed (even though sometimes controversial) suggestions and proposals that have generally been accepted.

- It is also worth noting that the work of bodies like the PCBS has, through reports and procedures couched in everyday (largely non-technical) language, made an understanding of how financial markets work more accessible to ordinary people.

- The banks' professed desire to "restore public trust" (however successful that may turn out to be) is a clear response to the outrage at their behaviour that has so forcefully been expressed by bodies such as the PCBS (and accompanying media comment).

- Politicians have successfully faced down the implicit and explicit recurrent threats from bankers, when presented with proposals for tighter regulation, to relocate to more "friendly" jurisdictions where lighter touch regulation may be found.

- Various political stimuli have led to a new focus on banking "standards", with an accompanying recognition that conventional regulation is now close to its limits as regards its effectiveness in driving ethical improvements. Following a report by Sir Richard Lambert's Banking Standards Review in May 2014, the Banking Standards Board was formed in May 2015 and, also, the Fair and Effective Markets Review ("FEMR") Final Report of June 2015 (published by the Bank of England, HM Treasury and the Financial Conduct Authority) recommended the

formation of a new FICC²⁶ Markets Standards Board. Things are not moving very quickly as regards "standards" but they seem to be moving in the right direction.

More important than any individual development is that the mood and general attitude of the regulators --and even many of the market participants-- has gradually, under the influence of pro-active political involvement, moved to be generally in line with what would appear to be the prevailing view of the majority of the public. There is a determination that, in future, bankers will not be as able to get away with poor, unethical conduct as they have in the past, that standards will improve and that slack supervision will be punished. The heading for the FEMR Report's principal recommendation, for example, is:

"raise standards, professionalism and accountability of individuals"

And in that document's opening section (where the concept of "fair markets is considered), the statement is made that:

"...in light of the misconduct of recent years, fair markets are markets in which participants behave with integrity. Among other things, that means that participants should be confident that they will not be subject to fraud, deception, misrepresentation, manipulation or coercion."

To those who cling to "old school" ways of thinking, such statements seem to be statements of the obvious. A pity, perhaps, that they are necessary at all. However, the first step in dealing with what we now might call the "conduct crisis" is to recognise that the problem exists. Politicians have played a valuable role in passing laws designed to make banks "safer" and now continue to serve the public by ensuring that the spotlight remains placed on conduct and morality. For all their faults and frailties, they deserve credit for this.

²⁶ This is the acronym for fixed income, currency and commodities markets. As the FEMR points out, these markets are enormous and have a huge influence on the borrowing costs of households, companies and governments, exchange rates, the cost of food and raw materials and the ability of companies to manage financial risks of various kinds.

HARMONISING BANKING RULES

IN THE SINGLE SUPERVISORY MECHANISM*

Ignazio Angeloni** and Thomas Beretti***

ABSTRACT: *The introduction of the Single Supervisory Mechanism significantly changes the European supervisory landscape, by providing for more harmonisation within the Eurozone. Under the SSM, national authorities cede a vast piece of their oversight responsibility to the ECB which, in turn, is in charge of prudential supervision over Eurozone banks. Of course, the set-up of the SSM (which represents a key pillar of the Banking Union) requires sufficiently harmonised regulation for euro zone banking in order to implement a single ‘rulebook’, deliver consistent supervision and create a real level playing field. The paper is sequenced as follows: in the first part, the current European policy framework is described, the remainder being focused on the description of the OND project.*

SUMMARY: 1. Introduction. - 2. The European policy framework in the banking sector: reshaping regulation and supervision in Europe. - 2.1. Post-crisis bank regulatory reforms: global and European. - 2.2. The institutional side: the banking union and the SSM. - 3. Enhancing and harmonising European regulation. - 3.1. Definition and rationale of the OND project. - 3.2 Description of the OND project. - 3.3. OND process and outcome. – 4. Looking ahead.

1. The year 2015 marks a turning point in the evolution of the euro area’s economic and financial crisis. The economy is recovering, though at an uneven pace. The countries most severely hit by the crisis in 2009-2011 are, after undertaking adjustment programmes supported by the international community (European Union and

* The views expressed in this paper are personal and should not be attributed to the ECB.

** Ignazio Angeloni is Member of the Supervisory Board at the European Central Bank.

*** Thomas Beretti is Member of the Supervisory Policies Expert at the European Central Bank.

IMF), performing better on average than the rest of the euro area (with the exception of Greece, a special case in several respects). In the financial sector, risk indicator levels are comparable with, if not better than, the pre-crisis levels.

Improvements in the banking sector are more tentative. A strengthening of the balance sheets, most clearly witnessed by the increase in average capital ratios, is taking place. The quality of capital, in terms of its loss-absorbing capacity, is also improving. At the same time, the long recession is taking a heavy toll on the quality of assets. Lagging behind the cycle, non-performing exposures increased virtually everywhere and are now close to historical peaks in most countries. Loan-loss provisions, together with low interest margins, are penalising bank profitability, which is very low by historical standards. The euro area banking system remains, in many respects, in a post-crisis “repair mode”. In the meantime, a new regulatory architecture, fruit of the experience of the crisis, is being phased in and tested. Starting this year, the Single Supervisory Mechanism is in charge of supervising the banks for which it has direct responsibility (123 banking groups, accounting for over 80% of banking assets in the euro area). The Single Resolution Mechanism is building up its structures and will start exercising its functions at the beginning of next year.

The legal framework for conducting bank prudential supervision in Europe has been strengthened with the introduction, in 2012, of the Capital Requirements Directive (CRD IV) and the accompanying Regulation (CRR). The latter is of special importance for the SSM because of its direct applicability in all member countries without transposition into national legislation. Direct application means less room for regulatory divergence and inconsistency across countries, hence a more level playing field; this is essential for an authority conducting supervision, which aims to achieve a level playing field and to foster cross-border mobility and integration of banking services in an area comprising 19 countries. In spite of these improvements, the existing legal framework still leaves room for considerable cross-country discrepancy, both because some scope for national legislative control in the banking area still exists and

because the European law itself (CRD IV and CRR) allows a certain degree of discretion to be exercised at the national level on how it is interpreted and applied.

Against this background, within its mandate the SSM has launched, this year, an ambitious project of regulatory harmonisation, consisting in setting criteria and modalities for exercising the discretion allowed by the EU law. The aim of this article is to describe the rationale behind the project and to give some indication on how it will develop. To provide some background, we will first give an overview, in the next section, of the main components of the new European banking architecture that emerged from the financial crisis. We will cover both the legislative side (the introduction of CRD IV and CRR, which are part of the broader global post-crisis reform process) and the institutional side (first and foremost, the creation of the SSM). In Section 3, we will describe the work programme of the SSM on regulatory harmonisation. Some concluding considerations are provided in Section 4.

2.2.1. Both regulation and supervision, the two elements that constitute the cornerstones of the financial stability frameworks in all countries, have been profoundly reformed in Europe in recent years, following the monetary union and the financial crisis. The two elements are interrelated and complement each other. Regulation is concerned with *setting the rules*, through legislation and secondary regulation. Supervision is mainly focused on ensuring that the rules are *correctly and uniformly applied*. In Europe, financial regulation has been increasingly dominated in recent years by European laws, gradually complementing and replacing national laws. European legislation comprises acts of a constitutional nature (the European Treaties) and lower-level legislation. Union laws take the form of Directives, addressed to all Member States and requiring further legislative acts at the national level in order to become operative, and Regulations, which are addressed to market participants and are directly applicable. In the banking field, the use of Regulations has become prominent in recent years, because of their advantages in terms of operational effectiveness, transparency and ability to promote an effective level playing field.

Though conceptually distinct, regulation and supervision complement and reinforce each other in several respects. In particular, since laws and secondary regulation can never be so detailed to envisage all possible concrete circumstances, typically they leave significant margin for a judgemental element in their application. This judgement is exercised by the banking supervisor, which itself follows, in order to be systematic and even handed, a number of self-established criteria and additional “rules”. In this way, the supervisor becomes an additional source of part of the regulatory framework, although at a different (lower) level than that established by the law.¹

At the global level, banking supervision has undergone a process of clarification and harmonisation in recent years, under the aegis of international coordination bodies – primarily, the Basel Committee on Banking Supervision, or BCBS. Clearer and transparent goals for banking supervisors have been set in order to improve the focus and effectiveness of supervision and to strengthen its democratic accountability. In particular, best practices at the global level today indicate that the goal of banking supervisors should be to ensure the safety and soundness of banking institutions and the stability of the banking system as a whole²; the SSM charter³ incorporates these objectives in its first article. The need for policy action to ensure individual and systemic stability of banks was clarified by a long stream of economic literature, which has demonstrated the existence of *market failures* in the banking activity. Market failures derive from the existence of externalities from banks to the rest of the economy and of safety nets relying, to some extent, on taxpayer funds. These elements generate an incentive to banks to undertake excessive risk, which regulators and supervisors are supposed to control.

Sound and effective banking policies are particularly important in Europe, for several reasons. First of all, banks in Europe perform a very high share of financial in-

¹ See ANGELONI, *Rethinking banking supervision and the SSM perspective*, speech given at the conference on *The new financial architecture in the eurozone*, European University Institute, April 2015, available at www.bankingsupervision.europa.eu.

² As dictated by the first of the BCBS’ core principles for effective banking supervision www.bis.org.

³ See Council Regulation (EU) 1024/2013, called here “SSM Regulation”.

termediation. To illustrate this point, total bank assets in the European Union are over 40% of GDP, compared with, for example, less than 15% in the United States. In Europe, 80% of the funding of non-financial corporations is provided by banks; the corresponding share in the US is around 20%. This reflects the fact that in the US, and in a number of other countries having comparable financial structures, a large part of the financing of investment takes place directly in the financial markets, without intermediation by credit institutions. Second, the existence of a single currency in most European countries creates additional channels of financial contagion across countries, which can give rise to financial instability and adverse feedback loops between public finances and the banking sector. The recent euro area crisis contains several examples; in Greece, for instance, the crisis originated from a fiscal imbalance (the recognition, in 2010, that public finance data had seriously misrepresented the situation of public finances), but quickly evolved into a banking crisis and, in rapid succession, into a monetary crisis involving the euro area as a whole. In Spain, in 2011, the sequence started instead in the banking sector and then spread to the public budget, with similar consequences. In these and similar cases, the absence of centralised banking policies (regulation, supervision and safety nets) contributed to an amplification of the risk and facilitated transmission across borders. One of the consequences of the crisis was to give rise to a setback in the functioning of the single banking market in the euro area, largely as a result of national authorities attempting to protect themselves from contagion by “ring-fencing” banking activities within their national boundaries.

2.2. Following the global financial crisis, the activity of international standard setters such as the Basel Committee on Banking Supervision intensified under the impulsion of the G20. While the first reform of the Basel Accord – known as Basel II and mostly focused on internal risk-based approaches (IRB models) – was accomplished sixteen years after the original Basel I agreement in 1988, the second reform came only six years later, in 2010.

The third Basel Accord is often portrayed as requiring “higher and better capital” from banks. This statement is true, but not sufficient. While the minimum total capital requirement remains at 8% until the end of 2015, just like the former Cooke and McDonough ratios used in Basel I and II, the eligibility criteria and level of “core equity” capital requirements become indeed more stringent. By 2019, additional capital buffers (called “conservation” and “countercyclical” buffers) will effectively increase the capital requirements beyond 8% for large so called “internationally active banks”⁴. But progress was also made on the exposure side of the solvency ratio, where more conservative assumptions and calibrations than in the existing requirements were also introduced, making the framework more risk-sensitive and less inclined to eliminate capital charges for the less risky exposures.

In order to act as a simpler backstop to the solvency ratio, where the underlying risk estimation may rely on complex models, difficult to check and challenge, a non-risk based leverage ratio was also introduced. This complementary tool measures the amount of capital relative to assets and off-balance sheet commitments. Its main difference with the traditional solvency ratio is the absence of risk weights, where all exposures are theoretically included at a grossed-up amount. The Basel III leverage ratio framework was published by the Basel Committee in January 2014, with a view to introducing it as a “Pillar 1” requirement for all banks in 2018.

In addition, based on the observation during the global financial crisis and its aftershocks that banks’ vulnerabilities in the liquidity area could prove as damaging as the lack of high quality capital, two liquidity standards were introduced, and will be fully in force in 2018-2019. The Liquidity Coverage Ratio (LCR) will require high quality liquid assets (cash equivalent and sovereign bonds, typically) to cover net liquidity outflows over a one-month period, while the Net Stable Funding Ratio (NSFR) aims to ensure that the available amount of stable funding exceeds the required amount of stable funding over a one-year period of extended stress.

⁴ See point 12 of the Basel 3 Accord available at www.bis.org.

Overall, the Basel III text provides a consistent framework where each prudential metric captures a specific risk. This Accord therefore constitute a major achievement and innovation in the field of international regulatory cooperation. However, one needs to bear in mind that the Basel agreements have no formally binding status. The actual implementation of the standards depends on the will of each participating country, and the binding provisions enforcing the Basel principles are national laws – or, in Europe, European Union laws.

This is why the onus has been on the European Union, since November 2010, to translate the Basel III standards into European law. Nine Basel Committee members⁵ are European Member States, and the very aim of this forum is to design rules for the large internationally active banks. By contrast, the European Union accounts for more than 8000 banks across its 28 Member States, only a few dozen of which are considered large and internationally active by Basel standards.

Introducing a “maximum harmonisation” framework valid for all EU Member States, on a topic as sensitive as financial regulation, was a steep challenge for European legislators. The European legislative process seemed long – nearly two years from the first European Commission proposal to the final adoption by the European Council in June 2013. However, considering the length and detail of the legal package – more than a thousand pages – as well as the very demanding institutional framework requiring a consensus among the European Commission, the Parliament and the Council, known as “Trialogue”, this package can be considered as having been adopted at record speed. The process benefited not only from the momentum created by high public expectations following the crisis, but also from the urgent need to tackle the banking market fragmentation and national ring-fencing which had burst onto the scene of the public debt crisis in the euro area in 2011.

The dual form of what is today known as the “CRD-CRR package” makes it one of the most innovative pieces of regulation ever produced by the European Union. The prudential regulation of European banks is indeed provided not only by a di-

⁵ Belgium, France, Germany, Italy, Luxembourg, Netherlands, Spain, Sweden and the United Kingdom.

rective, subject to the national transposition of Member States, with a common goal to be achieved, but by freedom in the means used under each national framework. But banks are now also subject to a directly applicable Regulation. The Capital Requirements Regulation contains the bulk of the internationally agreed Basel III Accord and specifies the way in which all prudential ratios shall be complied with, calculated, reported and disclosed.

Despite this impressive background, the package is still incomplete and falls short of the Basel mark in terms of prudence and harmonisation on a number of instances. Being the result of a political compromise, and subject to the legal and operational constraint of proportionality regarding smaller banks or specific business models, the CRD IV often deviates from the Basel III text and allows for some flexibility in the application of the standards. The Regulatory Consistency Assessment Programme (“RCAP”) of the Basel Committee, tasked with the peer evaluation of the national implementation of Basel III within its members, indeed published a report in December 2014 assessing the European framework as “materially non-compliant” to Basel III⁶. Major causes of deviations included the carve-outs to the Basel rule introduced in the European counterparty credit risk framework, namely in the scope of the “credit valuation adjustment” (CVA) charge, and also the more lenient approach to internal models and the flexibility left to supervisors in the treatment of insurance participations within financial conglomerates in Europe.

2.3.⁷ The overhaul on the legislative side was accompanied by an equally broad-ranging revamp on the institutional side. As often in the EU integration process, the path was a gradual one, accomplished in steps, the culmination of which was the launch of the banking union and the SSM. The first moves in this direction started shortly after the creation of the monetary union in 1999. Though the introduction of the single currency was not accompanied by any formal step to centralise

⁶ See www.bis.org.

⁷ This section is partly adapted from a speech given by Angeloni in Madrid in June 2014, available at www.bankingsupervision.europa.eu.

banking policies (regulation, supervision and safety nets) at the European level, a number of observers and policy-makers at the time warned that the new monetary architecture would be incomplete, hence fragile, without at least some tighter coordination of these policies among the members of the euro area⁸. The response to this concern came in the form of three “light” cooperation fora – the so-called Lamfalussy committees –in the areas of banking, securities markets and non-bank intermediaries. These committees had no decision-making power and their activity was limited to exchanges of views and information among national authorities.

A more significant move forward came after the crisis with the transformation, in 2011, of the three committees into permanent agencies. In the banking field, the European Banking Authority (EBA), with its seat in London, was given the task of issuing secondary regulation and technical standards to be applied in all member states. This secondary regulatory layer was intended to give rise to a more homogeneous implementation of the powerful body of European banking law being prepared. The EBA has no supervisory powers over individual banks but has played, since its inception, an important role in bridging the gap between primary banking laws (increasingly European) and the supervisory authorities (exclusively national, until 2014) that were supposed to ensure their application.

In 2012, the developments and aggravation of the euro area sovereign crisis and the aim of breaking the adverse nexus between public finances and banking systems at the national level, which we mentioned above, led to the decision, at the euro area summit of June, to mandate the creation of a single supervisory authority in the ECB. This decision was subsequently complemented by the decision to set up a centralised bank resolution authority, the Single Resolution Mechanism (SRM), responsible for resolving distressed banks supervised by the SSM, making use of a specific resolution fund built-up from contributions from the participating banks.

⁸ See PADOA-SCHIOPPA, *EMU and banking supervision*; lecture at the London School of Economics, 1999, available at www.ecb.europa.eu; BINI SMAGHI - GROS, *Open Issues in European Central Banking*, Palgrave, 2000.

The establishment of the SSM, which in 2014 took over the functions and responsibilities previously carried out by the national supervisors, constitutes the most prominent element of the banking union in terms of both its ambition and its timing (it is the first and so far the only component of the banking union to be completed and operational). The new supervisor, endowed with a genuine European mandate, is already having a significant impact on supervisory policies in the euro area. The rest of this section briefly explains how it works in practice.

The SSM consists of the ECB and the national supervisory authorities, with the ECB acting as decision-maker with responsibility for the effective functioning of the overall system. The ECB has been entrusted by the legislator with an extensive set of micro and macro-prudential powers. Its supervisory remit covers all credit institutions within the scope of the SSM; this means, initially, all banks in the euro area and, subsequently, banks of non-euro area Member States that wish to opt in. In its decisions and operational functions, the ECB is assisted by the national supervisory authorities, which contribute their long-established expertise. Their assistance includes the on-going day-to-day assessment of a bank's situation, participation in supervisory teams, and related on-site and off-site activities.

While the SSM is a single system, with the ECB ultimately responsible for its functioning, different modalities apply depending on the size and systemic importance of the banks.

The ECB directly supervises only those banks that are considered significant because of their size, presence in the national economy or cross-border activities, according to criteria spelled out in the SSM regulation. There are 123 of these banks (in many cases, banking groups including a large number of individual entities), covering over 80% of the assets held by banks in the euro area. All other, less significant banks are supervised on a daily basis by the national competent authorities. The ECB exercises surveillance over their actions through a general oversight framework, based on data and other information received from banks and national authorities. The SSM Regulation stipulates that, should the ECB consider there to be a need to directly su-

pervise a less significant bank to maintain high supervisory standards, it may decide to supervise that bank directly. The list of banks that are deemed significant is published on the ECB's website⁹.

The supervisory processes follow guidelines, specific regulations and a Supervisory Manual approved by the ECB, in conformity with the implementation standards issued by the EBA. Of central importance in this context is the Supervisory Review and Evaluation Process, or SREP, which is the quantified procedure that maps individual risk elements in each bank's balance sheet and business model into individual capital requirements. The SREP methodology was set up by the ECB's supervisory structures and is being used for the first time this year.

Importantly, day-to-day supervision of the significant banks is carried out by specialised groups of supervisors: the Joint Supervisory Teams (JSTs). Their responsibilities include performing the SREP, especially in the part of the process that requires discretionary judgement; preparing the supervisory examination programme and ensuring its implementation; and liaising with national competent authorities where relevant. Each JST consists of experts from the ECB and the national competent authorities of participating Member States, under the overall coordination of the ECB. This close cooperation within the JSTs helps maintain knowledge and understanding of pertinent issues at a national level.

All supervisory decisions are prepared by the Supervisory Board, consisting of a Chair, a Vice-Chair, four representatives of the ECB and one representative of each national competent authority. In total there are now 25 members, all of whom act by law in the interest of the European Union as a whole.

3. As the remaining parts of the banking union are still being shaped, the SSM has a pioneer role in restoring financial soundness and market confidence in the European banking sector, as well as in establishing an effective level playing field in banking supervision.

⁹ See www.bankingsupervision.europa.eu.

3.1. As mentioned above, although the new institutional setting provides a more adequate environment for the performance of supervisory tasks, progress is still needed in order to make banking regulation work in substance. The CRD IV is under constant evolution as national transpositions of the Directive have followed various paces and directions, and parts of the requirements introduced in the “level 1” texts – i.e. the Regulation and the Directive – still need to be further specified in order to become fully operational or harmonised. Against this backdrop, more than a hundred additional regulatory and implementing acts, the so-called level 2 acts, which are binding technical standards elaborated by the EBA and adopted by the European Commission, aim to complete what has come to be known, since 2013, as the single rulebook. This single rulebook allows European banks to compete safely and freely within the European Union.

But even with the addition of level 2 acts, the single rulebook still provides Member States or their supervisory authorities (often referred to as “competent authorities”), or sometimes both, with the possibility to choose whether or how to apply different prudential treatments for banks. Such provisions are called “options and national discretions”, or ONDs. National supervisors should disclose cases in which general options and discretions are exercised, including the way in which they are exercised. The European Banking Authority (EBA) monitors national practices across the European Union and publishes summary tables on its website. Importantly, neither the Directive nor the Regulation discusses the rationale of such provisions or binds Member States to converge; discretion is full and unconstrained within the boundaries specified by legislation.

The SSM Regulation confers supervisory tasks on the ECB with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and in each Member State, with full regard for the unity and integrity of the internal market. Since the operational start of the SSM on 4 November 2014, the ECB has therefore had the right and the obligation to determine

the most appropriate way to exercise the supervisory ONDs for the banking institutions under its direct supervision, replacing in this function the national supervisors. This exercise started as soon as November 2014 with a rigorous assessment of the way each OND had been implemented nationally, the related impact in terms of the level playing field and possible ways to converge in the euro area.

The relevance of this work was confirmed by the comprehensive assessment¹⁰ with regard to the transitional provisions of the CRR/CRD IV for the computation of CET1 capital, as the comprehensive assessment showed that there was very significant variation in the way the ONDs were actually applied across the SSM, sometimes with a material impact on banks (see figure 1). As at 1 January 2014, the total impact of the transitional adjustments on high-quality capital (CET1) across all participating banks amounted to €126 billion, concentrated in Germany (over €30 billion), Spain (about €25 billion) and Italy (over €15 billion). While some of these discrepancies will tend to diminish over the coming years as the transitional arrangements are phased out, considerable variation will remain if harmonisation does not intervene, most notably due to the fact that a large number of ONDs – which were not examined in the comprehensive assessment – are of a permanent nature.

3.2. Focusing on the provisions of the CRR/CRD IV and the LCR Delegated Act¹¹, where a clear and explicit discretionary mandate is given to Member States or competent authorities, the ECB has identified over 150 ONDs. These ONDs allow Member States or supervisory authorities either to choose from alternative treatments (options), or simply not to apply certain provisions (discretions).¹² This heavy presence of

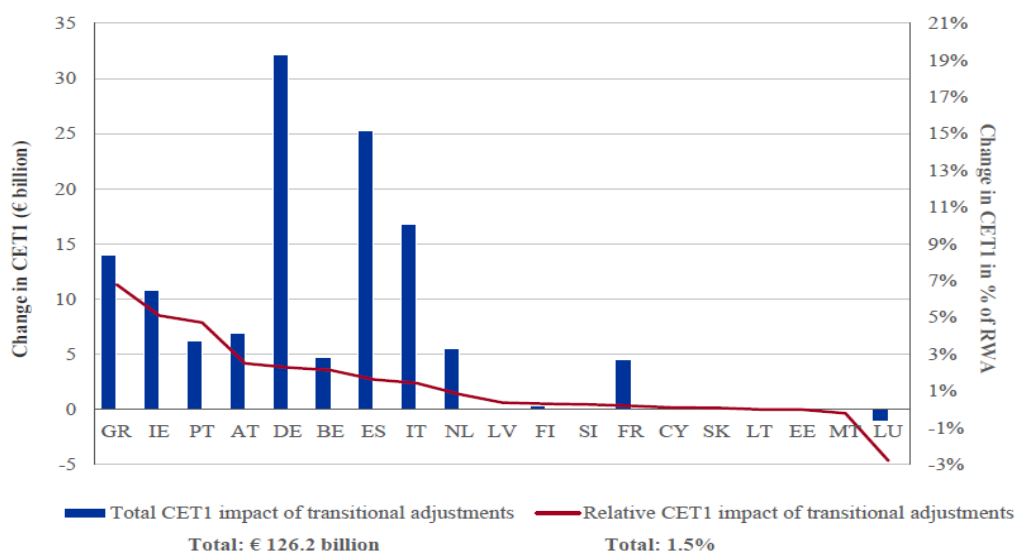
¹⁰ See the *Aggregate report on the comprehensive assessment* on the ECB's website, www.ecb.europa.eu, pp. 130-131.

¹¹ Delegated Acts are legal acts by which EU legislators delegate the power to amend or complete non-essential pieces of EU law to the European Commission. This allows a faster and simpler adoption process than the Trialogue. Article 460 of the CRR specifically empowers the European Commission to specify in detail the Liquidity Coverage Ratio (LCR) requirements. The LCR Delegated Act was adopted in October 2014 and entered into force on 1 October 2015.

¹² Other provisions that de facto allow some flexibility in the exercise of supervisory judgement, but where the discretionary mandate is less clear and explicit, were not included in this exercise. These provisions will be addressed through supervisory practice in the ongoing supervision of banks.

ONDs in the legal framework clearly undermines the level of prudence, comparability and level playing field that Europe has been striving to achieve in the area of banking regulation. A weaker single rulebook indeed creates confusion and room for regulatory arbitrage, which makes the performance of daily supervisory tasks more complex and uncertain.

Figure 1: Impact of transitional arrangements on CET1 ratios in the SSM:



Note: Based on transitional arrangements projected by the banks included in the EBA disclosure template; Calculated based on a fully implemented CRR/CRD IV definition of Common Equity Tier 1 capital including 60% of unrealised gains/losses from Sovereign Exposure in AFS portfolio.

A distinction needs to be made between the ONDs granted to Member States and those granted to supervisors. Since ONDs granted to the Member States (through the national governments) fall beyond the power of the supervisor, the ECB's current work addresses, as a priority, the second category, as this falls under its direct competence.

The CRR/CRD IV level 1 texts contain around 110 supervisory ONDs, and 12 additional ONDs are also laid down in the LCR Delegated Act. The reason for extending the exercise beyond the focus on CRR/CRD IV is that the LCR Delegated Act entered into force in October 2015. It was therefore important to have a single approach regarding the LCR within the SSM by that time.

Among the ONDs granted to the supervisors, a distinction can again be made between general and case-by-case ONDs. For general ONDs, the decision of the supervisor applies to all banks, whereas for case-by-case ONDs, supervisory decisions are bank-specific, but should generally follow harmonised policies in order to ensure an appropriate level of predictability and credibility.

Table 1: Breakdown of ONDs identified by the ECB in the CRD/CRR

Competence	Scope	Some examples	
Competent Authorities [119 ONDs]	All banks (general decision) [44 ONDs]	Transitional ONDs expiring end-2017; Definition of default; exposures to public sector entities; etc.	<div>INITIAL FOCUS: 110 Competent Authority Micro-prudential ONDs</div> <div>+</div> <div>12 ONDs in the LCR Delegated Act</div>
	Case-by-case (individual decision) [66 ONDs]	Waiver on liquidity and capital requirements at solo level; development of common criteria Waiver on Basel I floor; etc.	
	Macroprudential [9 ONDs]		
Member States [36 ONDs]	All banks (general decision) [36 ONDs]	[To be dealt with at a later stage]	

The ONDs of a general nature deal with a variety of prudential matters. They certainly include the above-mentioned transitional ONDs, but there are also general ONDs related to defining treatments in the credit, market and operational risk frameworks.

Some governance and reporting issues are also encompassed in the OND work. However, many of these ONDs are contained in the CRD IV text, which has been transposed into national law. As foreseen in the SSM Regulation, the ECB is generally obliged to apply these national transpositions. As a consequence, for these ONDs, the ECB's policy stances may trigger only partial harmonisation. At the same time, they may indicate potential ways forward for legislators towards full harmonisation.

On the other hand, typical instances of case-by-case ONDs can be found in the various waivers and derogations from the general rule in the regulation. Many of these provisions require the supervisor's assessment of specific requests made by in-

stitutions. Such assessment aims to check that all applicable conditions in the regulation are fulfilled. These conditions can be further specified, either through standards drafted by the EBA and adopted by the European Commission if available, or through internal guidance to the supervisory teams. The ECB then needs to take individual decisions on whether to grant a waiver or derogation for each applicant bank, while ensuring that these decisions are in line with the principles of prudence and equal treatment.

One of the main areas where waivers and other individual exemptions are possible is the cross-border intragroup exposures regime, notably in the new liquidity framework, following the introduction of the LCR from October 2015 onwards. But even the broader capital requirements can be waived at the level of single subsidiaries operating within national borders, in order to focus supervision at the level of the consolidating entity, or a wider subgroup, in order to align supervision with the way institutions effectively operate. Given the heterogeneous practices and the significant impact of such waivers – as they could essentially nullify some prudential requirements at the individual level for cross-border subsidiaries of SSM banks – it was crucial that the SSM developed a common and clear assessment methodology before proceeding with the exercise of these ONDs, striking the right balance between taking into account the higher level of integration of the euro area thanks to the achievements of the banking union on the one hand, and the prudence required due to the fact that this banking union is not yet complete on the other hand.

3.3. In line with the SSM mandate, the guiding principle of the ECB's work on ONDs has been the safety and soundness of banks and the overall banking system; convergence towards the lowest standard would constitute an undesirable outcome in terms of financial stability. In addition, financial integration should be enhanced through equal treatment, thereby ensuring a level playing field, where the same rules should apply for the same business and the same risks. The ECB has also given special consideration to international standards and in particular to the work of the Basel

Committee. Finally, the ECB has taken into account legitimate expectations created by previous decisions by national authorities on the affected banks.

Following these principles, the ECB has conducted a thorough analysis of current national implementation and practices. This analysis fed into the work of a high-level group within the Supervisory Board, in which the ECB and the national competent authorities were represented. The extensive participation of all national authorities from the participating Member States allowed for a beneficial exchange of experience, beyond the mere description of national frameworks. Various sets of supervisory approaches were considered and compared. This dialogue contributed to forming a balanced and consistent policy, in line with the above-mentioned high-level principles, but also drawing as much as possible from commonly identified best practices and methods, in order to ensure that this policy could be effectively enforced in a harmonious way in daily supervisory tasks.

After a thorough analysis of each relevant legislative provision, the ECB's Supervisory Board came to a general orientation on how to treat all 122 supervisory ONDs during the summer, also preparing the appropriate lower-level specifications and internal guidance for this harmonisation to actually take place in day-to-day supervisory decisions. In some cases, further analysis will be needed in order to take into account future European and international developments – at the level of the EBA, the European Commission and the Basel Committee, for instance¹³.

The analysis of current national practices has shown that, in many cases, convergence can be attained rather easily. However, even in cases where national treatments are the result of unquestioned traditions, or when implementation is already fairly harmonised thanks to EBA standards, further specification is often needed in order to ensure that any legal or practical loopholes have been eliminated.

¹³ For instance, all the ONDs related to the scope and method of consolidation for which work is ongoing at the EBA (Article 18 (1)(5)(6) CRR) or Article 467(2) CRR regarding the prudential treatment of unrealised gains and losses on sovereign debt instruments classified as “available for sale” (AFS) for which the adoption and endorsement of IFRS 9 by the European Commission is pending.

Many ONDs have a limited quantitative impact, so the cost of converging is well worth the benefit in terms of overall consistency and simplification of the prudential framework. A more limited number of ONDs are more material and controversial. These ONDs, relating to historical specificities, can result in supervisory leniency and an uneven international playing field. The Basel RCAP exercise identifies some of them as material deviations from the internationally agreed framework. The innovation of the OND project being conducted by the ECB is to address these ONDs in a consistent and pragmatic manner.

In many cases, the solution proposed consists in designing adequate transitional arrangements and review clauses. The progressive phase-in of the new prudential regime can cater for banks' legitimate expectations set by previous national implementation. It can also avoid any potential financial stability disturbance arising from too abrupt a change occurring in substantial parts of the SSM banking system. Last but not least, detailed review clauses help the decision-making on complex and uncertain issues by foreseeing and factoring in the impact that certain economic, institutional or regulatory changes may have on the banking system in the near future.

4. The implementation phase of the OND project is under way: the policy content is being translated into formal legal texts, on which the ECB will launch a public consultation with a view to adopting the whole policy package, foreseeably, in early 2016.

After finalisation of the policy package affecting the banks supervised directly by the SSM, similar provisions will need to be adapted to less significant institutions, for which the ECB does not conduct direct supervision, but which constitute an important stake in terms of financial integration and a level playing field. The contribution and local expertise of national authorities will be crucial in order to ensure a balanced outcome, achieving convergence while complying with the proportionality principle.

Finally, the SSM's contribution to the single rulebook will not be fully effective if not accompanied by an equivalent effort by European legislators regarding ONDs contained in national laws that fall outside the competence of the ECB. These ONDs will continue to apply as the ECB is responsible for enforcing national legislation deriving from Union law pursuant to Article 4(3) of the SSM Regulation¹⁴. ONDs attributed to national legislators as opposed to supervisors have a significant impact in the area of large exposure requirements, for instance, where the exemptions provided in Article 493(3) of the CRR fully overlap with the exemptions to be determined by the supervisors pursuant to Article 400(2) of the CRR. Member State ONDs also include other sensitive topics such as compensation issues and supervisory cooperation between competent authorities.

More broadly, national legislation in the area of prudential supervision can limit the ability of the SSM, as the competent supervisory authority, to act harmoniously across the euro area. There are still uncertainties surrounding the boundaries between the national legislators' powers and the ECB's powers in the area of prudential supervision, as both are empowered to issue instructions to national authorities and regulations directly applicable to significant institutions. An unduly extensive interpretation of the concept of transposition of the CRD IV could bind the ECB to enforce national implementations that are inconsistent with EU law, reducing both the effectiveness and the efficiency of banking supervision by the SSM¹⁵.

The OND project demonstrates the value and potential of the SSM also as a laboratory of supranational coordination in the financial regulation area. While the ECB has a strong mandate regarding the direct supervision of significant institutions and the subsequent decision regarding options and discretions granted to the competent

¹⁴ Article 4(3) of the SSM Regulation reads: "For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options".

¹⁵ See, for example, the recent ECB legal opinion on bank resolution (CON/2015/31), Germany, 2 September 2015, available at www.ecb.europa.eu.

authorities under EU law, the operational viability and the very legitimacy of its policies require the involvement of national supervisors in both the analytical and the decision-making process, as well as consultation of the relevant stakeholder on the final product. Our experience suggests that, in executing projects like the one on ONDs, inclusiveness and transparency, besides being consistent with the SSM statutory rules, are also conducive to more robust and valuable outcomes.

POLITICS AND FINANCE

WITH REFERENCE TO THE EUROPEAN INSTITUTIONAL FRAME*

Mads Andenas** and Ilaria Supino***

ABSTRACT: *The complexity of the European Union poses considerable challenges to both scholars and practitioners who seek for a better understanding of the current European situation. Recent events have shown that the lack of political coordination within the Union cannot be entirely compensated by purely economic agreements. The research reported here analyses how institutional arrangements – either well established or not – influence the effectiveness of policy making at supranational level. Thus, focusing on the EU institutional frame will mean, to us, linking the functioning of the European machine to a correct organizational configuration in which the decision-making process is channelled.*

SUMMARY: 1. Introduction. - 2. Institutional dysfunctions in EU: setting a research agenda. - 3. Institutional theories: guidelines and perspectives ... - 4. (*continued*): the European institutional set-up and the adoption of a formula for a watered down compromise. - 5. The Maastricht Treaty and the institutional typification of the body in charge of the implementation of monetary policy - 6. (*continued*): the supremacy of technical considerations over politics and the failure to achieve substantive equality between member States - 7. Concluding remarks.

1. The governance of the European Union has recently become a core topic in social sciences scholarship. The rapidly growing body of research knowledge on EU

* Although this paper is the result of a joint reflection of the authors, Mads Andenas wrote the paragraphs 1-2 and Ilaria Supino wrote the paragraphs 3-7.

** Mads Andenas is Professor of Law at *University of Oslo* and *Institute of Advanced Legal Studies*. School of Advanced Study, *University of London*. Visiting Professor at *Università La Sapienza of Rome*.

*** Ilaria Supino is PhD candidate at *Luiss Guido Carli University of Rome*.

institutions tries to address crucial issues, which concern the identification of the optimal formula for the definition of a well-functioning institutional frame. The purpose of this analysis is twofold: (a) to find out suitable organisational mechanisms of decision and control for the implementation of appropriate economic policies and (b) to assess whether the tools currently used in Europe can be regarded as meeting the requirement for a concrete reconciliation between political and technical leadership, both considered in their specific value.

The various economic and legal theories that have looked at the governance structures upon which modern states rely, have tended to first evaluate the functionalization of such structures for purposes of social integration and economic development. They have highlighted the need for a complete and balanced correlation between politics and finance; this in order to deepen the level of integration achieved in the European regional context and, therefore, promote forms of effective coordination between EU Member States, especially as regards the possibility of making significantly efficient EU-level organizational structures.¹

That said, we should move on the consideration that «the European Union is without question the most densely institutionalised international organization in the world, with a welter of intergovernmental and supranational institutions»². In fact, despite the lack of unity as a federal state, the EU – as will be better explained below – shows quite precise legal order features (identified in the joint presence of political and executive bodies), which features, with good reason, may legitimize the reference to a well-established paradigm that commonly characterizes modern states. Out of this came the substantial difference between the European Union and other types of intergovernmental organization playing at international level, which pursue aims such as economic and social cooperation (*in primis* the UN), or reconcile multiple in-

¹ See ANDENAS, *Who is Going to Supervise Europe's Financial Markets?*, in Andenas, Mads & Avgerinos, Yannis (eds), *Financial Markets in Europe - Towards a Single Regulator?*, New York, 2003; CAPRIGLIONE, *Mercato, regole, democrazia*, Torino, 2013, *passim* but in details p. 163 ff. where the A. describes the decision-making process in EU stressing out that governance issues involve both technical considerations and political choices.

² See POLLACK, *The New Institutionalism and European Integration*, in Wiener, Antje & Diez, Thomas (eds), *European Integration Theory*, Oxford, 2004, p.137.

terests through the definition of rules «valid in all parts of the global world» but without binding application (think of the Financial Stability Board).³

Many economists and jurists have argued and demonstrated over time as the adequacy and quality of the institutional background that characterizes a certain nation-state contributes to its economic⁴ and financial⁵ development.

Looking closer, the proper functioning of institutions is subject to the satisfaction of certain conditions that enable them to achieve the objectives for which they are responsible. Therefore, in order to identify these requirements, one should move from the simple observation that institutions – understood as *meso-level artifacts* that «possess or demand jurisdiction over the pre-existing national states»⁶ – require, first, an adequate endowment of credible instruments, such that to permit the finalization of their work (*appropriateness*) to the achievement of the objectives to be met. From another standpoint, it should be kept in mind the need that they comply with the provisions enshrined by a compact community of reference, which recognizes their authority and supports their actions (*legitimacy*).⁷

A specific role of European authorities is then identified. The configuration of such authorities – if we try to define it according to the functionality of the overall system – could help to moderate the resilience of individual Member States, providing the ideal container in which to gather the (sometimes divergent) instances of national governments. However, before going ahead with our discussion we should

³ See MONTEDORO, *Economia della crisi, trasformazione dello Stato, governo dei giudici*, in *Rivista trimestrale di diritto dell'economia*, 2009, I, p. 66 ff.

⁴ See, *inter alia*, NORTH, *Institutions and Economic Growth: an Historical Introduction*, in *World Development*, 1989, Vol.17, No. 9, pp. 1319-1332; POSNER, *Creating a legal framework for economic development*, in *World Bank Research Observer*, 1989, Vol. 13, No. 1, pp. 1-11; RODRIK – SUBRAMANIAN – TREBBI, *Institutions rule: the primacy of institutions over geography and integration in economic development*, in *Journal of economic growth*, 2004, Vol. 9, No. 2, pp. 131-165; ACEMOGLU – ROBISON, *The Role of Institutions in Growth and Development*, Working Paper No. 10, 2008, Commission for Growth and Development, Washington D.C.

⁵ See LA PORTA – LOPEZ-DE-SILANES – SHLEIFER – VISHNY, *The quality of government*, in *Journal of Law, Economics, and Organization*, 1999, Vol. 15, No. 1, pp. 222–279; RAJAN – ZINGALES, *The great reversals: the politics of financial development in the twentieth century*, in *Journal of Financial Economics*, 2003, Vol. 69, No. 1, pp. 5-50.

⁶ See HAAS, *The Uniting of Europe*, 1958, Stanford, p. 16.

⁷ See SANTI ROMANO, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto*, Pisa, 1918, *passim*.

declare that we will «favor using the concepts, ideas, and vocabulary of an increasingly generic, ‘institutionalist’ social science, rather than those developed in scholarship on European integration».⁸ The motivation is straightforward. We see the ‘Europeanisation’ process as a highly complex and nuanced phenomenon whose placement within a specific well-defined research subfield is quite hard. Thus, we aim to enhance complementarities between different methodological toolkits in order to promote and enrich a metatheoretical dialogue.

2. On that premise, the reference to the difficulties encountered today in the European regional context, with regard to the relations between EU authorities, leads to explore which are the causes of a clear institutional dysfunction. This, by taking into account either the organizational apparatus that characterizes the political and administrative activities handled by these authorities, or the configurability of possible systemic deficiencies in the prediction and adoption of appropriate forms of connection between the action of purely political bodies and that of those institutions responsible for exercising financial activity.

Generally speaking, we will build our approach on the basic presumption that ‘institutions matter’ since they provide the background arena for the interaction between different players. We defend the argument that institutions themselves have a strong political influence so that «EU outcomes cannot be read [...only...] from an analysis of preferences and relative state power alone».⁹ Moreover, for the purpose of our study, both formal (*i.e.* ‘de jure’ existing, self-enforcing rules) and informal (*i.e.* socially-shared norms and conventions proliferated outside of officially-sanctioned channels) structures are taken into account in order to «incorporate the traditional constitutional-legal notions of governance...[and] bring in the culture of political insti-

⁸ See FLIGSTEIN – STONE SWEET, *Constructing Politics and Markets: An Institutionalist Account of European Integration*, in *American Journal of Sociology*, 2002, Vol. 107, No. 5, p. 1209.

⁹ See ROSAMOND, *Theories of European Integration*, Basingstoke and New York, 2000, p.116.

tutions».¹⁰ It's quite evident that we analyze a reality influenced by the «smoke-filled rooms of politics», as highlighted by the scholarship abovementioned, which considers not only «the development of legal norms» but also «'soft law' and political declarations» as impacting on policy outputs.

The main reason for doing that relies in the fact that the EU puzzle – from our standpoint – should be explained not only in terms of strategic bargaining among agents involved but also considering non-formal mechanisms (such as identity-building, preference formation or deliberative shaping). Particularly, we think that – in order to clarify the problem at issue – we should put under analysis the relational dynamics between Member States as they are laid down in the EU Treaties. Thus, we will put under critical scrutiny the institutional disharmony within Europe, trying to explore the primarily reasons behind it.

Not surprisingly then, we don't assume a specific position within the traditional longstanding rationalist-constructivist debate;¹¹ indeed, we advocate that a frame analysis is needed in order to understand if the current institutional design fits well to the concern of full maximization of Member States' gains and the ultimate goal of common identity formation.

Our argument is sequenced as follows: we posit that through the analysis EU's evolution one should consider the extent to which institutional antecedents impact on the European current configuration; we argue that considering preexisting conditions (in which EU-level organizations have been created) may help in entangling the complex European puzzle because, if we state – as we do – that Europe-building process is an institutional development, we also admit that path dependence, historical

¹⁰ See BULMER, *New Institutionalism and the Governance of the Single European Market*, in *Journal of European Public Policy*, 1998, Vol. 5, No. 3, p. 370.

¹¹ As recently pointed out by Pollack (2005, p. 368) «in place of the traditional neofunctionalist/ intergovernmentalist debate, the 1990s witnessed the emergence of a new dichotomy in EU studies, pitting rationalist scholars against constructivists». For a deeper review of the main tenets of these theories, see also FEARON – WENDT, *Rationalism versus Constructivism: A Skeptical View*, in Carlsnaes, Walter, Risse, Thomas & Simmons Beth A. (eds.), *Handbook of International Relations*, 2002, London, pp. 52- 72; CAPORASO – CHECKEL – JUPILLE, *Integrating Institutions: Rationalism, Constructivism and the Study of the European Union*, in *Comparative Political Studies*, 2003, Vol. 36, No. 1-2, pp. 7-40.

causation as well as political contingencies play a terrific role in explaining internal (dis)functionalities.

3. Several methodological approaches have emerged in order to explore and investigate different facets of the complex EU architecture.¹² Two mainstream theories have been largely dominating the academic study of the European Union: on one hand, *intergovernmentalists*¹³ who argue that nation-states keep maintaining their primacy in shaping the EU decision making process to the extent to which they refrain from losing sovereignty and want to preserve their gatekeeper role; on the other, *neofunctionalists*¹⁴ who state that European integration occurs through the transfer of rulemaking authority to a supranational entity.

Both the abovementioned theoretical toolkits have shown their strong explanatory power in describing ‘Europe-building’ efforts, often also generating contrasting perceptions of the same phenomena. According to the supporters of neofunctionalism – for example – European integration is a continuous cumulative process that is basically independent from member states’ willingness, while theorists of intergovernmentalism attribute greater importance to member states’ preferences, which are supposed to guide (*rectius*: shape) the creation of supranational institutions. The latter, as a consequence, are not seen as autonomous bodies (as suggested by neofunctionalism¹⁵) but, on the contrary, as agents of member states struggling to not lose their sovereignty.

¹² For a more extended review, see WIENER – DIEZ, *European Integration Theory*, Oxford, 2004.

¹³ See HOFFMANN, *Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe*, in *Daedalus*, 1966, Vol. 95, No. 3, pp. 862-915; MORAVCSIK, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, in *Journal of Common Market Studies*, 1993, Vol. 31, No. 4, pp. 473-524; MILWARD, *The European Rescue of the Nation-State*, London, 2000; TOSIEK, *The European Union after the Treaty of Lisbon - Still an Intergovernmental System*, paper presented at Fourth Pan-European Conference on EU Politics, ECPR Standing Group on the EU, Latvia, September, 2008; CINI, *Intergovernmentalism*, in Cini, Michelle & Borragán, Nieves Pérez-Solórzano (eds), *European Union Politics*, Oxford, 2013.

¹⁴ See HAAS, *Regionalism, Functionalism, and Universal International Organization*, in *World Politics*, 1956, Vol. 8, No. 2, pp. 238-263; ID, *Beyond the Nation State: Functionalism and International Organization*, Stanford, 1964; NIEMANN – SCHMITTER, *Neofunctionalism*, in Wiener, Antje & Diez, Thomas (eds), *European Integration Theory*, Oxford, 2009.

¹⁵ Here we are using the term ‘neofunctionalism’ in a very broad sense, including under its label all the contributions which build on or relate to the Ernst Haas’s (1958) seminal work.

Put simply, the intergovernmentalist school revindicates the resilience of the nation-states arguing that EU institutions derive from the algebraic sum of the domestic political willingness that – based on the respective individual bargaining powers – are strategically juxtaposed. Accordingly, who emphasizes only functional spillovers designed to augment the process of European integration (*i.e.* functionalist scholars) through the transfer of additional authority to be pooled at EU level, fails to acknowledge the dominant role of national interests in modelling the overall EU scenario.

Nonetheless, by relying upon the prominent idea that integration implies the mere convergence of domestically determined interests toward the EU-level bargaining table, intergovernmentalists may run the risk to underestimate the relevance of institutions, *i.e.* the crucial role of those supranational actors to which national authority is delegated. It follows that the *agere* of EU institutions has not become fully independent from domestic requests.

It is clear, therefore, that these two ‘grand theories’ have been extensively exploited or revised by numerous scholars who, in turn, have provided more or less incisive counterarguments to expose flaws in them.¹⁶ There is no doubt, however, that – among the middle-range theories of EU integration – *institutionalism* provides good insights (and critiques) of both neofunctionalist and intergovernmentalist approaches.

That said, we claim that an institutional approach represents a privileged lens through which to view EU’s dynamics and evolution. However, as previously pointed out, for the purpose of our research we will not build upon a specific variant – namely rational choice,¹⁷ historical,¹⁸ sociological or constructivist¹⁹ – of institutionalism but

¹⁶ See, among the others, CAPORASO – KEELER, *The European Union and Regional Integration Theory*, in Rhodes, Carolyn & Mazey, Sonia (eds), *The State of the European Union: Building a European Polity?*, London, 1995. In their systematic review, the Authors call for a renewed attention to be paid to middle range models in order to overcome the traditional (and definitely past) predominance of grand theories in describing policy integration.

¹⁷ Largely related to rational choice economics, this type of institutionalism sees individuals as predominantly rational and able to manipulate and change institutional infrastructures in order to accomplish their selfish goals. Thus, economic players are ‘interest-maximizers’ who, driven by instrumental rationality, try to establish and

instead we will pick up (and re-elaborate) all the useful insights that such plural versions of the same theoretical rubric are able to produce.²⁰

Institutional scholars rest on the premise that institutions do matter to the extent to which they permit (and guide) the interaction between different actors as well as the viability of the economic exchange. They define the ‘rules of the game’ and shape the actions of involved players, whose moves (if jointly considered) determine the final outcome.²¹

According to the above-mentioned approach, institutions – *if* efficient – foster social exchange and enable better human interaction by lowering transaction costs. If stable and ‘Pareto-efficient’, – as some (rational) institutionalists argue – institutions are able to channel and structure individuals’ interactions, making them more fruitful and even developed.

However, as correctly pointed out elsewhere, «institution-building episodes typically take place in preexisting social arenas», so that valid institutional outcomes predominantly stem from the initiative of some organizations that want to «structure their environments» and «modify [...existing...] rules and procedures in order to

design a formal and durable design of institutions. On that point, see SHEPSLE, *Rational Choice Institutionalism*, Harvard University, accessed on August 2015, scholar.harvard.edu, 2005.

¹⁸ Historical institutionalists challenge the rational choice modeling by claiming that institutions (a) tend to rest sticky over the time and (b) individuals cannot always overcome ‘path dependent’ institutional thresholds because of the *lock-in* effect; see THELEN – STEINMO – LONGSTRETH, *Structuring Politics: Historical Institutionalism in Comparative Politics*, New York, 1992; PIERSON, *The path to European integration: A historical institutionalist analysis*, in *Comparative Political Studies*, 1996, Vol. 29, No. 2, pp. 123–63; ID., *Politics in Time: History, Institutions, and Social Analysis*, Princeton, 2004; HALL, *Historical institutionalism in rationalist and sociological perspective*, in Mahoney, James & Thelen, Kathleen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power*, Cambridge, 2010, pp. 204 – 223.

¹⁹ This approach does benefit from sociological thinking: both formal and informal conventions are taken into account when exploring EU’s evolution. See RISSE, *Social constructivism and European integration*, in Wiener, Antje & Diez, Thomas (eds), *European Integration Theory*, 2004, Oxford, pp. 159–176; WIENER, *Constructivism and sociological institutionalism*, in Cini, Michelle & Bourne, Angela K., *Palgrave Advances in European Union Studies*, Basingstoke and New York, 2006, pp. 35–55; FAVELL, *Euroclash: Towards a sociology of the European Union*, in *European Journal of Sociology*, 2008, Vol. 49, No. 3, pp. 495–501.

²⁰ See HALL – TAYLOR, *Political Science and the Three New Institutionalisms*, in *Political Studies*, 1996, Vol. 44, No 5, pp. 936–57; JUPILLE – CAPORASO, *Institutionalism and the European union: Beyond international relations and comparative politics*, in *Annual Review of Political Science*, 1999, Vol. 2, pp. 429–44; ASPINWALL – SCHNEIDER, *The Rules of Integration: Institutional Approaches to the Study of Europe*, New York, 2001.

²¹ See both NORTH, *Institutions, Institutional Change, and Economic Performance*, Cambridge, 1990 and TSEBELIS *Institutional analysis of the European Union*, European Communities Studies Association Newsletter, 1999.

structure the ongoing interactions of diverse sets of actors».²²

Building on that presumption, we can argue that the proper functionality of institutions is strictly dependent upon the *unitary* feature of the context in which they are inserted and built up; in other words, institutions to be effective require that environmental surroundings are not socially and politically fragmented. Otherwise, both coercive and normative processes put in place by institutions will lead to rather divergent social outcomes.

Of course, if we apply our overarching argument to the current situation of Europe, we can easily conclude that EU's supranational institutions are not completely grounded in a (political) unitary terrain and this implies the malfunctioning of the organizational 'machine' due to the fact that an institutional design should reflect one community, one type of membership, one unique social identity. A confirmation of these considerations is the reference to the current difficulties (detectable within the EU) to find points of agreement in the reconciliation of opposing interests or adequate solutions to the many problems (not purely economic ones) presently on the bargaining table.

4. The institutional architecture of EU has shown to be a constantly evolving organism, subjected to incremental variations and alternative periods of continuity and change.²³

As widely acknowledged, the Union's institutional construction relies upon a designated group of three institutions (*i.e.*, the Commission, the Council and the Parliament) which represents the so-called 'institutional triangle'.²⁴ In exercising their

²² See FLIGSTEIN – STONE SWEET, *supra*, p. 1211.

²³ See FABBRINI, *Alternative Views on the European Union: Which Institutional Architecture?*, in Piattoni, Simona (eds), *The European Union: Institutional Architectures and Democratic Principles in Times of Crisis*, Oxford, 2015, available at papers.ssrn.com.

²⁴ See on this point CAPRIGLIONE, *Mercato regole democrazia. L'UEM tra euroscetticismo e identità nazionali*, Torino, 2013, p. 151; in order to better evaluate the pictured institutional frame see, *inter alia*, WEILER, *Il sistema comunitario europeo: struttura giuridica e processo politico*, Bologna, 1985; SHAWJ, *Law of the European Union*, Basingstoke, 2000; POCAR, *Commentario breve ai trattati della Comunità e dell'Unione europea*, Padova, 2001; TIZZANO, *Trattati dell'Unione e della Comunità*, Milano, 2004; MENGIOZZI, *Istituzioni di diritto comunitario e dell'Unione europea*, Padova, 2006; CRAIG, *Institutions, Power and*

decision-making powers under the EC Treaty, these bodies interact according to a ‘community method’ that – using the words of the Commission itself – «provides a means to arbitrate between different interests by passing them through two successive filters» represented by the «general interest at the level of the Commission» and the «democratic representation, European and national, at the level of the Council and European Parliament» being «together the Union’s legislature».²⁵

More in details, the Commission is the body in EU polity that typically undertakes legislative initiatives and makes policy proposals. Such proposals are then made effective by the other organs of the triangle.

As a matter of fact, the Council of the EU underpins an intergovernmental feature and primarily represents national parties. It has both legislative and executive powers and decides in terms of budgeting, common foreign policy and international agreements. Its agenda is set by the European Council, which is composed by the heads of state and government of the EU who decide together upon relevant common initiatives.²⁶ This often implies that lines imposed by member States prevail and participants at the Council complement their national allegiances rather than supra-national interests. Therefore, territorial cleavages persist at EU level and may undermine the proper functioning of the concert system and impede the ordinary adoption of EU measures.

As one might expect, the power to initiate legislation is given to an independent (but unelected) body – *i.e.* the Commission – with the aim of ensuring the continuity of the EU machine; this body operates autonomously its power in order to avoid *empasse* situations, that can be potentially caused by the typical shortcomings

Institutional Balance, in Craig, Paul, & de Burca, Grainne (eds), *The Evolution of EU Law*, Oxford, 2011, chap. III; DECARO, *Integrazione europea e diritto istituzionale*, in *Elementi di Diritto pubblico dell'Economia*, curated by Pellegrini, Padova, 2012, p. 49 ff.

²⁵ See EUROPEAN COMMISSION, *European Governance. A White Paper*, COM(2001) 428 final, 25 July 2001, p. 8.

²⁶ Remember – for example – that the creation of the Single Supervisory Mechanism derives from the initiative of the Council, which was then followed by the regulation proposed by the European Commission in September 2012 for the establishment of the SSM; see EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament and the Council: A roadmap towards a banking union*. COM(2012) 510 final, September, 2012.

of intergovernmental institutions. In fact, thanks to its structure basically not based upon territorial criteria, the EC is supposed to have the ability to enforce EU-centred (instead of state-centred) order and encourage cooperation.

Eventually, the European Parliament's standing in the 'triangle' is notably more limited because – even though it is actively involved in the co-decision process – it continues (or at least seems to continue) to have a much-reduced role in the overall 'congress' dynamics, notwithstanding its incrementally enhanced powers thanks to the Treaty of Lisbon.²⁷

According to the outlined scenario, the current institutional set up of EU is rooted in a sound logic insofar mutual interaction among entities is granted. As a consequence, the framework outlined above takes the formation of rules back to «an *agreement* between involved parties, in which... emerges the ultimate goal of overcoming past ambiguities, pushing the European system towards new forms of balance».²⁸ However, several events occurred in the last decade – first of all, the 2008 financial distress – have shown numerous fragilities in the system, which has displays some dysfunctional problems.

As a consequence, an issue has become crucial: to understand why some EU institutions (those related to financial activity) have a better performance and why some others (the political ones) are even more and more marginalized.

5. The foregoing considerations find confirmation if we analyse the way in which the Maastricht Treaty – which set up the EMU – has been implemented. Indeed, the creation of the European Central Bank, in charge of managing the 'single currency', was made according to the traditional institutional paradigm: the ECB is positioned in the centre of the Eurosystem and is provided with a set of prerogatives

²⁷ See, among others, KREPPEL, *The European Parliament and Supranational Party System. A Study in Institutional Development*, Cambridge, 2002; MAURER, *The Legislative Powers and Impact of the European Parliament*, in *Journal of Common Market Studies*, 2003, Vol. 41, No. 2, pp. 227-247; VOERMANS, *The Birth of a Legislature: The EU Parliament after the Lisbon Treaty*, in *The Brown Journal of World Affairs*, 2011, Vol. 17, No. 2, pp. 163-180, available also at papers.ssrn.com.

²⁸ See CAPRIGLIONE, *Mercato regole democrazia*, *supra*.

that locate it immediately outside and above the individual member States which contribute to its formation.

Being specified its key objectives (price stability, sound public finance, interest and exchange rates setting, advice on banking), which appear to be substantially delimited (so that the ECB cannot be immediately placed in a context of central banking), no room for doubts is left on the intent of the European regulator to provide the Bank with a well-defined institutional typing – also through the attribution itself of a precise legal position. In particular, the EC Treaty – while defining a specific legal personality (Art. 107) – recognises to the European Central Bank a full independence in performing its duties, clarifying that neither the ECB nor any member of its decision-making bodies shall take instructions from Community institutions, from any government of a Member State or from any other body (Art. 108). Additionally, the ECB is also entitled to make regulations, formulate recommendations or deliver opinions; this power is integrated by the ability to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations or decisions (Art. 110).

According to an agency theory perspective, the European Central Bank can be conceptualized as an agent ‘appointed’ by a collective principal (*i.e.* member States) that delegate to it the responsibility for formulating and implementing monetary policy.²⁹

However – as correctly underlined elsewhere – the ECB is an *atypical* institution vis-à-vis other EU supranational actors.³⁰ In fact, features such as a narrower and more precise mandate (compared to other EU institutions), a greater independence from political interference and a maximized operational autonomy cast doubt on the possibility to punctually define ECB’s fit into the EU’s institutional architecture.

The empowerment of ECB as an ‘independent specialized organization of

²⁹ See, *inter alia*, ELGIE, *The politics of the European Central Bank: principal-agent theory and the democratic deficit*, in *Journal of European Public Policy*, 2002, Vol. 9, No. 2, pp. 186-200.

³⁰ See HODSON, *Governing The Euro-Area in Good Times and Bad*, Oxford, 2011, *passim*.

Community law³¹ further shows its institutional distance from other agents playing at EU level. Thus, if we apply our institutional logic, we can conclude that such remoteness and autonomy within the overall established order allow the ECB to be effective in accomplishing its required tasks.

Consequentially, several scholars agreed in qualifying ECB as a body empowered to act autonomously, being required to play a role of primary importance within the overall Union's scenario.³² It's clear how, having taken the important decision of «transferring the *monetary power* from the Member States individually» to the European Central Bank, countries inside the Community understood the need for an institutional form capable of detaching from any particular national bound the subject intended to be the «holder of monetary sovereignty and solely responsible for the policies implemented».³³

On the basis of these considerations, it can be explained why, more recently, in the presence of a financial crisis – which, as you all know, has had a significant negative impact on the entire EU giving rise in strong Eurosceptic reactions that have questioned the continuity of the Union itself – the ECB has been able to fulfil its mis-

³¹ See ZILIOLI – SELMAYR, *The European Central Bank: An Independent Specialized Organization of Community Law*, in *Common Market Law Review*, 2000, Vol. 37, No. 3, pp. 591- 643.

³² See, among the others, PAPADIA – SANTINI, *La banca centrale europea*, Bologna, 1998; BERK, *Banca centrale e innovazione finanziaria. Una rassegna della letteratura recente*, in *Moneta e credito*, 2002, p. 345 ff.; AMTENBRINK – DE HAAN, *The European Central Bank: an Independent specialised Organization of community Law. A Comment*, in *Commercial Mararket Law Review*, 2002, Vol. 39, p. 65 ff.; VELLA, *Banca centrale europea, banche centrali nazionali e vigilanza bancaria: verso un nuovo assetto dei controlli nell'area dell'euro?*, in *Banca e borsa*, 2002, I, p. 150 ff.; ID., *La nuova banca centrale europea*, in *www.lavoce.info* 18/9/2012; PELLEGRINI, *Banca Centrale Nazionale e Unione Monetaria Europea*, Bari, 2003, chap. VI; VV. AA., *La banca centrale europea*, curated by Belli and Santoro, Milano, 2003; MALATESTA, *La Banca centrale europea*, Milano, 2003, *passim*; ID., *Unione monetaria, banca centrale europea e allargamento dell'unione europea*, *Liuc Papers*, n. 148, 2004; LODDO, *Banca centrale, vigilanza e efficienza del mercato del credito*, Milano, 2007; VILLANI, *Istituzioni di diritto dell'Unione Europea*, Bari, 2008; BINI SMAGHI, *Going Forward: Regulation and Supervision after the Financial Turmoil*, in *Paolo Baffi Centre Research Paper* no. 2009-47; PITRUZZELLA, *Austerità finanziaria verso crescita economica nel dibattito dell'Eurosistema*, in *Quaderni costit.*, 2012, p. 427 ff.

³³ See HOWARTH – LOEDEL, *The European Central Bank: The New European Leviathan?*, Basingstoke, 2005; CAPRIGLIONE, *Manuale di diritto bancario e finanziario*, Padova, 2015, p. 103, and, previously, UME e riforma del 'sistema banca centrale': *l'Ufficio Italiano dei Cambi tra passato ed avvenire*, in *Banca borsa e titoli di credito*, 1997, I, p. 684 ff.; ID., *Moneta*, voce in *Enc dir*, III Aggiornamento, Milano, 1999, p. 761 ff.

sion, by using *unconventional* operational forms³⁴ and tackling with determination and energy the serious situation of *liquidity risk* caused by the financial turbulence.³⁵

In a difficult moment in European history, the ECB stands as a bulwark of the Eurosystem's stability. In a context – in which, as was pointed out in the scholarly doctrine, it was not possible to make a proper «degree of financial integration ... since the mechanisms for cooperation and coordination between national authorities are unfit to ... achieve homogeneous models of control over economic activities within the Union»³⁶ – that institution, thanks to its structure, managed to disengage itself from particularism and Member States' interferences, demonstrating that, if an organizational formula is appropriate to the tasks to be performed, then it is possible to pursue the objectives which the regulator has connected to the establishment of the institution itself.

This also explains why – following the definition of a new European financial framework, constituted by a *network* of authorities responsible for supervision, the so-called SEVIF³⁷ - European leaders (wanting to further strengthen the unity of the supervision over the banking activities) decided to introduce to a «single supervisory

³⁴ See EUROPEAN CENTRAL BANK, *The ECB's response to the financial crisis*, in *Monthly Bulletin*, October 2010, available at www.bancaditalia.it; LENZA – PILL – REICHLIN L., *Monetary policy in exceptional times*, in *Economic Policy*, 2010, Vol. 25, No. 62, pp. 295–339; CECIONI – FERRERO – SECCHI, *Unconventional Monetary Policy in theory and practice*, in *Bank of Italy Occasional Papers*, 2011, n. 102; BUITER, *The role of Central Banks in Financial Stability*, CEPR Discussion Paper No. DP8780, 2012; MICOSSI, *The changing task of the ECB*, in *VOX CEPR's Policy Portal*, July 2015, available at www.voxeu.org. More specifically on the QE, see (among others) GIAVAZZI – TABELLINI, *Effective Eurozone QE: Size matters more than risk-sharing*, in *VOX CEPR's Policy Portal*, January 2015, available at www.voxeu.org.

³⁵ See DE GRAUWE, *The European Central Bank: Lender of Last Resort in the Government Bond Markets?*, in *Oxford Journals Social Sciences CESifo Economic Studies*, 2013, Vol. 59, No 3, p. 520 ff.; here the A. underlines that the actions undertaken by ECB were designed «to prevent countries from being pushed into bad equilibria by self-fulfilling fears of liquidity crises in a monetary union».

³⁶ See PELLEGRINI, *L'architettura di vertice dell'ordinamento finanziario europeo: funzioni e limiti della supervisione*, in *Rivista trimestrale di diritto dell'economia*, 2012, I, p. 54.

³⁷ See, *inter alia*, FERRAN, *Understanding the New Institutional Architecture of Eu Financial Market Supervision*, in *Legal Studies Research. Paper Series*, University of Cambridge, Faculty of Law, n. 20/2011, p. 34 ff.; LEMMA, *La riforma degli intermediari non bancari nella prospettiva di Basilea III*, in *Rivista elettronica di diritto, economia, management*, 2011, n. 1, p. 185; GUARRACINO, *Supervisione bancaria europea (Sistema delle fonti e modelli teorici)*, Padova, 2012, *passim*; CAPRIGLIONE, *Globalizzazione, crisi finanziaria e mercati: una realtà su cui riflettere*, in *Concorrenza e mercato*, 2012, p. 867 ff.; TROIANO, *Interactions Between EU and National Authorities in the New Structure of EU Financial System Supervision*, in *Law and Economics Yearly Review*, n. 1/2012, p. 104 ff. available at www.laweconomicsyearlyreview.org.uk; ID., *L'architettura di vertice dell'ordinamento finanziario europeo*, in VV. AA., *Elementi di diritto pubblico dell'economia*, curated by Pellegrini, Padova, 2012, p. 541 ff.

mechanism for the euro area» and thus create a European Banking Union, in which the ECB is involved in a decisive way.³⁸ The assignment to the ECB of supervision tasks over credit institutions finds its regulatory legitimation in the provisions of Article 127 TFEU (which mentions that the Council may decide unanimously, after consulting the European Parliament and the Central Bank itself, to confer specific tasks on the ECB concerning prudential supervision over banks); this provides additional evidence of the fact that European policy makers, when deciding on financial issues, have respected the relationship *organization/function*, in line with the guidelines of the institutionalist theory that sees in the appropriate 'structural' typification of institutions a prerequisite for the achievement of the objectives they are asked to pursue.

6. On the basis of the above, it is clear that in the European context there is an asynchronous development of the political institutions compared to technical ones. In fact the bodies of the so-called 'institutional triangle', having failed to obtain a structural configuration suitable for the performance of their own functions, struggle to reach their ideal dimension. This further implies that such a functional undersizing negatively impacts on relational options and, consequently, prevents these bodies from converging on a common political direction (and, more generally, on a socio-political unity as the one hypothesized by the EU's founding fathers).³⁹

Obviously, we are in presence of a perverse vicious circle in which the relationship *function/organization* does not occur within EU's bodies; such a missing, if on one hand is *cause* of a limited political action (and, therefore, affects the creation of a unified European state), on the other is *effect* of the difficult placement of such insti-

³⁸ See on this point, among the others, WYMEERSCH, *The European Banking Union. A first Analysis*, Universiteit Gent, *Financial Law Institute*, WP, 2012-07, October 2012, p. 1; VV.AA., *Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri*, Proceedings of the conference organised by Bank of Italy, Rome, 16 September 2013, in *Quaderni di ricerca giuridica della Banca d'Italia*, n. 75; SARCINELLI, *L'unione bancaria europea e la stabilizzazione dell'Eurozona*, in *Moneta e credito*, 2013, p.7 ff.; CAPRIGLIONE, *European Banking Union. A challenge for a more united Europe*, in *Law and Economics Yearly Review*, 2013, I, p. 5 ff. available at www.laweconomicsyearlyreview.org.uk.

³⁹ See PADOA-SCHIOPPA, *Europe, a civil power. Lesson from EU experience*, London, 2004, *passim*.

tutions within a level playing field, which field is needed for the full expression of their powers.⁴⁰

Conversely, institutions performing economic and technical tasks – as already mentioned in the preceding paragraph – do fit better into the European context (think, again, to the major role of ECB). This results in ‘fettering’ political coordination as compared to monetary policy implementation; such distortion is mainly due to inadequate coordination forms in the EU and to perhaps unconvinced willingness to participate in the process of integration for purposes other than purely economic ones.⁴¹

This, of course, poses new obstacles to economic and legal convergences, leaving substantially unchanged the original gap between the Member States. As a result, some inequities (especially between North and South Europe) still remain and it becomes possible to some EU countries reap benefits from this circumstances. More particularly, the abovementioned institutional limits determine diverse growth patterns that give the advantage to economically stronger countries, able to exert then an attractive *vis* on flight capitals from countries with financial difficulties.⁴²

Even though confined in the areas defined above, the difficult integration between political and technical leadership cannot be considered as a factor impeding the evolution of the Europeanization process started more than half a century ago. Eventually, a turning point in the system now described would occur as a common sense of belonging matures, cultural divergences diminish and historical events show the urgency to reach a reunification of the peoples of our old continent.

⁴⁰ For an organizational theory of institutions, see COMMONS, *A Sociological View of Sovereignty*, in *American Journal of Sociology*, 1899, Vol. 5, No. 1, pp. 1-15; ID., *Institutional Economics*, in *American Economic Review*, 1936, Vol. 26, No. 1, pp. 237–249.

⁴¹ See SAVONA, *L' esprit d'Europe. Come recuperarlo riformando le istituzioni*, Soveria Mannelli, 2007, *passim*; CAPRIGLIONE – TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, Torino, 2014, p. 34; DI TARANTO, *L'Europa tradita*, Roma, 2014, *passim*.

⁴² See CAPRIGLIONE – SEMERARO, *Crisi finanziaria e dei debiti sovrani. L'Unione Europea tra rischi ed opportunità*, Torino, 2012, p. 118, where the Authors clarify that some countries (such as Germany) have been able to borrow at close to zero interest.

7. In the light of the foregoing, we can formulate some conclusions concerning the issue that we intended to address in this inquiry. The current European situation – characterized by a notable difficulty in carrying forward the process of economic integration and making it converge toward a even wider political union (notwithstanding its constitutive formula) – gives a clear demonstration that those outcomes resulting from a functionalist (or ‘by small steps’) approach are quite limited in their scope if the surrounding institutional frame is not appropriately structured, *i.e.* sufficient to serve the purpose for which it was been set up.

A maladjusted organization – as correctly emphasized by the scientific literature – not allowed Europe to create the amalgam necessary for consistently pooling the diverse decision making mechanisms of the Member States and, therefore, to build a ‘common house’, in which different countries were allowed to sit down in equal position in order to achieve long-run growth and better overall balancing.

At political level, a common *agere* oriented to supranational interests failed to take place, being it a basic requirement for overcoming individualisms and national egoisms aimed at protecting (if not giving priority to) domestic instances.

From there we see a reality that appears increasingly reluctant to embrace a logic of ‘staying together’ orientated towards common well being; this is also confirmed, firstly, by the lack of harmony in facing and solving common problems (just think – for instance – to the problem of irregular immigration), and secondly, by the rise of populist eurosceptic trends basically contrary to the idea of a ‘united Europe’.

It is hard to say how present difficulties that challenge the persistence itself of the EU will be surmounted, nor do scholars should go beyond the simple analysis of phenomena to be explored. Maybe, some input for change may come from traumatic events, which events will renew the need to counter, with joint forces, dangers or threats (such as, for example, terrorism) coming from outside and appearing destined to involve all European peoples.

EBU AND THE NATIONAL CREDIT AUTHORITIES' STRUCTURE:

THE ITALIAN CASE.

THE ROLE OF CICR IN THE NEW INSTITUTIONAL CONTEXT

Marco Sepe*

ABSTRACT: *The European Banking Union, together with the implementation of CRD4, started an historic transformation phenomenon on banking prudential supervision, that inevitably translated into a radical restructuring process of the national legal systems in order to adapt to the community standards and to the structure of the national authorities.*

Oppositions to this adjustment were expressed both by the national technical authorities and by the politics, resulting, among other things, in institutional structures and internal regulations that still leave room for different interpretation aiming at restoring national centrality.

An example, within the Italian institutional landscape, is the position of the CICR, that the CLB continues to identify among the credit authorities and which is still in charge of the “high supervision in the field of credit and protection of savings”. This work analyses the possible meaning of keeping up that authority, in a context of an eventual renewed intervention of the national politics within this sector.

SUMMARY: 1. Introduction. – 2. EBU's governance framework: problematic profiles. – 3. The Italian case: failure to adapt to the regulation and configurable institutional discrepancy. - 4. The position of the CICR: political role and functional limitations. - 5. *(continued)*: the uncertainty of its final end. - 6. Conclusions.

1. The establishment of the European System of Financial Supervision (ESFS) and, then, the introduction of the European Banking Union¹ led to a significant in-

* Marco Sepe is Full Professor of Law and Economics at *Università Unitelma Sapienza* of Rome.

crease of the level of complexity and articulation of the financial/banking supervisory system, as well as an exponential growth of the primary and secondary level² sources of law.

To an increase of the sources, corresponds an increase of the authorities, with powers not always well defined and at times overlapping, each of which is searching for its own identity, in a constantly changing system, not yet consolidated, ranging from the conservation of old prerogatives to the emergence of new ones.

In this context jurists seem to get lost, struggling to reunite and organize the system, or eventually giving up , by focusing on the mere phenomenological description of the rules and of the power relationships between authorities.

2. Indeed, to a first approximation, starting from common data, the system, although being multi-levelled, appears to be coherent and homogeneous. Macroscopically, at European and National level, one can identify:

- a) the three-way division of the financial system into three sectors (banks, securities/markets and insurances)

¹ As known, the Union is established on the three pillars of: banking supervision (attributed to Single Supervisory Mechanism- SSM), crisis resolution (competence of Single Resolution Mechanism – SRM) and deposit guarantee mechanism.

² In order to give a numerical consistency, in reference to the SSM, the first level regulatory framework, constituted by Directive 2013/36/EU (so called CRD4) and the linked EU Regulation no. 575/2013 (CRR), consists in 686 articles; less consistent, 231 articles, (so to speak) is the first level regulatory framework at the base of the SRM, constituted by Directive 2014/59/EU (establishing a framework for the recovery and resolution of credit institutions and investment firms) and by EU Regulation no. 806/2014 (*establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund*); only 23 articles are contained in the Directive 2014/49/EU concerning deposit guarantee schemes . Indeed, over 940 dispositions that replace an existing legislation subject of many “recasts”, to which, always at primary level, are added EU Regulation no. 1024/2013 which attributed to ECB the role of prudential supervision authority (34 articles) and the EU Regulation no. 1093/2010 which establishes the EBA (82 articles), nonetheless a muddle of dispositions of secondary level, consisting in: a) delegated acts (directives or regulations) of the European Commission; b) technical implementing measures adopted by the European Commission with the assistance of the European Banking Committee; c) regulations (among these of special importance is the Regulation no. 468/2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities) and decisions of the European Central Bank; d) orientations and recommendations of the EBA .

b) the presence of three authorities, at supranational (EBA, ESMA and EIOPA) and national (B.I., CONSOB and IVASS) level, with transversal coordination forms;

c) the attribution of tasks and powers substantially 'equal' for each one of the areas of competence to the supranational authorities, as it emerges from the almost identical lexical structure of articles 8 and 9 of their establishing regulations.

d) substantially similar sites for the analysis of macro-prudential issues (CERS and CSSF);

e) three pieces of legislation, related to each of these areas; subjects of a recent revision at European level, with a preference for using instruments for the direct application in the national systems, such as regulations and self-executive directives, all with the objective to realize the "single rulebook" that the De La Rosiere Group in 2009 has identified as a necessary requirement to reach an single financial and capital market; to these legislation pieces correspond, within the Italian system, three Consolidated Acts launched in 1993, in 1998 and in 2005.

Therefore, our system could be considered to be ordered , uniform and with a regulation and structure that replicate the European standards (or vice versa that place the national articulation at European level).

However, there are many elements, referable to the legislative sources³ and to the authority system, that raise doubts on the harmony and homogeneity of the ensemble.

³ For that concerning sources, just to quote some of the elements:

- the absence of a common language, with the consequence that all the normative measures must be translated in 28 languages, all considered official, by translators who are not jurists, with the possibility of misunderstandings, if not discordances, among the different versions;
- the normative overproduction, even for detail aspects, with measures that at times betray their function: regulations that more conveniently should be directive (considering their general tenor, due to the need to obtain the necessary approval);
- the possibility that each of the Countries, on specific disciplines and questions, exercise "opt out" (for example Great Britain and Denmark have not opted into CSMAD Directive no. 2014/57/UE, that aims at introducing a minimum homogeneous level of penal repression for the more relevant market abuse

In reference to the Authorities, among the most relevant elements that damage the uniformity and symmetry of the structure, or that however produce doubts, we can find:

- in the banking sector the presence of the “moloch” represented by the ECB which has prudential vigilance powers that the Bank itself tends to, at least at its first appearances, interpret in an extensive way (not only formal, but also substantial), as a detriment both for each of the national supervision authorities and for the EBA;
- also in the banking sector, in addition to the overlapping of the regulatory powers between EBA and ECB, the unresolved problem of the specific decisional and interventional powers that art. 8 par. 2, let. E) and F) of the EBA establishing regulation reserve to the mentioned authority, both in relation to the competent authorities (and here it should be stressed that among these the ECB itself could be included) and to supervised entities (powers that are subject of art. 3 of the 1024/2013 regulation);
- again in the banking sector, the fact that prudential supervision entrusted to the ECB is directly exercised only on the intermediaries of those countries that have adopted the euro as their single currency, whereas for the remaining countries the assumption of the prudential supervision duties by the ECB remains subject to the fact that ECB itself and the competent national

forms within the Union, and to which application the abovementioned countries have not participated, nor are bound or subject to its application (see Recital no. 29 and 31 of the Directive), circumstance that makes it possible to take opportunistic choices oriented towards the violation of the substantial discipline in these Countries not provided with penal safeguards;

- difficulty, common to all countries, in terms of legislative technique, to implement into their national law Community regulations which shall take immediate effect ; In this regard, the possible alternatives, all sub-optimal, are: a) to reproduce blindly the text at national level; b) to re-interpret the text of the regulation by making the same insubstantial lexical changes necessary to integrate it into the national legislation; c) to refer directly to the EU regulation by loosing, however, unity and making the national legislative source indecipherable (in this regard it is sufficient to read, for example, art. 69-bis of the Consolidated Finance Act, regarding authorization and supervision of central counterparties, the subject on which EU regulation 648/2012 has intervened). It 'obvious that, in this context, more than the national legislation refers to secondary sources, the greater the persistence of primary legislation; in this context, the CLB is still recognizable in the original system (at least until the introduction of SRM); the CFA has instead experienced and will experience substantial additions, where the CPI (Code of Private Insurances) should not undergo major changes in response to the adoption of the so called Solvency 2).

authority of the Member State involved have established a close cooperation in accordance with art. 7 of Regulation 1024/2013;

- the existence of "borderlands" such as the "structured deposits" or the " policies of a predominantly financial character " in which the supervisory and regulatory responsibilities of the Authorities overlap (see. Recitals 89 and Art. 1, par . 4 and art. 4 no. 43 of the MiFID II, Dir. 65/2014 / EU);

- the reluctance of certain countries, those in which the Eurosceptic forces are stronger, to accept the powers (especially interventional ones) recognized the supranational authorities⁴ or otherwise the reserves (more or less obvious) of both the politics and certain national supervisory authorities for the absorbing and encompassing role that the Community attributes to the European Central Bank on the European banking system;

- the peculiarities, in the individual national legal systems, concerning the interaction and the location (as part of the NCS or not) of the Supervisory Authorities, or the presence of authorities that "mediate" between politics and administration and that do not accord with the "tecnocraticism" coming from the Union.

3. In reference to the last two problems reported it appears to be significant how in Italy the "Consolidated Law on Banking" (Legislative Decree 1.09.1993 no. 385), even following the implementation of the CRD4 directive, accordingly to Legislative Decree 12 May 2015 no. 72, continues to contain a "Title I" (art. 2-9) on "Credit Authorities".

⁴ Well known is the case of the appeal carried out by the United Kingdom in May 2012 for the annulment of art. 28 of EU Regulation no. 236/2012, concerning the intervention powers recognized in exceptional circumstances to the ESMA on short selling, appeal that the European Justice Court rejected with verdict on the 22nd January 2014, affirming that the discretionary margin of the European Authority is limited by a long list of procedural and jurisdictional guaranties that make the "interventional powers" attributed to the same perfectly compatible with the general principles on the delegation of tasks to the organs/organisms of the Union and with art. 114 of the EU Treaty, that therefore constitutes a juridical base appropriate for the adoption of art. 28 of the Regulation (*Justice Court, Grand Chamber, 22 January 2014, in the case C-270/12, United Kingdom of Great Britain and Northern Ireland v European Parliament, Council of the European Union*).

These Authorities, according to article 1, paragraph 1, let. a) of the CLB, are still identified in the "Interministerial Committee for Credit and Savings, in the Minister of Economy and Finance and in the Bank of Italy", in a logic that remains, therefore, purely national, as if the Banking Union has not been yet established and the European Central Bank has not concentrated in its hands the supervisory powers on most of the European banking system (the so-called significant banks) and beyond (this in relation to the right to assume responsibility also on the non-significant ones as recognized to ECB by Art. 6 of the EU Regulation 1024/2013)⁵.

But there is more. In the "Consolidated Law on Banking" the EU Regulation 1024/2013 is never mentioned, nor is the Single Supervisory Mechanism (SSM), nor even the European Central Bank (the latter only appears in article 114 quinquiesdecies with reference to the information exchange circuit between authorities on the supervision of payment systems) and absolutely insufficient are the provisions contained in Article 6 concerning the relations with the EU law and integration into the ESFS. So that those who wished to learn about the structure of the banking supervision system in Italy, reading only the Banking Law and not knowing the Community legislation, would be seriously misled.

If, however, these omissions do not alter the substance of the European banking supervision system, in view of the direct effect in the individual member states (and therefore also in ours) of the EU Regulation 1024/2013, it might, however, be reductive to confine the omissions in question to a lack of coordination between national and European legislative sources, also due to the integration difficulties of these sources in terms of legislative technicalities (see footnote no. 4).

Wanting to give a systematic justification to the current formulation of the consolidated banking law in terms of credit authorities, it can be deduced that this continues to be guided by the principle of separation between legal systems and therefore towards the existence of two separate legal systems (European and na-

⁵ In fact, at any time the ECB can decide to directly supervise any one of less significant banks to ensure that high supervisory standards are applied consistently.

tional) when it comes to banking supervision, autonomous although linked together (under the single supervisory mechanism), rather than acknowledging the existence of a jurisdiction, albeit of variable geometry ,given the element of significance of the banks falling under the European Supervision.

The thesis on unification of the system (even in the presence of a plurality of sources and competent authorities for their application) seems preferable, if not only for the presence of "common supervisory procedures" applicable to all banks , regardless of their "importance" (those related to the application for and the withdrawal of authorization to take up the business of a credit institution and the acquisition of qualifying holdings)⁶, for the abovementioned power to 'call back', recognized to the ECB by art. 6 of Regulation 1024/2013.

In this context, the current structure of the Consolidated Law on Banking is still the "precipitate " of an European Banking Union intended not as a true "union", which absorbs and synthesizes the various national legal systems, relegating domestic systems to a minimal role of "operational branches", but as a Banking Union understood as "re-enforced coordination system", in which the individual national systems (and the Italian one in this case) maintain their own autonomy and specific duties.

4. From another and different standpoint it is possible to evaluate the current declination of Articles 2-9 of the Consolidated Law on Banking regarding credit authorities and, specifically, in the sense of a latent, but still persistent, reluctance of "politics" to back down when facing the "administrative technocracy" (be it of national or international order), as if politics would like to maintain some "normative powers" for interventions in the banking sector where the circumstances would require it.

⁶ See artt. 14 and 15 of EU Regulation 1024/2013 and the Decision adopted by Bank of Italy on the 4th November 2014.

Significant in regard to the latter in the Italian case is the position of the CICR, to which the article 2 of the CLB continues to attribute " high supervision in the field of credit and protection of savings " ⁷.

As it is known, the CICR, is the heir of the Committee of Ministers established by the 1936 Banking Law , which law , in response to the crisis of the economic model based on mixed bank (years 1929-1933), fully reorganized the banking system, in view of a, however unrealized, more general control pattern of the financial system, not limited to the banking component but extended to the stock market.

This pattern was never actually exercised:

- either because of the prevalence of the technical-administrative profile on the political and guidance profile in the exercise of control over banks and financial intermediaries;

- either because of the lack of significance that the securities market has long played in the national financial economy;

- or, finally, because of the progressive success at European and national level (starting from the years 1970/1980) of a principle of neutrality and independence from political power/government of the supervision on the financial system in general and on each of its sectors , principle that does not tolerate planning interferences by the authority, "inspired" or "infected" by the need for economic policy. And at international level, serious doubts have been expressed about the possible interference that the CICR, as the Committee of Ministers, may produce during the

⁷ The CICR includes the Minister of the Economy and Finances who chairs it and other 5 ministers (MCI, MPAAF, MSE, MIT and MPC), and is duly constituted with the presence of the majority of its members and decide by majority vote of those present. At CICR assemblies participates the Governor of the Bank of Italy, with advisory vote. Also at advisory purpose the President can invite other ministers or Presidents of other competent authorities to participate to the individual meetings in accordance with arguments linked to "the fields for which they have statutory responsibility that regard the overall stability, transparency and efficiency of the financial system". The general director of the treasury carries out the function of secretary and for the exercise of its functions the CICR "*avails itself of the services of the Bank of Italy*". In fact the CICR doesn't weigh (at least directly) on the National Balance Sheet, being the secretariat structure held in the MEF, and made up by Bank of Italy staff. In particular, the CICR secretariat is one of the services in which the supervision area of the Bank of Italy is organized.

exercise of the "high supervision" with respect to a control activity that should have principally technical nature.⁸

Therefore, it is no coincidence that, both in the preparation of the CLB and subsequently, on several occasions⁹, the issue of the abolition of the CICR or of a complete review of the role and tasks assigned to it has emerged and that the maintenance of that body has raised doubts in a large part of the legal scholarship (Merusi, Costi, Belli), whereas others (Capriglione) emphasized (until recently) the need to maintain a traceability of the responsibility of the supervision policy to a ministerial body, since this gives democratic legitimacy to the overall supervision system, otherwise poor in a self-referentiality that the general objectives laid down by law are not sufficient to justify.

Specifically, the role of "high supervision in the field of credit and protection of savings" attributed to the CICR has so far been essentially explicated through the exercise of legislative powers and precisely, the enactment of resolutions, adopted in the cases provided by law, on the proposal of the Bank of Italy, in the areas covered by Titles II and III of the CLB¹⁰. In such cases, the CICR acts "upon a proposal", which assumes therefore "obligatory" but not "binding" importance; to the resolutions may follow, as appropriate, implementing instructions of the Bank of Italy (see. art. 4 CLB), in a process of "circular formation" of the supervisory regulations.

More specifically, it was argued that, with the Banking law, the regulatory power of the CICR lost its general character previously recognized to the directive power attributed to the Committee by Temporary Head of State Legislative Decree No. 691/1947 (and tailored to the needs of the development of the national economy), nor may the same be exercised outside the cases expressly provided by law or

⁸ ECB opinions, 11th May 2005 (CON/2004/16), 3rd November 2006 (CON/2006/51), 18th June 2007 (CON/2007/17) and IMF "Detailed assessment of compliance with the Basel Core Principles for effective banking supervision", April 2004, IMF Country Report n. 04/133.

⁹ Among others, in 2005 in occasion of the emission of law no. 262, or again in 2008 with the presentation of the Draft Law of government initiative recalling "Disposizioni in materia di regolazione e vigilanza sui mercati e di funzionamento delle Autorità indipendenti preposte ai medesimi" AS1366.

¹⁰ The reference to Title III, the one concerning individual and consolidated vigilance, has been canceled by Legislative Decree 72/2015. On the subject of the transparency of the contractual conditions the proposal must be carried out in accordance with Consob (see. Art. 127 and Title VI of the CLB).

autonomous initiative (being necessary as mentioned for the supervisory subjects the proposal of the Bank of Italy) or by the adoption of measures of particular character, aiming at the pursuit of the purposes of Article 5 of the CLB, objectives that apply to all credit authorities (sound and prudent management of the persons subject to supervision, overall stability, efficiency and competitiveness of the financial system and compliance with provisions concerning credit).

With this in mind, the deliberative power of the CICR, would have played the sole role of giving "political cover" to the proposals of the Bank of Italy or, at most, to "control" the compliance of the regulatory proposals advanced by the Bank in accordance with the Community framework.

On this point - under the principle that supervision is only prudential and technical and unmediated by political bodies - the enabling act (Law on Oct. 7, 2014, n. 154), transposing CRD4, has provided in Article. 3, paragraph 1, let. b) as a guiding principle that of the "use of secondary legislation adopted by the Bank of Italy and the National Commission for Companies and the Stock Exchange (CONSOB) accordingly with their duties and in any case within the scope of that specifically expected by Directive 2013/36/EU", adding that "implementing provisions of the Bank of Italy are issued without a prior deliberation of the Inter-ministerial Committee for Credit and Savings."

And in response to the transposition, thus:

- the CIRC, first mentioned in 36 provisions of the CLB, has been deleted from 11, with the elimination of its relative deliberative duties in terms of prudential supervision¹¹;

- article 4 has been amended in the sense that the mechanism "proposal-CICR deliberation- supervisory instructions" remains effective only for the remaining matters of supervision provided for in Title II, re-conducting each reference to Title III, in which are inserted provisions relevant for the purposes of prudential supervision;

¹¹ Conversely, the CICR has been mentioned *ex novo* in art. 128, which attributes the power to identify the competent authorities for the further subjects to which the Minister of Economy and Finance can extend the application of the transparency legislation.

with reference to Title II, the supervisory provisions in which the competence of the CICR persists are those set out in Articles 27 (the assumption of administrative positions in banks by public employees) and Art. 38, 40 and 43 (in the field of mortgage credit, and agricultural and fishing credit) where, be it noted, only Article. 38 expressly provides instructions from the BoI after the deliberation of the CICR (the others are exclusive CICR powers); similarly, the BoI proposal - CICR deliberation mechanism remained in the discipline of transparency (see art. 127, paragraph 3).

Indeed, in these cases, the permanence of the decision-making responsibilities of the CICR is justified, as well as the limits of the delegation, also in relation to the principle well known by the original drafters of the CLB, which states that the direct allocation of powers of secondary legislation to a technical Authority, not politically empowered and responsible, is only possible if the powers attributed affect exclusively on supervised entities and not the generally all associates¹².

Principle, however, that no longer seems so solid, having been called into question by the previous revision occurs with the reform of Italian Cooperative Banks (Decree Law 24/01/2015 n. 3, converted into Law 24/03/2015 n. 33) which allocated to the Bank of Italy directly the power to identify cases where the reimbursement of shares due to the other shareholder may be limited, marking a hiatus with the above principle, as the Bank of Italy is attributed with very broad powers (largely undefined in terms of content, scope and operational modalities of the restrictions on the right of reimbursement) that affect the majority of shareholders of the banks, also by way of derogation from legislative or statutory rules¹³.

¹² It is no coincidence that the dispositions of the Consolidated Law on Banking provide the normative power of the CICR to which follow actuation dispositions of the Bank of Italy (e.g. in case of mortgage credit, banking transparency, ect.) or of the Minister of Economy and Finance (in case of honorability, professionalism or independence requirements) when the dispositions are potentially addressed to generally all associates and not only to the supervised subjects.

¹³ Due to the absence of community restrictions on the identification of a competent authority, it is possibly appropriate to confer mentioned normative power to an Administrative authority politically responsible or to mediate this power, foreseeing, before the dispositions of the Bank of Italy, a guidance power of a ministerial Authority. The possible doubts on the constitutionality that induces such a choice are herein not discussed; in reference to art 95 and 97 Cost., doubts that are not dispelled by the necessary adherence of the national implementing dispositions to art. 28 and 29 of EU regulation 575/2013 and art. 4, 10 and 11 of the Commission Delegated Regulation n. 214/2014.

5. Can the mentioned changes to the CBL lead us to consider the CICR's role definitely gone when it comes to supervision?

Indeed, there are regulatory signs that lead to reconsidering the elimination of the CICR in a different direction or that suggest that its suppression from the sources is incomplete, and therefore that further changes are foreseeable, or even, that the "political forces", especially those of Eurosceptic inspiration, want to maintain a legislative power to re-obtain a "national responsibility" in extreme cases.

These signs, importance of which precludes them from being dismissed as a mere lack of coordination, can be found in the following circumstances:

- the CICR has however maintained "highest supervision of credit and protection of savings" (art. 2); the meaning of which in the new regulatory environment has all to be investigated, being limitative to refer them only to matters of transparency, consumer finance and systems of dispute resolution;

- to the Minister of Economy and Finance, as President of the CICR, the Bank of Italy cannot oppose the secrecy with regard to "all the information and figures possessed by the Bank of Italy by virtue of its supervisory activity" (art. 7);

- finally, the right to complain to the CICR "against measures adopted by the Bank of Italy in the performance of the supervisory functions conferred on it by the CLB" (art. 9) remains untouched; in this case also it seems difficult to argue that this possibility of complaint is limited to matters on which the CICR maintains decision-making responsibilities. Which would confirm, also in the new context, the permanence of that sort of improper hierarchical relation that earlier doctrines have identified between the areas of supervision between Bank of Italy and CICR.

But there is more. In a regulatory framework that sees the elimination of the above mentioned process of circular formation of the discipline of prudential supervision (Bank of Italy proposal - CICR deliberation - Bank of Italy Supervisory instructions), the reaffirmation *tout court* of the CICR of the high supervision of credit and savings protection role, could paradoxically lead, in second and last resort to a

"politically oriented" interpretation, to an extension of its scope (no longer limited to cases where the decision-making powers are expressly provided by law) and to a substantial atypicality of its execution modalities, resulting no longer bound to the circular mechanism of lawmaking that has failed, but substantially free as the concrete explanatory modalities.

In concrete terms, therefore, it could be considered that the CICR - in the exercise of the high supervision that continues to be in its power in accordance with art. 2 of CLB, and having regard for the purposes of art. 5, par. 1 of the Consolidated Law on Banking - may request the adoption by the Bank of Italy of supervisory regulations on issues not specifically regulated at EU level, require the implementation of the Community framework remained unimplemented, give general guidelines for the adoption of the discipline itself, ensure that the provisions adopted by the Bank of Italy are in conformity with Community rules; this also in relation to the provisions of Article 6, paragraph 1 and 3a of the CLB that, with regard to relations with the EU law, without distinction puts in the hands of all credit authorities (and not only to the Bank of Italy) the task of ensuring the harmony of the internal discipline with that of the Union.

And in accomplishing the purposes aforesaid the CICR could also take advantage and enhance the function of the place of exchange of information and of liaison and institutional coordination between Government and Supervisory Authority, that the Article 2, paragraph 2 of the Banking Act also continues to award him and that is preliminary and aimed at the realization of the "high supervision" referable to the "profiles of overall stability, transparency and efficiency of the financial system." This function, introduced by Law 262/2005, finds its necessary complement, on the one hand, in the provisions on the unenforceability of professional secrecy and cooperation between authorities laid down in the CLB, in the Consolidated Finance Act, in the Code of Private Insurance and in the law regulating COVIP¹⁴; on the other hand, in

¹⁴ Indeed the doctrine (especially that close to the Bank of Italy) has minimized this function, highlighting how it "doesn't implicate an amplification of the operative field of the high supervision to authorities different from the

the recognized capacity of the Minister of Economy and Finance to submit in advance to the CICR the measures within its competence, in view of the sharing, if not formally, at least substantially, the responsibility for the choices.

Obviously, such an interpretation, that continues to recognize CICR with an incisive (and even strengthened) role of guidance, aimed at the realization of the "high supervision", albeit abstractly arguable, it appears in light of the difficult practice of sustainability, as it stands in contrast with the whole evolution process that has seen the erosion of the legislative and political power of the individual European nation states, with the transfer and centralization of the decisions at Community level even those of detail in terms of banking supervision.

However, it is the potential compatibility of this interpretation with the current wording of the CLB, together with the failure of all the legislative initiatives to promote the abolition of the CICR, that report how "politics" still endure in maintaining an instrument of administrative intervention in the banking sector, which is activated in case of need.

In a different perspective, the permanence of the abovementioned provisions governing the CICR, combined with the elimination of its decision-making responsibilities, could also mean the successful metamorphosis of the CICR for that concerning

Bank of Italy, nor to different subjects than those covered by the CLB, nor finally, to different supervision finalities to present ones", also because such an amplification of the orientation power would be "herald of a re-expansion of the government control on the entire financial market and, therefore of the risk of a resurrection of the CICR in place of a political and administrative guidance organism, nonetheless of a reemergence of vigilance as an instrument of economic policy", CAPOLINO, in VV.AA., Diritto delle banche e degli Intermediari finanziari, edited by Galanti, 2007, p. 174. From another perspective its utility has been proved, due to the presence of other instruments to which could meet the satisfaction of the need for a political-institutional connection among authorities, where the need for a control on the operation of the single Authorities would still be satisfied by the respective sector regulation that impose the obligation to periodically refer to the Parliament and to the Government (for the Bank of Italy art. 19, par. 4 and 8 of Law 262/2005). Among the instruments of which the forum in the CICR should constitute a duplicate we can recall the coordination committees provided by art. 20 of Law 262/2005, but mainly the Committee for the Safeguard of the Financial Stability (CSFS), established the 7th march 2008 with the subscription of the "memorandum of understanding on cooperation for financial stability". The committee is composed by the Minister of Economy and finance, who chairs it, by the Governor of the Bank of Italy, the president of Consob and by the President of Isvap, and is called to implement the cooperation and the exchange of information and assessments for the protection of the Italian financial system, and the prevention and management of the financial crises with potential systemic effects.

supervision, from authorities with guidance and regulatory skills to authorities with powers to essentially "para-judicial control "on the work of the Bank of Italy."

In this sense, the maintaining of the reference to high supervision and to the unenforceability of professional secrecy, would be functional to the confirmation of the possibility to resort to the CICR of the supervisory measures taken by the Bank of Italy.

Indeed, the para-judicial function in question, has always been seen as a historical heritage (dating back to the period when there was no possibility of take action under the administrative law) and is not given to find cases in the last fifty years, since the very few complaints in this period have not led to pronouncements, all having been interrupted or rejected on procedural grounds. Moreover, the fact that the preliminary investigation on a complaint against the Bank of Italy is carried out by staff of the Institute itself (CICR Secretariat), pushed sanctioned people to prefer the use of administrative justice.

In addition, the effective transfer to the ECB of the formal task to enforce most of the supervision measures (leaving the Bank of Italy with only the task to adopt those measure for "not significant" banks and that they are not related to the application for and the withdrawal of authorization to take up the business of a credit institution and the acquisition of qualifying holdings) limits the possibility to resort to the CICR, not being able to recognize this right against measures taken by the ECB¹⁵.

It follows that the "para-judicial" function in question does not in itself justify the permanence of the CICR and the fact that it maintains "high supervision of credit and protection of savings", where this does happen also through an preventive activity (orientation or legislative one).

¹⁵ Are not herein discussed the issues of jurisdictional competence through the measures formally assumed by the ECB but which find their assumption in acts of investigation taken and defined by the individual national supervisory authorities and, in particular, whether judging on the appeals is competence of the Court of Justice or national courts.

6. The launch of the European Banking Authority, together with the transposition of CRD4, have started an epochal transformation phenomenon, not yet completed, of the exercise of prudential supervision on banks, that reflects inescapably in a radical reviewing process of the individual domestic laws in order to make them compliant with Community requirements and with the national authority structure.

Resistances or "caveats" in the adjustment process are identified, more or less openly, both by national technical authorities and by "politics", resulting in, among other things, institutional arrangements and internal regulations that still leave room for interpretation for a recovery of national centrality.

Of this process, the updates of the CLB placed by Legislative Decree May 12, 2015 n. 72, (in force on June 27th) is only the last in order of time, but not the final step because, on the one hand, many of the Community provisions of the first and second level relative to SSM were already previously implemented by secondary legislation (with the new issue of the supervisory instructions, identified by the Bank of Italy Circular no. 285 of December 17, 2013 and subsequent updates)¹⁶, on the other hand, more and not insignificant adjustments will follow the transposition/ adaption (not yet taken place) of the domestic law to the provisions on SRM and insurance deposits.

We will need to wait and see if the knots discussed will be loosened, through specific modifications to the Consolidated Law on Banking, with an unequivocal and irrevocable choice towards a unique mechanism of banking supervision, forming a peer with the irrevocability, most recently questioned, but strenuously defended, of the Euro.

¹⁶ And especially those concerning: a) market access and structure (including the discipline of the authorization of the banking activity and of the banking groups, nonetheless the cross-border operations with the establishment of branches and freedom to provide services); b) prudential measures (including the dispositions on the additional capital reserves); c) prudential process; d) public disclosure state by state e) corporate governance, internal controls, risk management; f) policies and remuneration and incentive practices. As the Report to the scheme of Legislative Decree 72/2015.

For that concerning credit authorities the signals do not seem so encouraging, considering that the versions recently approved in first reading by the Council of Ministers of the transposition decrees for the provisions on SRM and deposit insurance, leave everything unchanged, perpetrating uncertainty onto the final abandonment of "high supervision".

THE BANK INSOLVENCY DIRECTIVE (DIRECTIVE 2001/24/EC)

HALFWAY BETWEEN SCYLLA (POLITICS) AND CHARYBDIS (FINANCE):

A COMPARATIVE AND EMPIRICAL ANALYSIS

Pierre de Gioia-Carabellese*

ABSTRACT: *Politics, finance and bank insolvency procedures! It is a trite statement that Britain, in 2008, was caught off guard by the financial collapse of its banking sector. The distinct lack of bank insolvency procedures and the scramble to reshape overnight the relevant legal instruments bears testament to the weakness of the system at that time. Yet, this paper, through an analysis that is both doctrinal and empirical, seeks to boldly challenge this assertion. Thus, the lack of bank insolvency procedures, also in part due to the weak harmonisation of the Bank Insolvency Directive (Directive 2001/24/EC), presented the British Government with a stroke of luck and the good fortune to be in a position to re-organise in a more flexible way its banking industry. Accordingly, the significant power left in the hands of the Government, and the de facto public money bail-out, contributed tellingly to the comparatively successful performance that the UK banks are currently demonstrating. Nor has Britain departed from the legacy of the financial crisis: the new Special Resolution Regime, shaped by the Banking Act 2009, still leaves room for significant political discretion. The comparison with Italy, a traditional counterpart manifesting opposing national characteristics, particularly in terms of legal systems and cultural background, may confirm this assumption, rather than dispel it. Ultimately, there are many of the opinion that the legislative framework in this area should be revamped so that a proper*

* Pierre de Gioia Carabellese is Associate Professor of Business Law at *Heriot-Watt University* of Edinburgh.

harmonisation of the Bank Insolvency Procedures is achieved. The conclusions drawn in this contribution may, however, present a more prudent course of action which is undertaken at the pace of the proverbial snail rather than with the velocity of Achilles.

SUMMARY: 1. Introduction. – 2. The banking crises in the EU architecture. - 3. The banking crisis and the national legislative context: Italy; Britain. - 3.1. Italy: the special administration; the compulsory administrative liquidation.-3.1.a. The special administration.- 3.1.b. Compulsory administrative procedure. - 3.2. Britain: the special resolution regime.- 3.2.b. The bank insolvency. - 3.2.c. The Bank administration. - 4. The empirical analysis: Italian and British Bank Insolvency Procedures in the 2008/2014 period. - 5. A critical discussion about the comparison. - 6. Conclusion.

1. The insolvency of a corporation, in either its commercial form (the inability of the debtor to honour its debts, thus effecting illiquidity) or its absolute form (in the balance sheet of an entity, an excess of liabilities when compared with its current assets) is not entirely perspicuous in company law.¹ In applying such a notion to credit institutions, a range of intriguing and problematic issues emerge, given some specific features: (a) the existence of a set of macro-prudential rules governing the banking sector;² (b) the presence of an authority supervising the industry and cardinal principles; (c) the depositors' protection distinctly enshrined in the sectoral legislation.³

Against this background, the fundamental research question entailed in this contribution requires an examination as to whether there is a connection and/or interplay between bank insolvency procedures, politics and the EU. More specifically, in a scenario of 'softly' harmonised rules in the area of the

¹ See GOODE, *Principles of Corporate Insolvency Law*, 4th edn, Sweet & Maxwell 2011, pp. 109-147. See also FINCH, *Corporate Insolvency Law*, 2nd edn, Cambridge University Press 2009, pp. 144-177.

² See M HAENTJENS - DE GIOIA-CARABELLESE, *European Banking and Financial Law*, Routledge 2015, p. 112.

³ See AVGouleas, *Banking Supervision and the Special Resolution Regime of the Banking Act 2009: the Unfinished Reform*, 2009, 4, in *Capital Markets Law Journal*, pp. 201-235; ID., *The Global Financial Crisis, Behavioural Finance and Financial Regulation: in Search of a New Orthodoxy*, 2009, 9, in *Journal of Corporate Law Studies*, pp. 23-59.

bank insolvency,⁴ hinged upon the entrenched Directive 2001/24 (the ‘Bank Insolvency Directive’),⁵ the analysis of this paper seeks to assess the level of politics existing at home and the influence that may exert towards two possible directions: on the one hand, the way in which the relevant rules governing this area are conceived; on the other hand, the ways in which these rules are applied. In connection with this, a further consideration is whether a role played by politics in the bank insolvency procedure is a benefit, rather than a hindrance: in this respect the mass tax-payers bail-out of the British banks in 2008 is critically revisited.

In assessing the aforementioned deliberations, the paper tackles the phenomenon by employing a comparative law methodology. Therefore, the influence of politics on the bank insolvency is discussed and analysed from the perspective of two countries, the UK and Italy, and their supervisory bodies, the Bank of England (and its ancillary bodies)⁶ and the Banca d’Italia, respectively, and the ‘invisible hands’ operating behind them, the respective Governments.

The conclusions, based on a doctrinal analysis, are reinforced by some findings, of an empirical nature, relating to the number of financial institutions subject to an insolvency procedure. The figures gleaned at the time the contribution was drafted (2014) are compared with those relevant to the previous period (2008), when the financial crisis originated. This empirical data is cross-examined in light of the legal background of a theoretical nature existing in the two jurisdictions.

⁴ These rules are going to be briefly described under Section 3 below.

⁵ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the winding up of Credit Institutions. OJ L 125/15.

⁶ As a result of the Financial Services Authority 2012, both the Prudential Regulation Authority and the Financial Conduct Authority. See C Proctor, *The Law and Practice of International Banking* (2nd edn, OUP 2015) 175-188.

Finally, the analysis does not extend so far as to contemplate the new legal provisions of the Bank Recovery and Resolution Directive (BRRD).⁷ Directive 2014/59 merely caters for a regime the purpose of which is ‘to stave off future likelihood that banks will fail in a disorderly manner.’⁸ Thus, technically speaking, the two pieces of EU legislation respond to two distinct needs: how to organise insolvency procedures that exhibit a cross-border magnitude (Bank Insolvency Directive); how to avoid a time-consuming bank insolvency procedure, where, in keeping with any other insolvency procedure, the scope of the procedure is the maximisation of the creditors’ interests.⁹ Yet, the prospective scenario of a cohabitation of the two Directives (Directive 2001/24 and BRRD) is briefly discussed in the paper, with conclusions that, surprisingly, may not concur with the prevailing train of thought maintained by the consolidated literature.

2. It is well known that the approach to bank insolvencies can take many different forms. The differences reflect the variation in legal traditions existing in the respective jurisdictions.¹⁰

Additionally, EU rules governing cross-border bank insolvencies have been in place since as early as 2001: these are hinged upon an influential piece of legislation, the Bank Insolvency Directive. This legal framework, albeit not

⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. OJ L 173/190. In the vast literature already built up on this topic, see M HAENTJENS - WESSELS (eds.), *Research Handbook on Crisis Management in the Banking Sector*, Edward Elgar Publishing 2015; M HAENTJENS - WESSELS (eds.), *Bank Recovery and Resolution. A Conference Book*, Eleven International Publishing, 2014; HAENTJENS, *Bank Recovery and Resolution: An Overview of International Initiatives*, in *International Insolvency Law Review*, 2014, pp. 255-270; GRUENEWALD, *The Resolution of Cross-Border Banking Crises in the EU. A Legal Study from the Perspective of Burden sharing*, Kluwer 2014; MEZZACAPO, *Towards a New Regulatory Framework for banking Recovery and Resolution in the EU*, in *Law and Economics Yearly Review*, 2013, 2, pp. 213-241; MOONEY - MORTON, *Harmonizing Insolvency Law for Intermediated Securities: the Way Forward*, in KEIJSER (eds.), *Transnational Securities Law*, Oxford University Press, Oxford 2014, pp. 193-239.

⁸ See HAENTJENS - DE GIOIA-CARABELLESE, *European Banking and Financial Law*, n 2, p. 119.

⁹ *Ibid*, p. 119.

¹⁰ See HAENTJENS - DE GIOIA-CARABELLESE *European Banking and Financial Law*, n 2, pp. 112-113.

designed to ‘influence the content of the substantive or procedural law’ applicable to the banking crisis,¹¹ offers forth a definition of the insolvency crises of financial institutions. In this respect, two procedures are identified: the ‘reorganisation measures’; the ‘winding-up’ process.

The reorganisation measures shall be applicable not only to financial institutions, but also now to investment firms,¹² in cases where the recovery of the financial institution is remains feasible. In this scenario, the measures will seek to ‘preserve or restore the financial situation of a credit institution and..... could affect third parties’ pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims’.¹³

The second hypothetical outcome of a crisis, the winding-up process, is designed as a collective proceeding ‘opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure [...]’.¹⁴ Also, the winding-up process is now applicable to the investment firms too, as per amendments encompassed within the BRRD.

3. The concept of reorganisation measures and the winding-up process is implemented in the two jurisdictions under scrutiny, the UK and Italy, along significantly different channels, courtesy of the ‘soft’ harmonisation prompted by Directive 2001/24, as highlighted previously in Section 2. In this comparative analysis, intertwined with an element of empirical research, it would stray too far from the purpose of the research to dwell on an extensive description of

¹¹ See PROCTOR, *The Law and Practice of International Banking*, n 6, p. 266.

¹² The extension to the investment firms of the Bank Insolvency Directive is the outcome of the BRRD, particularly its art 106(3). The investment firms now subject to the Winding-up Directive are those with a minimum capital requirement of Euro 730.000.

¹³ Art. 2 of the Bank Insolvency Directive.

¹⁴ Bank Insolvency Directive, *ibid*.

these occurrences.¹⁵ Nonetheless, some main characteristics of the procedures in the two countries are certainly worthy of a brief mention.

3.1.3.1.a. In Italy, the special administration, or amministrazione straordinaria,¹⁶ is codified under article 70 of the Legislative Decree 185/1993 (The Consolidated Banking Act).¹⁷ It is worth highlighting that there are three main alternative conditions, according to article 70(1) of the Consolidated Banking Act (Italian CBA): (a) ‘serious administrative irregularities, or serious violations of laws, regulations or bylaws governing the bank’s activity are found’¹⁸; (b) serious capital losses are expected’¹⁹; (c) ‘the resolution has been the object of a reasoned request by the administrative bodies or an extraordinary general meeting’.²⁰

In these circumstances, the Italian ‘special administration’ shall receive the recommendation of the Bank of Italy and thereupon be adopted by the ‘Italian Treasury’ (Ministero dell’Economia) in force of a specific decree.²¹ The outcome of the procedure will be the dissolution of the management and control bodies of the bank. Further, the functions of both the general meetings and the other governing bodies of the financial institution concerned will be suspended²², in light of the fact that an appointment of the special administrator or special administrators is required.

The ultimate aspiration pursued by the bodies overseeing the procedure under discussion is to steer the bank away from the precipice and, hopefully,

¹⁵ The Italian literature on bank insolvencies is vast: see, among the others, BOCCUZZI, *L’Unione Bancaria Europea. Nuove Istituzioni e Regole di Vigilanza e di Gestione delle Crisi Bancarie*, Bancaria Editrice 2015. The lack of specific bank insolvency procedures in Britain, until 2009, seems to be testified by a dearth of textbooks in this area. Nevertheless, contributions tangentially dealing with the bank insolvency procedures are PROCUTOR, *The Law and Practice of International Banking*, n 6, pp. 199-316 and, in Scotland, ST CLAIR - DRUMMOND YOUNG, *The Law of Corporate Insolvency in Scotland*, 4th edn, W. Green, 2011.

¹⁶ Our translation.

¹⁷ Legislative Decree no 185 of 1st February 1993 and following amendments.

¹⁸ Our translation.

¹⁹ Our translation.

²⁰ Our translation.

²¹ Art. 70 of the Consolidated Banking Act.

²² Art. 71(2) of the Consolidated Banking Act.

accomplish a turnaround in its fortunes. Should that positive scenario materialise, the mandate to the administrator will be regarded as having naturally expired. At the end of the procedure, the special administrator, alongside the oversight committee, will prepare its own reports to the Bank of Italy.²³ The latter, in turn, shall arrange for the closure of the special administration. Entailed in this is the possibility that the financial institution may return to its normal business, with its own management bodies. This procedure is, *mutatis mutandis*, what the EU legislature defines as a ‘reorganisation measure’.

3.1b. It is also well known that the Italian corollary of the special administration is the compulsory administrative procedure. This, in many ways, mirrors the EU legal notion of winding-up, already detailed above. Remarkably, as regards the conditions for Italian LCA to apply, art. 80(1) laconically refers to the same conditions of the special administration (namely, administrative irregularities, violation of laws, regulations or bylaws; or losses), although they must be exceptionally ‘serious’.

3.2. Across the Channel, prior to the major 2007-2008 financial crisis, legislation applicable to bank insolvencies was conspicuous by its absence. Yet, the Bank Insolvency Directive had already been implemented in Britain as a result of the Credit Institutions (Reorganisation and Winding-up) Regulations (SI 2004/1045). Therefore, as the 2007/2008 financial crisis dawned on its banking sector, Britain did have a basic system of cross-border bank insolvency procedures, although the domestic insolvency rules governing the credit institutions were merely those applicable to ordinary businesses.

²³ Art. 75(1) of the Consolidated Banking Act.

However, dramatic events unfolded in the Summer and Autumn of 2008 as the near collapse of two major British banks²⁴ marked one year on from Northern Rock's demise.²⁵ The ensuing huge tax payers' bail-out by the Government of the major British Banks prompted the British legislature to step up to the plate and to provide ad hoc rules, better equipped to deal with the circumstances of the banking crisis. These events represent the genesis of the Banking Act 2009.²⁶

Indeed, the Banking Act 2009 was preceded by the enactment, a year before, of the Banking (Special Provisions) Act 2008 (BA 2008).²⁷ The purpose of this piece of legislation, which received Royal Assent on 21 February 2008, was to allow the Treasury 'to bring any UK deposit-taker into public ownership'. This power would have been exercised in cases where such a measure appeared opportune and desirable, 'in order to maintain the stability and/or to protect the public interest where the Treasury has provided financial assistance to a deposit-taker for the purposes of preserving the stability of that system.'²⁸

To summarise, within this congested period of contemporary financial history, it is authoritatively affirmed²⁹ that the Northern Rock collapse provided a good litmus test for the British banking system in order to implement rules that, ultimately, allowed the 'orderly handling of the second and most important phase of the global crisis'. Notoriously, this has come at a serious cost to the taxpayer.³⁰

²⁴ See HBOS - RBS. As to the latter, the injection of public money in the capital resulted in being £ 45.5 billion: see GRACIE - CHENNELS - MENARY, *The Bank of England's Approach to resolving Failed Institutions*, Bank of England, in *Quarterly Bulletin*, 2014 Q4, p. 410.

²⁵ See SONG SHIN, *Reflections on Northern Rock: the Bank Run that Heralded the Global Financial Crisis*, 2009, 23, in *Journal of Economic Perspectives*, pp.101-119.

²⁶ See AVGOULEAS, *Banking Supervision and the Special Resolution Regime of the Banking Act 2009: the Unfinished Reform*, n 3, pp. 201-235.

²⁷ See PROCTOR, *The Law and Practice of International Banking*, n 6, p. 229.

²⁸ Banking (Special Provisions) Act 2008, s 2.

²⁹ See AVGOULEAS, *Banking Supervision and the Special Resolution Regime of the Banking Act 2009: the Unfinished Reform*, n 3, pp. 231-235.

³⁰ See GOODE, *Principles of Corporate Insolvency Law*, n 1, p. 45.

As a result of these events, the Special Resolution Regime (SRR) is the new architecture applicable to banks in Britain, should they face any future difficulties. Its pillars are: the three stabilization options; the bank insolvency procedure; the bank administration procedure.³¹

3.2.a. As highlighted by Scholars,³² the stabilization option branches out to encompass: (a) the private sector purchaser;³³ (b) bridge bank;³⁴ (c) temporary public ownership.³⁵

In the first option (a), there is the transfer by operation of law of 'all or part of the business of the bank to a commercial purchaser.'³⁶ In the second option (b), the transfers shall be to a company 'which is wholly owned by the Bank of England.'³⁷ In the last option (c), the stabilisation option is 'to take the bank in temporary public ownership.'³⁸

Technically, the means by which the three options above may be achieved is twofold: the share transfer power; the property transfer power. In the former, shares shall be deemed as transferred to a third party regarded by the supervisor as eligible; in the latter, the transfer will relate to the 'property, rights or liabilities, in other words the business undertaking of the financial institution.'³⁹

³¹ The practical instructions relating to the SRR are provided by the same British Treasury. See TREASURY, *Banking Act 2009: Special Resolution Regime Code of Practice*, March 2015, available at www.gov.uk.

³² See PROCTOR, *The Law and Practice of International Banking* (n 6) 233-258. See, in the Italian literature, DE POLI, *Crisi Finanziaria e Salvataggio delle Banche Inglesi. Il Banking Act 2009*, 2009, 1, in *Rivista Trimestrale di Diritto dell'Economia*, pp. 29-30.

³³ S 11 of the BA 2009.

³⁴ S 12 of the BA 2009.

³⁵ S 13 of the BA 2009.

³⁶ S 11(1) of the BA 2009.

³⁷ S 12(1) of the BA 2009.

³⁸ S 13(1) of the BA 2009. Practically, this option seems to be similar to what the British Treasury did in dealing with the Northern Rock crisis.

³⁹ See GOODE, *Principles of Corporate Insolvency Law*, n 1, p. 47.

3.2.b. The Bank insolvency represents the second pillar of the bank insolvency procedures. It gives rise to a liquidation of the bank and is legislated upon under section 90 of the BA 2009.

The notion in comment is applicable in cases where the insolvency of the bank is declared as a result of a court order,⁴⁰ with the ensuing appointment of a bank liquidator.⁴¹ The ultimate purpose of the Bank Insolvency⁴² will be for the bank liquidator to wind up the credit institution.⁴³ More specifically, the Court is empowered to prescribe a bank insolvency order in two cases: (a) upon request of the Bank of England,⁴⁴ if the bank concerned with the request has eligible depositors and, coupled with this, either the bank is unable, or is likely to become unable, to pay its debts or the winding up of a bank would be fair;⁴⁵ (b) upon request of the Secretary of State, in circumstances where the bank has eligible depositors and either the winding-up of that bank would be in the public interest or the winding-up would be fair. The liquidator shall pursue two objectives, according to the procedures specified under section 99 of the BA 2009: particularly the possibility that, 'as soon as reasonably practicable each eligible depositor (a) has the relevant account transferred to another financial institution, or (b) receive payment from (or on behalf of) the F[inancial] S[ervices]C[ompensation]S[cheme].'⁴⁶

⁴⁰ S 90(2)(a) of the BA 2009. Section 92 clarifies that the 'court' shall be the High Court in England Wales, the Court of Session in Scotland, the High Court in Northern Ireland.

⁴¹ S 90(2)(b) of the BA 2009.

⁴² See the Heading of Part 2 of the BA 2009.

⁴³ S 90(2)(d) of the BA 2009.

⁴⁴ In the original wording of the BA 2009 mention was made to the Financial Services Authority too. As a result of the abolishment of this authority (Financial Services Act 2013), the reference, *mutatis mutandis*, should be referred to its successor, the Financial Conduct Authority. In the literature (C Proctor, *The Law and Practice of International Banking* (n 6)), mention is still made to the previous body (the FSA).

⁴⁵ See combined reading of Sect. 97(1) and Sect. 96(1)(a) or 96(1)(c).

⁴⁶ Section 99(2). The second objective, according to section 99(3) is 'to wind up the affairs of the bank so as to achieve the best result of the bank's creditors as a whole.' Among Scholars (R Goode, *Principles of Corporate Insolvency Law* (n 1) 47), it is highlighted that the BA 2009 'does not preclude the presentation of an ordinary winding up or administration petition, but the court may instead make a bank insolvency order on the application of the FSA with the consent of the Bank of England or on the application of the Bank of England, while a resolution for voluntary winding up has no effect without the prior approval of the court.' (Ibid, 47).

3.2.c. The bank administration is the procedure, stipulated under section 136 ff of the BA 2009, whereby a bank administrator is appointed to oversee the activities of a credit institution, in cases where part of the business of the insolvent bank is sold to third parties. In this case, it is obvious that the residual bank (ergo, the part of activities not sold to third parties) will require competent management in order to provide 'services or facilities required to enable the commercial purchaser ... or the transferee ... to operate effectively.'⁴⁷ Should this need arise, a qualified insolvency practitioner shall be appointed. The process shall proceed in a similar vein to that of normal administration legislated under the Insolvency Act 1986, subject to the variations and adaptation of the BA 2009.⁴⁸

4. Having detailed the legislative scenario of the banking crisis procedure, it is possible at this stage to test the legislation against the background of some empirical data.

As of 11th February 2015, a significant number of Italian banks had fallen under the 'reorganisation measure'. Amongst these banks, there was even a listed one: the Banca Popolare dell'Etruria e del Lazio. Furthermore, amidst a special category of banks, called Savings Banks (Casse di Risparmio), three were subject to special administration. Moreover, eight cooperative banks were undergoing the procedure at stake while, in addition to the typical cooperative banks, a further two cooperative banks belonging to the special category called banche popolari met with the same fate. The final toll of Italian credit institutions subjected to special administration, as of 2014, stood at 17 financial institutions.⁴⁹ As far as the compulsory administrative procedure

⁴⁷ BA 2009, s 136(c).

⁴⁸ BA 2009, s 136(2)(d). The analogies between the two procedures are correctly emphasised in the recent literature. See PROCTOR, *The Law and Practice of International Banking*, n 6, p. 255.

⁴⁹ See BANCA D'ITALIA, *Relazione sulla Gestione sulle Attività della Banca d'Italia*, Rome, 26 May 2015, pp. 104-105.

is concerned, five Italian banks have encountered the commencement of this procedure in 2014.⁵⁰

These figures contrast markedly with those existing in Britain. At the same time, in Britain there was no credit institution under the Special Resolution Regime.⁵¹ Remarkably, in the intervening seven years since the BA 2009 came into force only two British institutions were subjected to the instruments of the SRR.⁵² However, it is also true to say that, in 2008 and 2009, the British banking industry endured, as a result of the financial crisis and the ensuing bank losses, a 'huge diet'. In this respect, the British Government relied heavily on the BA 2008, in order to furnish British banks with tax payers' money. Fundamental to this provision, in 2008, all the banks and building societies, with very limited exceptions,⁵³ were somehow subject to forms of public money rescue.⁵⁴ Conversely, within the same time period, in Italy the insolvency measures adopted amounted, roughly, to the same figure as those in 2015: 20 banks subjected to the Italian reorganisation measures, with no process of compulsive administrative procedure adopted.⁵⁵

A caveat is necessary in dealing with the data under this current section of the contribution. The British market of the financial institutions is concentrated, with a few banks occupying a large share of the market,⁵⁶ whereas the Italian banking system is traditionally dispersed across a larger number of operators.⁵⁷ It can be inferred, without any pretence of rigor in the analysis of the

⁵⁰ Banca d'Italia, *Relazione sulla Gestione sulle Attività della Banca d'Italia*, Rome, 26 May 2015, 106-107.

⁵¹ See BANK OF ENGLAND, *Previous Resolutions under the Banking Act 2009*, available at www.bankofengland.co.uk.

⁵² It is the case of the Dunfermline Building Society. See BANK OF ENGLAND, *Report under Section (80)1 of the Banking Act 2009 on the Dunfermline Building Society (DBS) Bridge Bank*, July 2010, available at www.bankofengland.co.uk. The second case is Southsea Mortgage and Investment Limited. See BANK OF ENGLAND, *Previous Resolutions under the Banking Act 2009*, available at www.bankofengland.co.uk.

⁵³ Abbey, Barclays, Clydesdale, HSBC, Nationwide and Standard Chartered.

⁵⁴ See TREASURY, *Treasury Statement on Financial Support to the Banking Industry*, 13 October 2008.

⁵⁵ See BANCA D'ITALIA, *Relazione sulla Gestione sulle Attività della Banca d'Italia*, (May 2009, p. 254.

⁵⁶ See BANK OF ENGLAND, Prudential Regulation Authority, *List of Banks as Compiled by the Bank of England as at 30 June 2015*, available at www.bankofengland.co.uk.

⁵⁷ See Banks in Italy at www.tuttitalia.it.

statistics, that the UK and Italy reflect two distinct patterns in the area of the bank insolvencies.

In the Italian banking market, within the period of observation, a significant number of banks have been subjected to bank crisis procedures and, additionally, no significant variation in the number has occurred. Conversely, in Britain, a very different unfolding of events can be observed. Only one bank has been subjected to the SRR,⁵⁸ in its seven years of application, subsequent to the Dunfermline Building Society ‘crisis’, in 2009.⁵⁹ However, in the middle of the financial crisis, a near nationalisation of the entire banking sector occurred, based on the powers granted by the BA 2008 to the British Government and the recapitalisation of their capital with public money. Yet, seven years after such Draconian measures were implemented, the sector appears to have totally ‘recovered’, as demonstrated by no procedure having been adopted in the meantime.

5. First and foremost, the British system of insolvency of the banks seems to place emphasis, from what has been highlighted in this paper, exclusively on deficiencies of a financial nature of the bank (the insolvency), rather than on those of a legal or administrative nature. Yet, the British system allows for more discretion in carrying out the liquidation of a credit institution, given the parameters of ‘fairness’ and ‘other circumstances’ enshrined in the legislation. Such parameters are defined in this paper as political weapons that the British Government may employ on discretionary basis.⁶⁰

Further, the mass bail-out of the British banks, organised in 2008 with the deployment of public money, may be the empirical corroboration of the

⁵⁸ It is Southsea Mortgage and Investment Company Limited. See BANK OF ENGLAND, *Previous Resolutions under the Banking Act 2009*, available at www.bankofengland.co.uk. The bank was placed on the bank insolvency procedure on 16 June 2011, upon decision of the then Financial Services Authority and subsequent application to court of the Bank of England.

⁵⁹ See Bank of England, *Report under Section (80)1 of the Banking Act 2009 on the Dunfermline Building Society (DBS) Bridge Bank*, July 2010, available at www.bankofengland.co.uk

⁶⁰ See previous Section 3.

above sentiments. The underpinning philosophy of the BA 2008 is reminiscent of the intervention of politics in the market and the Machiavellian support of national interests and, therefore, the national players. The BA 2009, which closely follows in the footsteps of its predecessor, does not discard that spirit and so retains ‘fairness’ and the ‘public interest’ as strong reasons for justifying the utilisation of the bank crisis instruments. Conversely, it does not appear that these scenarios can be replicated in Italy, where the administrative authority (the banking sector supervisor) is the only body which, eventually, decides if and where to open the procedures. Ultimately, the mechanism in place in Britain, despite the BA 2009, is more ‘contractual’. The relevant instruments, albeit formalised in law, may be regarded as belonging to the realm of private law or, simply, to the common law tradition.⁶¹

Additionally, it appears that the British legislature, in dealing with the insolvency of the bank, and also the less problematic one (the reorganisation measures), does not necessarily engage in a legitimate procedure. The only concern of the authority is to ensure that, by virtue of fast and straightforward contractual mechanisms,⁶² the consequences arising from the insolvency of the bank can be minimised. Actually, paradoxically, it can be said that of the three bank insolvency procedures introduced in Britain, one (the stabilization option) is not a ‘bona fide’ procedure either, but rather the mere legislative categorisation of contractual instruments.

From a different angle of observation, the Italian procedures (including the *amministrazione straordinaria*), hinged upon a public officer and with specific bodies (including the insight body), appear rather too rigid in their structure. Due to the lack of codified contractual instruments, they do not ben-

⁶¹ The British peculiarity, therefore, may be due to Britain belonging to the common law tradition. For the perennial divergence between common law and civil law, see the entrenched but still actual LEGRAND, *European Legal Systems are not Converging*, 1996, 45, in *International and Comparative Law Quarterly*, pp. 52-81. See also, more recently, CARNEY, *Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions*, 2015, 36, in *Statute Law Review*, pp. 46-58.

⁶² The aforementioned ‘share transfer power’ and ‘property transfer power’.

enefit from the same level of speed and effectiveness as their British counterparts.

Ultimately, this paper somehow advocates the view⁶³ that the ‘soft’ harmonization of the bank insolvency procedure turned out to be a benefit for some countries, such as Britain. In its darkest moments (2008), this vacuum allowed British politics (ergo, the British Government) to manoeuvre in ways that, probably, would not have been imaginable in other countries. In turn, this flexibility, possible also because of the very tenuous EU rules in this area, has allowed Britain to save its renowned industry, to autonomously reshape its procedures in line with its common law tradition, and, ultimately, to mastermind a turnaround of its banking sector. In 2015, seven years on from the onset of the financial crisis, only two British banks have been under a reorganisation measure or winding-up procedure,⁶⁴ whereas, as highlighted under Section 4 above, Italy has still to reach the light at the end of the tunnel following the significant level of insolvency measures already existing in 2008.

6. In a contribution where the ontological driver was the interaction between politics and the financial system, it is hoped that sufficient evidence has been provided on the influence which political systems can exert over the way in which the banking business, in cases of insolvency, can be reorganised (reorganisation measures) or even terminated (winding-up).

The area of the bank insolvency was never designed to be harmonised at EU level by the Bank Insolvency Directive, given the scope of this piece of legislation: to merely ‘synchronise’ the cross-border bank insolvency procedures, rather than the internal national procedures. The peculiarity of the Directive at

⁶³ Such a provocative assertion should be tested against the more authoritative literature flourished in the wake of the 2008 financial crises. Among the contributions: ANDENAS - CHIU, *The Foundation and Future of Financial Regulation: Governance for Responsibility*, Routledge 2013; WYMEERSCH - HOPT - FERRARINI, *Financial Regulation and Supervision. A Post-Crisis Analysis*, OUP 2012; FERRAN – MOLONEY – HILL - COFFEE, *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge, 2012.

⁶⁴ As mentioned above under Section 4, the first SRR regime was applied to the Dunfermline Building Society in 2009 and the second one to the Southsea Mortgage and Investment Company Limited.

stake has been highlighted by virtue of a comparison of the two jurisdictions under discussion and also by the empirical evidence provided in the two periods under observation.

In Britain, a laissez-faire approach to the codification of the bank insolvencies has been apparent, with the two main procedures clearly market-oriented, market-friendly and fast-tracked. The velocity of the procedure is confirmed by the codification of contractual instruments that may represent the legacy of the 2007/2008 financial crises that heavily affected the credit institutions, and more generally speaking, the banking sector across the Channel. In Italy, the bank insolvency procedures seem to be saddled with bureaucracy, handled in a much too heavy handed fashion by the supervisor and reliant upon a lengthy procedure. Surprisingly, given what was highlighted in this paper, the bank insolvency procedures in Britain rely on much more political discretion, whereas those in Italy confer on the administrative authority all the required powers to initiate the procedure.

The very recent case of the Co-operative Group may confirm this possible theory of a double-standard. Although this credit institution was found responsible for serious irregularities,⁶⁵ the Financial Conduct Authority, in a pragmatic/political way, decided to waive a £ 120 million fine, given the possible impact that this decision would have on financial stability.⁶⁶

More practically, the performance of British banks in the last seven years seems to be better than that of the Italian counterparts, if this was assessed merely on the basis of the insolvency procedures in place. Nevertheless, from a pure financial point of view, the profitability of the British banks would need a proper assessment of an economist, rather than a jurist.⁶⁷

⁶⁵ A serious mismanagement in the way investors were given informations.

⁶⁶ See TREAMOR, *Co-op Bank Praises Move to Waive £120m Fine as "Pragmatic Solution"*, in *The Guardian*, available at theguardian.com.

⁶⁷ See WILSON, *British Banks among the Most Unprofitable in the World*, in *The Telegraph*, 7 June 2012, available at telegraph.co.uk.

Beyond this, it is certainly possible to affirm that the political discretion, coupled with the lack of proper harmonization of the procedures, might have caused a 'perfect storm', not of calamity, but of fortunate circumstances which aided the British economy in 2008 to successfully emerge relatively unscathed from the worst crisis to hit its shores since WWII. To elaborate, Britain, during the financial crisis, because it was not shackled by rigid EU rules, was in a position to reorganise and reshape its domestic system of bank insolvency and to orchestrate a bail-out of banks uninhibited by any legal constraint. Indeed, a significant volume of tax payers' money has been deployed.

In light of this, the paper carries with it not simply an analysis but also a warning. The BRRD Directive has been recently enacted and, as has already been emphasised, it is aimed at averting the bank insolvency procedures, rather than setting out common rules relating to the way they should be organised. Given that the lack of harmonisation has been a relative success in the case of Britain, the EU would do well to take note and think twice before introducing, parallel to the BRRD, a pure harmonised system of bank insolvency procedures.

THE INDEPENDENCE OF THE EUROPEAN CENTRAL BANK BETWEEN MONETARY UNION AND FISCAL UNION: THE OMT CASE AS A CON- FLICT AMONG NON-MAJORITARIAN INSTITUTIONS

Stefano Lombardo*

ABSTRACT: *Given the complex relationship between politics and finance, this Article deals with the independence of the European Central Bank in light of the decision of the European Court of Justice of June 2015 on the OMT program. The Article analyses the economic reason for granting independence to a central bank and takes the economic variables of independence as a point of reference for analyzing the relevant Treaty provisions and the OMT decision. It then describes the OMT case as a conflict among non-majoritarian institution for the (supposed) transformation of the monetary union into a fiscal union.*

SUMMARY: 1. Introduction. – 2. The independence of the central bank in economic perspective. – 2.1. The theoretical justification for independence. – 2.2. The qualitative dimension of independence. – 3. The independence of the European Central Bank in the Treaties. – 4. The OMT decision of the ECJ. – 5. The OMT as a case of delegation of powers to non-majoritarian institutions. – 6. Conclusions.

1. It is well known that the establishment of the Economic and Monetary Union (EMU)¹ has provided the Eurozone with an incomplete architecture, because the

* Stefano Lombardo is Associate Professor of Economic Law at Faculty of Economics and Management at *Free University of Bolzano*.

¹ By way of the Maastricht Treaty of 1992 and the Stability and Growth Pact, SGP, of 1997, on which see HAHN, *The stability pact for European Monetary Union: Compliance with deficit limit as a constant legal duty*, in *Common Market Law Review*, 35, 1998, pp. 77-100.

monetary union is not accompanied by a fiscal union.² In essential economic terms, the problem is that the current monetary union does not represent an optimum currency area. Possible economic shocks of some Member States are not corrected and absorbed by wages/prices flexibility, factor (particularly labor) mobility or fiscal transfers.³ While the first years of the Euro were quite promising, it is only with the emergency of the sovereign debt crisis of 2010 that followed the economic and financial crisis having started in 2008 that the Eurozone is confronted dramatically with this incompleteness. The reaction of the Member States (of the Eurozone) and of the European Union to the crisis has concretized in several responses that have (maybe) partially modified the (development of the) constitutional architecture of the European Union.⁴ In particular, interventions include, among others,⁵ in June 2010 the establishment of the European Financial Stability Facility (EFSF)⁶ and of the European Financial Stabilization Mechanism (EFSM)⁷ followed in February 2012 by the establishment of the European Stability Mechanism (ESM)⁸ for the provision of financial

² On the relationship between the monetary union and the fiscal union discussing several possible solutions, see HINAREJOS, *Fiscal federalism in the European Union: evolution and future choices for EMU*, in *Common Market Law Review*, 50, 2013, pp. 1621-1642.

³ The reference point is MUNDELL, *A Theory of Optimum Currency Areas*, in *American Economic Review*, 51, 1961, pp. 657-665. See also KRUGMANN, *Revenge of the Optimum Currency Area*, in *NBER Macroeconomics Annual*, 27, 2013, pp. 439-448. For a comparison of the development of five currency areas, reviewing also theories of fiscal federalism (USA, Canada, Germany, Brazil and Argentina) and the conditions of their success, see BORDO - JONUNG - MARKIEWICZ, *A Fiscal Union for the Euro: Some Lessons from History*, in *CESifo Economic Studies*, 59, 2013, pp. 449-488. On the incompleteness of the European monetary union, see also GERNER-BEUERLE - KÜÇÜK - SCHUSTER, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, in *German Law Journal*, 15, 2014, p. 8.

⁴ See CHITI - TEIXEIRA, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Market Law Review*, 50, 2013, pp. 683-708. See also RODI, *Machtverschiebungen in der Europäischen Union im Rahmen der Finanzkrise und Fragen der demokratischen Legitimation*, in *Juristen Zeitung*, 70, 2015, pp. 737-744, particularly with respect to the modification of powers of the EU organs and a possible problem of democratic deficit.

⁵ Like the creation of the European Banking Union, including the Single Supervisory Mechanism and the Single Resolution Mechanism, on which see MOLONEHY, *European Banking Union: Assessing its Risks and Resilience*, in *Common Market Law Review*, 51, 2014, pp. 1609-1670.

⁶ Created as intergovernmental agreement by the euro area Member States as a temporary crisis solution institution as a company under Luxembourg law.

⁷ Created on the basis of Art. 122(2) TFEU, Council Regulation (EU) No 407/2010 of 10 May 2010 establishing a European financial stabilization mechanism.

⁸ Established on the basis of an amendment of Art. 136 TFEU (see European Council decision of 25 March 2011 amending article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, 2011/199/EU).

help to Member States in difficulties.⁹ The coordination of more stringent budgetary rules was achieved with the so-called Six-Pack¹⁰ and Two-Pack,¹¹ and more importantly with the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, or Fiscal Compact) in March 2012.¹² Also the European Central Bank did intervene on the market with some operations, namely the LTRO program and the SMP program.¹³ Furthermore, the ECB announced the OMT program in September 2012 and started in March 2015 its “quantitative easing” program.¹⁴

In the complex relationship between politics and finance, this Article deals with the issue of the independence of the European Central Bank as shaped by the sovereign debt crisis and in particular in relation to the OMT decision which is the first important decision of the ECJ in this field.¹⁵ The Article takes economic theory on the independence of central banks, that focuses on one aspect of the complex relationship between politics and finance, for justifying the supremacy of finance (i.e. of the central bank and its technical expertise) in this particular regulatory field (Section 2) and analyses the relevant Treaty provisions related to the ECB (3). The analysis confirms that the ECB was designated as an extremely independent institution devoted to price stability. This characteristic has been reinforced by the OMT decision of the ECJ that presents some interesting points for the qualification of the operative

⁹ For a first legal judgment on these instruments, see the opposing views of RUFFERT, *The European Debt Crisis and European Law*, in *Common Market Law Review*, 48, 2011, pp. 1777-1806 and HERMANN, *Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Verfassungsrechts*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 23, 2011, pp. 805-812.

¹⁰ Including five regulations (1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011) and one directive (2011/85/EU).

¹¹ Including two regulations (472/2013, 473/2013).

¹² On the TSCG, see PEERS, *The Stability Treaty: Permanent Austerity or Gesture Politics*, in *European Constitutional Law Review*, 8, 2012, pp. 404-441. Provided the apparent deficit bias of democratic governments, for an empirical evaluation of constitutional budget provisions, see BLUME - VOIGT, *The economic effects of constitutional budget institutions*, in *European Journal of Political Economy*, 29, 2012, pp. 236-251.

¹³ On LTRO and SMP programs see SESTER, *The ECB's Controversial Securities Market Programme (SMP) and its role in relation to the modified EFSF and the future ESM*, in *European Company and Financial Law Review*, 9, 2012, pp. 156-178.

¹⁴ See ECB, Press release of 22 January 2015. On the quantitative easing and its compatibility with the mandate of the ECB, see LAMMERS, *Die Politik der EZB an den Grenzen ihres Mandats?*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 26, 2015, pp. 212-217. The quantitative easing program is already object of a *Verfassungsbeschwerde* at the Federal German Constitutional Court (n. 2BvR859/15).

¹⁵ See Case C-62/14, *Peter Gauweiler and others v Deutscher Bundestag, (OMT)*, of 16 June 2015.

independence of the ECB (4). The ECJ stresses the independence of the ECB, shaping the complex relationship between politics and finance by (re)affirming the supremacy of the monetary technical expertise over the political sphere. The Article then describes the current situation deriving from the OMT case as a conflict among non-majoritarian institutions for the possible transformation of the monetary union into a fiscal union (5). Short conclusions follow (6).

2. In the complex relationship between politics and finance, the essential objective of an independent central bank in modern democracies is traditionally qualified in terms of price stability, i.e. the capacity of the central bank to successfully fight inflation in the medium and long term.¹⁶

2.1. Monetary history helps explaining the development toward central bank independence. Indeed, historically, there have been three monetary systems.¹⁷ The first one relied on metallic coins that reflected the full intrinsic value of silver or gold, the quantity of which was limited by extraction capacity. The second one developed with the creation of paper notes (issued by banks or governments) and the legal rule (obligation) of convertibility at a fixed parity of these notes into gold (gold standard). During these two periods price stability was a direct consequence of legal rules, respectively on the metal content of coins and of convertibility at a fixed parity.¹⁸ The third period, the current one, sees the monopoly of money creation delegated to a central bank. The traditional argument economists use to justify the creation of an independent central bank runs as follows. Since the convertibility of banknotes at a fixed parity into gold is no longer possible, the government could have an incentive to

¹⁶ See the literature reviewing article by DE HAAN - MASCIANDARO - QUINTYN, *Does central bank independence still matter?*, in *European Journal of Political Economy*, 24, 2008, 717-721. From an historical perspective for the pros and cons of an independent central bank, see also CAESAR, *Die Unabhängigkeit der Notenbank im demokratischen Staat*, in *Zeitschrift für Politik*, 27, 1980, pp. 347-377.

¹⁷ See BERNHOLZ, *Independent central banks as a component of the separation of powers*, in *Constitutional Political Economy*, 24, 2013, pp. 199-214, p. 202.

¹⁸ As argued by BERNHOLZ, *supra*, p. 202, in the first period inflation was still possible to the extent that legal rules on full metal content were changed by diminishing the content of precious metal in the coins (so-called debasement).

expand its budget to finance public expenditures and/or to try to fight unemployment (so fostering the economy) simply by convincing the central bank to print banknotes (money). In this context, a time inconsistency problem arises between short run and the medium to long term run. This is a situation where rational agents are able to anticipate policy outcomes and to react to them so eliminating their results.¹⁹ Indeed, given the anticipation of government's behavior by rational agents and considering the (fixed) potential GDP growth ratio, a higher average inflation rate in the medium-long run is the result of the government printing money.²⁰ This means that the government is not the best actor in deciding how much money to print because high inflation is the consequence (s.c. government inflationary bias).²¹ As an alternative, an (independent) central bank is a better actor to define and enforce monetary policy in terms of long run price stability.²² In regulatory terms, an independent central bank is a non-majoritarian institution able to credibly commit itself to a future appropriate level of inflation.²³ Furthermore, the independent central bank does not create costs for society in terms of macroeconomic performance.²⁴ In this way, in the complex relationship between politics and finance, the financial sphere (i.e. the central bank and its technical expertise) is considered superior to the political sphere.

¹⁹ The time inconsistency problem goes back to the article of KYDLAND - PRESCOTT, *Rules Rather than Discretion: the Inconsistency of Optimal Plans*, in *Journal of Political Economy*, 85, 1977, pp. 473-490 and evidences the possible actual anticipation of agents based on their rational expectations with respect to policy-makers' action.

²⁰ The reference model of this literature are BARRO - GORDON, *Rules, Discretion and Reputation in a Model of Monetary Policy*, in *Journal of Monetary Economics*, 12, 1983, pp.101-121.

²¹ Again, the basic model is ROGOFF, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, in *Quarterly Journal of Economics*, 110, 1985, pp. 1169-1189, where the central bank is "conservative" meaning, in short, that it prefers a future lower rate of inflation than the government.

²² The commonly accepted economic justification of central bank independence from political pressure as best device to keep price stability, has been doubted in historical perspective with respect to the cases of the United States and the United Kingdom by HOWELS, *The U.S. Fed and the Bank of England*, in *International Journal of Political Economy*, 42, 2014, pp. 44-62

²³ See MAJONE, *Non majoritarian Institutions and the Limits of Democratic Governance: a Political Transaction Costs Approach*, in *Journal of Institutional and Theoretical Economics*, 157, 1998, pp. 57-78.

²⁴ The reference point is ALESINA - SUMMERS, *Central Bank Independence and Macroeconomic Performance*, in *Journal of Money, Credit and Banking*, 25, 1993, pp. 157-162. See also WALSH, *supra*, p. 6.

Provided the theoretical framework for justifying central bank independence as the best device to grant price stability, economists have studied independence with respect to its qualitative dimension.²⁵

2.2. When speaking about central bank independence, the economic literature distinguishes between *political independence* (or *goal independence*) and *economic independence* (or *instrument independence*).²⁶ Political (i.e. goal) independence means the capacity for the central bank “to choose the final goal of monetary policy”.²⁷ A goal of low inflation is a good proxy for central bank independence.²⁸ Political (i.e. goal) independence relates to the degree of freedom a central bank enjoys vis à vis the government. This dimension includes three aspects:²⁹ (i) no government appointment of the central bank governing bodies (governor and board) and office periods of more than 5 years; (ii) no mandatory presence of government representatives in the board and no provision for government approval of monetary policy; and finally (iii) formal responsibilities of the bank in terms of statutory requirements for price stability (among other possible goals) and legal provisions that protect the bank from the government in case of conflict.³⁰

²⁵ See WALSH, *supra*, 3.

²⁶ See WALSH, *supra*, 3. The terms political independence and economic independence go back to the article of GRILLI - MASCIANDARO - TABELLINI, *Political and Monetary institutions and Public financial Policies in the Industrial Countries*, in *Economic Policy*, 6, 1991, pp. 341-392. The synonymous terms of respectively goal independence and instrument independence were used by DEBELLE - FISCHER, *How Independent Should a Central Bank Be?*, in FUHRER (eds.), *Goals, Guidelines and Constraints Facing Monetary Policymakers*, Boston, 1994, pp.195-221, p. 197.

²⁷ See GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 366 and Table 12, p. 368.

²⁸ See GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 367. For DEBELLE - FISCHER, *supra*, goal independence refers to the freedom granted to a central bank “to set the final goals of monetary policy” (197) meaning that the goal has not necessarily to be the one of price stability but could also be for instance output stability (197). This is in contrast to Grilli GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, where price stability is the proxy for political independence.

²⁹ See GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 366.

³⁰ According to the result of GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 368, of the 18 OECD countries analyzed in their study “West Germany and the US, but also the Netherlands, Canada and Italy, enjoy the highest degree of political independence. At the other end are Austria, New Zealand, the UK, Belgium and Portugal, and not far above Greece, Spain and France”.

Economic (i.e. instrument) independence is the central bank's capacity to choose the instruments used to pursue the chosen goals.³¹ This dimension includes two aspects:³² (i) the (im)possibility for the government to obtain credit facilities from the central bank³³ and for the central bank to participate to the primary public debt market; (ii) the nature of the monetary instruments at the disposal of the central bank in terms of the discount rate set by the central bank and banking supervision not entrusted with the central bank.³⁴

A more elaborated index for measuring the *de jure* independence of a central bank includes four groups of legal elements.³⁵ This index combines some of the elements of the former study but covers substantially the same factors. In short, the first group includes four legal variables related to the "quality" of the office of the members of a central bank.³⁶ The second group relates to three variables in relation to the competence about policy formulation.³⁷ The third group deals with the objectives of

³¹ See GRILLI - MASCIANDARO - TABELLINI, *Politica*, *supra*, p. 367. The corresponding notion in DeBelle and Fischer, *supra*, 197, is the one of instruments independence and refers to the central bank freedom to choose the "means by which it seeks to achieve its goals".

³² See GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 368 and Table 13, p. 369.

³³ Credit facilities to the government should be not automatic, provided at market interest, temporary and in limited amount.

³⁴ According to GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 370, "Economic independence of the central bank is high in West Germany, Switzerland, the US, but also in Austria and Belgium. Conversely, central banks in Italy, New Zealand, Portugal, Greece and Spain have very little economic independence". Furthermore, the authors point out that political independence and economic independence do not necessary coincide in all countries.

³⁵ See CUKIERMAN - WEBB - NEYAPTI, *Measuring the Independence of Central Banks and its Effects on Policy Outcomes*, in *The World Bank Economic Review*, 6, 1992, pp. 353-398, pp. 356-359. This study covers 72 countries in 4 periods. According to WALSH, *Central bank independence*, 2005, prepared for the New Palgrave Dictionary, 4, this index is the most used in the related literature (for a survey of which, see CUKIERMAN, WEBB - NEYAPTI, *supra*, p. 355). To be sure, CUKIERMAN - WEBB - NEYAPTI, *supra*, stress (p. 355) that the level of the actual (*de facto*) central bank independence "depends not only on the law, but also on many other less structured factors, such as informal arrangements between the bank and other parts of government, the quality of the bank's research department, and the personality of key individuals in the bank and the (rest of the) government". For assessing independence, their study takes also in consideration actual governor turnover and a questionnaire to the central banks. A description of the importance of *de facto* independence to measure real independence, is provided by BLANCHETON, *Central bank independence in an historical perspective. Myth, lessons and a new model*, in *Economic Modelling*, in press 2015.

³⁶ Which relate to the (i) appointment, (ii) dismissal, (iii) term of office of the chief officer and (iv) the regime of incompatibility with other government offices. Independence is higher where the government has less authority over these decisions and the term of office is up to 8 years with a strict regime of incompatibility, see CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 358, Table 1.

³⁷ It includes (i) who formulates monetary policy (ii) who decides about conflict resolutions and (iii) the role of the central bank in the government budgetary process. Independence is higher if the central bank alone decide on monetary policy, the final word belongs to the central bank inside a certain legal framework about its objectives

the central bank. This group considers price stability as the major objective and includes six combinations in relation to the possible mix of different objectives. Independence is higher where price stability is the only or major objective (as opposed e.g. to a situation where price stability is not an objective or is combined with others like full employment). The fourth and last group of legal elements relates to the limitations on lending to the government and includes eight variables.³⁸ For all the eight variables the stricter the limitation the higher the central bank independence.³⁹

3. The variables used by economists to evaluate central bank independence in terms of goal independence and instrument independence are useful for analyzing the legal notion of independence of the European Central Bank (ECB) and the European System of Central Banks (ESCB) as “constitutionally” fixed in the Treaties (TEU and TFEU) and in the Statute of the ESCB-ECB.⁴⁰ The TFEU does mention the independence of the ECB in positive terms, stating that it is *independent in the exercise of its powers and in the management of its finances* (Art. 282(3) TFEU) and in negative terms, stating that *union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence* (Art. 282(3) TFEU). The TFEU does not provide for an explicit notion of independence with respect to the ECB (and the ESCB). Nevertheless, a qualification of independence can be identified on the basis of the different legal provisions related to the powers assigned to it.

Starting the analysis with goal independence in terms of price stability, this is statutorily granted. Indeed, the Treaty directly sets the goal of price stability as the

and the central bank is active on the government budgetary policy, see Cukierman, Webb and Neyapti, *supra*, 358, Table 1.

³⁸ These eight variables are: (i) permissibility of non-securitized lending, (ii) permissibility of securitized lending, (iii) control of the terms of lending, (iv) number of subjects who are potential borrowers from the bank, (v) definition of limits on central bank lending, (vi) maturity of loans, (vii) quality of interest rates on loans, and (viii) activity on the primary markets, see CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 359, Table 1.

³⁹ So for instance, with respect to the first and second group, independence is higher if advances and securitized lending are prohibited. Independence is also higher if the terms of lending (maturity, interest and amount) is controlled by the central bank (third group) and the lending limits are defined in currency terms (fifth group): see CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 359.

⁴⁰ Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank.

principal goal of monetary policy.⁴¹ This feature differentiates the mandate of the ECB-ESCB from the mandate of the U.S. Federal Reserve where price stability is formally not prioritized with respect to maximizing employment and moderating long-term interest rates.⁴² In the European system, provided the principal goal of price stability is preserved, the ESCB shall support the general economic policies in the Union (e.g. Art. 127(1) TFEU, Art. 282(2) TFEU). Price stability is not defined in the Treaties, but it is from a legal perspective normally understood as a situation where no inflation and deflation take place.⁴³ Goal independence is also ensured because it is the competence of the ESCB to define and to implement the monetary policy of the Union (Art. 127(2) and Art. 282(1) TFEU). The ECB competence for the definition of monetary policy includes also the numerical definition of price stability and so the proper level of inflation. It is well known that the ECB sets a target inflation rate “below, but close to, 2% over the medium term”.⁴⁴ Goal independence in the European system also considers the composition and appointment of the Governing Council. This is composed by the Governors of the national central banks of the Member States whose currency is the euro and by the six members of the Executive Board, nominated by qualified majority by the European Council (Art. 283(2) TFEU and Art. 11 Statute). The extent to which independence from the government (the political actor) in the appointment procedure is achieved in reality, is difficult to assess. Economic theory seems to rely on an ideal system where the political actor does not

⁴¹ See Art. 3(3) TEU, *balanced economic growth and price stability*; Art. 119(2) TFEU, *single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability*; Art. 127(1) TFEU *the primary objective of the European System of Central Banks (hereinafter referred to as ‘the ESCB’) shall be to maintain price stability*; Art. 2 of the Statute, *the primary objective of the ESCB shall be to maintain price stability*; Art. 282(2) TFEU *the primary objective of the ESCB shall be to maintain price stability*.

⁴² Federal Reserve Act: Section 2A. Monetary Policy Objectives: *The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates*. For the extent to which the FED “plays” among the different objectives, providing in any case for price stability, see DeBelle and Fischer, *supra*, for a comparison between the FED and the Bundesbank. See also Blancheton, *supra*.

⁴³ See WALDHOF, Art. 127, in SIEKMANN, *Kommentar zur Europäischen Währungsunion*, Tübingen, 2012, pp. 263-322, p. 277.

⁴⁴ See EUROPEAN CENTRAL BANK, *The Monetary Policy of the ECB*, 2011, p. 65: the notion of price stability is defined “as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%. Price stability is to be maintained over the medium term”.

appoint the board and the Governor. This ideal model is probably difficult to find in the real world.⁴⁵ Indeed, in Europe, the procedure for nomination of the national Governors is in the hand of national legislators and possibly subject to government approval (even within the limit of Art. 131 TFEU and Art. 14 Statute). The President, the Vice President and the other four members of the Executive Board are appointed by the European Council, which is the highest political actor of the Union (Art. 15 TEU).⁴⁶ The mandate of the members of the Executive Board is eight years and they cannot be reappointed (Art. 283(2) TFEU and Art. 11 Statute).⁴⁷ The term of office of the governors of the national central banks is not directly regulated but Art. 14.2 Statute sets a period of no less than five years, without prohibiting the possibility of re-appointment.⁴⁸ Governors are protected against dismissal by Art. 131 TFEU and Art. 14 Statute, while the members of the Executive Board by Art. 11.4 Statute. Connections between the political actors and the ECB that could prejudice goal independence are provided for (Art. 284 TFEU), but their real consequences should be of limited importance.⁴⁹ Goal independence in terms of prohibition of political pressure over monetary policy is granted to the members of the ESCB-BCE by Art. 130 TFEU. This provision insulates the mandate of the Governing Council members (and of the members of the national central banks) from political influence coming from

⁴⁵ Indeed, in the study of GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 368, Table 12, the only country where the Governor was not appointed by the government was Italy. Furthermore, only in Greece and Italy all the board was not appointed by the government.

⁴⁶ Of course, in the context of the European Union the traditional tripartition of powers between parliament, executive and judiciary is altered and the government cannot be identified with precision like in a national State. According to Rodi, *supra*, 740, the role of the European Council has increased as a consequence of the crisis to become a kind of economic government. See Van ESCH and DE JONG, *Institutionalisation without internalisation. The cultural dimension of French-German conflicts on European Central Bank Independence*, in *International Economics and Economic Policy*, 10, 2013, pp.631-648, p. 639, for political disagreement about the nomination and the composition of the Executive Board in the recent past.

⁴⁷ Which is the optimal term office in by CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 358, Table 1.

⁴⁸ The term of at least five years correspond to what GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 368, Table 18, consider a good proxy for independence while in the study of CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 358, Table 1, the optimal term is eight years. According to SIEKMANN, *Art. 130*, in SIEKMANN (hrsg.), *Kommentar zur Europäischen Währungsunion*, 2012, pp. 402-452, 411, the five years term and the possibility of reappointment may weaken the “personal” independence of the governors.

⁴⁹ For the development of this connections during the crisis, see BEUKERS, *The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, in *Common Market law Review*, 50, pp. 1579-1620.

the national level and the European level.⁵⁰ Finally, goal independence is also granted because in the case of conflicts the European Court of Justice is competent to decide (Art. 263(1) and (3) TFEU and Art. 35 Statute).

With regard to instrument central bank independence, i.e. the central bank's capacity to choose the instruments used to pursue the chosen goals, this is also granted by the Treaty. The possibility for the government(s) (at European level or national level) to finance itself from resources provided by the central bank (i.e. monetary financing) is strictly prohibited by Art. 123 TFEU (prohibiting *overdraft facilities or any other type of credit facility*) and Art. 21.1 Statute. The same articles prohibit also the participation of the central bank to the public debt primary market of a Member State (*the purchase directly from them by the European Central Bank or national central banks of debt instruments*). Art. 123 TFEU represents the core article for instrument independence and has to be read in connection with Article 125 TFEU that contains the no-bail out clause: both of them are contained in Chapter 1 on economic policy. This clause is the expression of the current incompleteness of the currency area of the European monetary union that does not include fiscal transfers of any type among Member States or a central budget. Indeed, the monetary union was based on the premise (and hope) that each Member States keeps a strict regime of fiscal discipline (Art. 119(3) and Art. 126 TFEU). The extent to which this premise was credible (in terms of credible commitment for the Member States and for the procedures laid down for its enforcement and the possible resulting moral hazard problem) is of course highly debatable.⁵¹ The *Pringle* case decided by the European Court of Justice in November 2012 was the milestone to clarify the interpretation of

⁵⁰ Also the ECJ already stressed the importance of Art. 130 TFEU (former Art. 108 EC Treaty) in terms of independence from political pressure ECJ, C-11/00, 10 July 2003, *Commission v ECB (OLAF)*, par. 134: "Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute".

⁵¹ For comparative purposes, see the historical analysis for six federal systems by BORDO - JONUNG - MARKIEWICZ, *supra*. On the credible commitment problem of budgetary discipline and the deriving moral hazard problem, see HINAREJOS, *supra*, p. 1625 and p. 1628.

this article with respect to the moral hazard problem.⁵² In short, the (Full!) Court decided that the ESM does not distort incentives for Member States. There is no mutualization of debt and Member States remain fully responsible for their obligations, so that the no-bail out clause is not circumvented.⁵³

Instrument independence is granted also because the discount rate is set by the Governing Council of the ECB on the basis of its monetary competence (Art. 12.1 Statute). The setting of the key interest rates is not considered an explicit instrument of monetary policy but a natural precondition for its realization.⁵⁴ Key interest rates are, indeed, explicitly mentioned together with intermediate monetary objectives and the supply of reserves to the ECSB, as the core decisions related to the formulation of monetary policy (Art. 12 Statute), which is mandated to price stability as the primary goal. Indeed, the monetary functions and operations of the ESBC are regulated in Art. 17-24 Statute. In particular, the instruments of monetary policy are subject to a *numerus clausus* rule.⁵⁵ They are described in Art. 18 Statute (*open market and credit operations*)⁵⁶ and Art. 19 (*minimum reserves*).⁵⁷ The instrument independence of the ECB in relation to open market and credit operations (i.e. their conformity with Art. 123 TFUE) has to be measured and evaluated according to the terms of the conditions it sets when (i) it takes public debt securities as collateral for

⁵² Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, of 27 November 2012. On *Pringle*, see e.g. DE WITTE - BEUKERS, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, in *Common Market Law Review*, 50, 2013, pp. 805-848; CRAIG, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, in *Maastricht Journal of European and Comparative Law*, 20, 2013, pp. 3-11; BECK, *The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the Pringle Case*, in *Maastricht Journal of European and Comparative Law*, 20, 2013, pp. 635-648; Ruffert, 2013, *Anmerkung*, in *Juristen Zeitung*, 68, pp. 257-259; THYM, *Anmerkung*, in *Juristen Zeitung*, 68, 2013, pp. 259-264.

⁵³ See in particular par. 129-147. The Court stresses the difference between mutualization (i.e. real fiscal transfer) and maintenance of the full obligation to repair the debt. The second is considered as a legitimate financial help by way of an international agreement as the ESM.

⁵⁴ The typical instrument of monetary policy is the setting of the discount rate at which banks can obtain credit from the central bank, GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 369, Table 13.

⁵⁵ Art. 20 Statute provides the possibility for the Governing Council, by a majority of two thirds of the votes cast, for other monetary instruments but within the limits of Art. 2 Statute (price stability as primary goal) and the possible intervention of the Council.

⁵⁶ On these instruments, see Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (recast), OJEU, 2.04.15, L 91/3.

⁵⁷ See ECB Regulation EU 1376/2014 of 10 December 2014 amending Regulation (EC) 1745/2003 on the application of minimum reserves ECB/2003/9, ECB/2014/52.

credit operations in favor of banks and (ii) it purchases public debt securities on the secondary market.⁵⁸

All in all, the analysis has shown that the Treaties grant to the ECB a high degree of goal independence and instrument independence, so that in this regulatory field the technical expertise of the financial sphere is protected from the political sphere.⁵⁹

4. For the first time in its history on 14 January 2014, the Federal Constitutional Court of Germany referred a case to the European Court of Justice for a preliminary ruling under Article 267 TFEU in relation to the OMT program of the European Central Bank. In the recent past, the Federal German Constitutional Court already considered some issues related to the provisions taken by the Member States and the European Union to deal with the economic crisis.⁶⁰ Nevertheless, the Federal German Constitutional Court did not bring an action for a preliminary ruling to the European Court of Justice. The OMT request for a preliminary ruling was highly debated among German legal scholars with respect to the *ultra vires* and national constitutional identity issues as well as the proper role of the ECB as an independent central bank.⁶¹ This debate is not a surprise. History shows that the monetary dimension of the German economic

⁵⁸ On the point, see also SESTER, *supra*, p. 26, for the SMP program.

⁵⁹ Finally, the extent to which instrument independence in banking supervision is organized at the ECB is a more complex issue. Indeed, in the study of GRILLI - MASCIANDARO - TABELLINI, *supra*, banking supervision should not be entrusted with the central bank (369, Table 13) because administrative instruments like portfolio constraints can facilitate the financing of government borrowing (370). On the contrary, the study of CUKIERMAN - WEBB - NEYAPTI, *supra*, does not contain such variable. Banking supervision in relation to prudential requirements rules (the CRR and CRD IV) is indeed in the competence of the ECB. The SSM provides a separation between monetary policy and supervision (Art. 25 and 26 of Council Regulation 1024/2013); for the extent to which this separation is effective, see MOLONEY, *supra*, p. 1634. On the more recent economics of central bank supervision, see MASCIANDARO - QUINTIN - TAYLOR, *Inside and outside the central bank: independence and accountability in financial supervision. Trends and determinants*, in *European Journal of Political Economy*, 24, 2008, pp. 833-848.

⁶⁰ See WENDEL, *Exceeding Judicial Competence in the Name of Democracy: the German Federal Constitutional Court's OMT Reference*, in *European Constitutional Law Review*, 10, 2014, pp. 263-307, with respect in particular to the ESM and TSCG and to the activity of other constitutional courts (p. 266).

⁶¹ In favor of the decision of the Federal German Constitutional Court and against the operations of the ECB, see e.g. SCHMIDT, *Die entfesselte EZB*, in *Juristen Zeitung*, 70, 2015, pp. 317-327; STÄDTER, *Das OMT-Verfahren in Luxemburg und Karlsruhe – ein wesentlicher Schritt der europäischen Krisenbewältigung?*, in *Recht und Politik*, 51, 2015, pp. 20-28. Against the decision and in favour of the operation of the EZB, see e.g. HEUN, *Eine verfassungswidrige Verfassungsgerichtsentscheidung – die Vorlagebeschluss des BVerfG vom 14.1.2014*, in *Juristen Zeitung*, 69, 2014, pp. 331-337; WENDEL, *supra*.

constitution after the second World War has always been of determinant importance, shaping the national identity. The German Bundesbank has always been considered among the most independent political central banks in the world.⁶² Both legal doctrine and the public opinion in Germany see this “constitutional” dimension of the Bundesbank as a fundamental element of the German cultural model of the *soziale Marktwirtschaft*.⁶³

The German Court asks essentially two questions to the ECJ:⁶⁴ (i) whether the OMT program exceeds the monetary policy mandate of the ECB and encroaches upon the economic policy competence of the Member States and (ii) whether the OMT program involves monetary financing. In short, both questions refer to the possible transformation of the monetary union into a fiscal union.⁶⁵

The European Court of Justice provides a judgment which strengthens the independence (particularly, instrument independence) of the European Central Bank and serves as strong precedent for future possible cases.⁶⁶ The Court reformulates the questions for a preliminary ruling into a single question asking whether the OMT program is compatible with Artt. 119, 123(1), 127(1) and (2) TFEU and Artt. 17 to 24 Statute.⁶⁷ In short, the European Court of Justice answers that the OMT program is a monetary program and that it is in conformity with the prohibition of monetary fi-

⁶² See GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 368.

⁶³ See VAN ESCH - DE JONG, 2013, *supra*, describing the different attitude of the several Member States toward the independence of the central bank and in particular to the different approaches of France and Germany, pointing out the cultural dimension in explaining these differences. See also KALTENTHALER, *German Interests in European Monetary Integration*, in *Journal of Common Market Studies*, 40, 2004, pp. 69-87.

⁶⁴ See also Mayer, *Zurück zur Rechtsgemeinschaft: Das OMT-Urteil des EuGH*, in *Neue Juristische Wochenschrift*, 68, pp.1999-2003, p. 2000; HERMANN - DORNACHER, *Grünes Licht von EuGH für EZB-Staatsanleihenkäufe – ein Lob der Sachlichkeit*, in *Europäischen Zeitschrift für Wirtschaftsrecht*, 26, 2015, pp. 579-583, p. 580.

⁶⁵ The short statement has to be understood as possible circumvention of the prohibition of the monetary financing provision of Art. 123 TFEU and refers to the doubts expressed by the Federal German Constitutional Court (see par. 87 of the decision of the German Court). Circumvention means essentially that there is a mutualization of resources.

⁶⁶ For first comments on the OMT decision of the ECJ, see: Mayer, *supra*; HERMANN - DORNACHER, *supra*; ROSSANO, *Legittimo il programma “OMT”: La Corte di Giustizia dà ragione alla BCE*, in *Rivista trimestrale di diritto dell'economia*, 2/15-II, 2015, pp. 75-93; PRINCIPE, *Gli strumenti di intervento della BCE e le prospettive dell'Unione europea*, in *Rivista trimestrale di diritto dell'economia*, 2/15-II, 2015, pp. 94-107; critical, see KLEMENT, *Der geldpolitische Kompetenzmechanismus*, in *Juristen Zeitung*, 70, 2015, pp. 754-760.

⁶⁷ Par. 32 OMT decision.

nancing. More particularly, with respect to the core economic questions,⁶⁸ the Court makes four essential points: (i) in the ESCB-ECB system it is the task of the Governing Council to formulate the monetary policy and of the Executive Board to implement that policy under no threat of political pressure;⁶⁹ (ii) in the distinction between economic policy and monetary policy,⁷⁰ the OMT program has the direct aim of improving the transmission mechanism of monetary policy and the indirect consequence of improving the stability of the euro area supported by the ESM;⁷¹ (iii) the proportionality of the OMT program is given because there is a sound relationship between instruments and objectives;⁷² (iv) there is a clear distinction between forbidden primary market bonds purchases and allowed secondary market bonds purchases, and the conditions of the OMT program do not violate the prohibition of monetary financing.⁷³

The OMT decision is of relevant importance because it starts to trace the limits of the powers of the ECB that may be better refined in future cases.⁷⁴ In particular, with respect to the proportionality test (which is apparently of decisive importance in this context)⁷⁵ and the analysis of Art. 123(1) TFEU, the ECJ grants the ESCB-ECB a high level of technical discretion for the definition and implementation of the monetary policy. The general principle one can derive from the OMT decision is the following. Court review of ECB decisions requiring a high level of *technical* discretion, provided *the highly controversial involved choices of a technical nature as well as the forecasts and complex assessments* (par. 68 OMT decision), is and will be limited to a control more focused on the respect of procedural issues rather than content issues.

⁶⁸ On these core economic questions and the conformity of the operations of the ECB with the relevant Treaty provisions, see the analysis of Gerner-Beuerle, Küçük and Schuster, *supra*; see also THIELE, *Die EZB als fiscal- und wirtschaftspolitischer Akteur*, in *Europäischen Zeitschrift für Wirtschaftsrecht*, 25, 2014, pp. 694-812.

⁶⁹ Par. 34 to 46 OMT decision.

⁷⁰ The distinction was already treated in *Pringle*.

⁷¹ Par. 47 to 65 OMT decision.

⁷² Par. 66 to 92.

⁷³ Par. 93 to 126.

⁷⁴ See ROSSANO, *supra*, for a possible application of the principle of the ruling to the quantitative easing program started in March 2015.

⁷⁵ As noted by MAYER, *supra*, 2001, the proportionality test was not problematized by the German actors. It was discussed by the General Advocate Cruz Villalón (see par. 159-202 of the opinion)

In this way, the Court recognizes its (objective) limits and a substantial “agnostic” attitude with respect to complex issues of monetary policy.⁷⁶ This interpretative approach can be criticized but it is in line with the (new?) approach used for evaluating the discretion of the exercise of the powers of European agencies.⁷⁷ If the ECJ grants some discretion in deciding technical issues to European agencies that for sure do not have the same legal status as the ECJ, it is reasonable to assume that the discretion enjoyed by the ECB is of a more comprehensive nature, both with respect to its limits and contents. Indeed, in the constitutional system of the European Union, the ESCB-ECB is precisely the actor in charge (in term of both, the right and the duty to act) of the monetary policy and judicial review of the ECB’s technical decisions has to respect this primacy, precisely with respect to technical discretion.⁷⁸ In this way the ECB has stressed the prevalence of the technical monetary expertise over the political sphere and the independence of the ECB from politics, so granting autonomy to finance in the complex relationship between politics and finance.

5. Experience shows that independent central banks have developed in recent years in more or less developed countries as the best actors to run monetary policy in terms of price stability.⁷⁹ This means that the delegation of power to this non-majoritarian institution in this particular regulatory area has proven to be quite efficient. Functionally, even if not legally, independent central banks can be considered as the fourth actor in the separation of powers together with the legislature, the ex-

⁷⁶ This attitude is difficult to criticize in a context where the same academic, economic profession is divided between about 240 people in favor of the OMT program, (see *berlinoeconomicus.diw.de*) and about 140 against it (see *www.vwl.uni-mannheim.de*)

⁷⁷ See case C-270/12, *United Kingdom v. European Parliament and Council*, 22 January 2012 (Short Selling Regulation), on which see BERGSTROM, *Comment*, in *Common Market Law Review*, 52, 2015, 219-242. With respect to the relationship between technicalities and expertise, see e.g. par. 83, ESMA is vested with *certain decision-making powers in an area which requires the deployment of specific technical and professional expertise*.

⁷⁸ See also LAMMERS, *supra*, p. 215.

⁷⁹ See for recent empirical evidence CROWE - MEADE, *The Evolution of Central Bank Governance around the World*, in *Journal of Economic Perspectives*, 21, 2007, 69-90; DAUFELD - HELLSTRÖM - LANDSTRÖM, *Why Do Politician Implement Central Bank Independence Reforms?*, in *Atlantic Economic Journal*, 41, 2013, pp. 427-438.

ecutive and the judicative.⁸⁰ It is apparent that their success resembles the widespread development around the world of another particular institution: the Constitutional Court. Also this non-majoritarian institution has proved to be an extremely successful (and hence efficient) one, because in the recent past more and more countries introduced the constitutional review of legislation.⁸¹

The paradigm of delegation of power to non-majoritarian institutions, in the case of the OTM decision is interesting for two reasons.⁸² The first one is that the OMT decision is the first ECJ decision on the independence of the ECB on a delicate issue such as the borders between monetary union and fiscal union and serves as a strong precedent. The ECJ has ruled that the ECB enjoys a high level of goal and instrument independence. The second reason is that it shows the potential problems that this independence can entail when the non-majoritarian⁸³ actors with an open-ended commitment to broad objectives, are “playing a game” without precise specification of their mandate in limit situations.⁸⁴ Indeed, some scholars have criticized the Federal German Constitutional Court for having acted unconstitutionally.⁸⁵ The Federal German Constitutional Court doubts that the European Central Bank has act-

⁸⁰ See BERNHOLZ, *supra*.

⁸¹ For a review of the several legal theories justifying the emergency of constitutional courts providing also an empirical test, see RAMOS ROMEU, *The Establishment of Constitutional Courts, A Study of 128 Democratic Constitutions*, in *Review of Law and Economics*, 2, 2013, pp. 103-135.

⁸² The theory of delegation of powers to non-majoritarian institutions is a paradigm used both in political science (deriving from economics) and constitutional political economy. For political science, see Thatcher and Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in *West European Politics*, 25, 2002, pp. 1-22; for the delegation of power to the constitutional court, see STONE SWEET, *Constitutional Courts and Parliamentary Democracy*, in *West European Politics*, 25, 2002, pp. 77-100. For the political economy of constitutional courts (or economic analysis of constitutional courts), see GINSBURG, *Economic Analysis and the Design of Constitutional Courts*, in *Theoretical Inquiries in Law*, 3, 2002, pp. 49-85.

⁸³ The qualification of the European Court of Justice as non-majoritarian institution, is provided by MAJOINE, *supra*, p. 68, who qualifies the same European community Treaty as non-majoritarian institution, because of its nature as “framework Treaty”.

⁸⁴ See MAJONE, *supra*, p. 72, suggests that non-majoritarian institutions have an open-ended commitment to broad objectives because the nature of the delegated mandate cannot be specified in detail *ex ante*. The relationship between delegating political actor and delegated institution can be described as a relational contract and is based on fiduciaries duties the latter owns to the former in a context he qualifies in terms of trustee-property-duty (74). The point of open-ended commitments resembles the notion of general clauses in private law (like good faith or the diligence of the good family father). This point is probably better understandable in the present context if we assume that, provided the price stability objective of the ECB which is something simply identifiable in a number, the ECB keeps independence in reaching the objective. On the contrary, the open-ended commitment of constitutional courts is more pronounced because they have the monopoly of constitutional interpretation that is something intrinsically more flexible in its results.

⁸⁵ See HEUN, *supra*, who speaks of an unconstitutional decision.

ed within the limits of its competence transforming the monetary union a fiscal union. The Federal German Constitutional Court challenges the same preliminary ruling mechanism of the European Court of Justice, admitting the possibility (at least indirectly) of a different interpretation for national purposes.⁸⁶ Of course, by definition as independent, non-majoritarian institutions all three actors are supposed to have monopolistic power in their competence sphere and this is the reason of the conflict. In this case, the Federal German Constitutional Court, the European Court of Justice and the European Central Bank “play a game” where the Federal German Constitutional Court questions the behavior of the ECB. In essence, in legal terms, the Federal German Court doubts the legitimacy of the OMT program with respect to a supposed transformation of the monetary union in a fiscal union. The ECJ did decide for the legitimacy of the OMT, thus also defining the limits of this status by arguing that, as far as technical issues are concerned, the evaluation and the action of the ECB includes a high degree of permitted independence. For the ECJ the tension between monetary union and fiscal union is only apparent and not present. In economic terms, this case is interesting because the conflict is between non-majoritarian, independent institutions about rules related to the incompleteness of the monetary union as described in Section 1. It is not possible to evaluate here whether this conflict was anticipated as a possible future scenario by the delegating actors (the politicians establishing EMU). In other words, it is not possible to evaluate whether the delegating politicians were aware of the fact that the incompleteness of the monetary union would have caused sooner or later a case where a possible transformation into a fiscal union would have been decided by the interaction of delegated non-majoritarian institutions. Two cases are possible. In the first case, which is less probable given the open ended commitment of non-majoritarian institutions, the possible conflict was non anticipated by the delegating politicians because of the supposed clarity of the delegation of powers to all there institutions about their mandate and competences.

⁸⁶ See par. 102 of the decision for preliminary ruling of the German Constitutional Court for the issue of national identity. On the point, see also HEUN, *supra*, p. 336.

In this case, the conflict is something outside the delegation and should go back to the political actors for a proper, political solution. In the second case, the more probable one given the open-ended commitment of non-majoritarian institutions, the conflict was anticipated as possible future scenario and the delegation of powers included also the (implicit) assumption that the three actors would find the non-majoritarian (correct?) solution. In this case, it is now up to the Federal German Constitutional Court to decide whether the conflict can find a proper solution among non-majoritarian institution.⁸⁷ Based on the ruling of the Federal German Constitutional Court, only (economic) history will show whether the OMT decision is a first step toward the transformation of the European monetary union into a fiscal union⁸⁸ and whether the OMT decision has transformed the role of the ECB.⁸⁹

6. In the complex relationship between politics and finance, this Article has analyzed the issue of the independence of the European Central Bank taking into consideration the economic foundations that justify the delegation to this non-majoritarian institution of the task of price stability, so granting to finance supremacy over the political sphere. A review of the relevant Treaty provisions has shown that the ECB enjoys a very high level of independence that has been confirmed by the European Court of Justice. In a game among non-majoritarian institutions, the ECJ has ruled that the OMT program is not transforming the European monetary union into a fiscal union as doubted by the Federal General Constitutional Court. In the relation-

⁸⁷ For possible solutions of Federal German Constitutional Court more or less open to collaboration or confrontation with the European Court of Justice, see HEUN, *supra* p. 336; KLEMENT, *supra*, p. 760, HERMANN, *supra*, p. 582; MAYR, *supra*, 2003.

⁸⁸ On the future development, see HINAREJOS, *supra*. See also MADURO, *A new governance for the European Union and the euro: democracy and justice*, Robert Schuman Center for Advanced Studies, 2012/11, 11. For the current impossibility to have Eurobonds because of Treaty prohibitions, see HEUN - THIELE, *Verfassungs- und europarechtliche Zulässigkeit von Eurobonds*, in *Juristen Zeitung*, 67, 2012, pp. 973-982. For possible developments, see also JUNKER, *Completing Europe's Economic and Monetary Union*, 2015, p. 14. See also the interview of the French Economy Minister Macron of Monday 31 August 2015 in the German newspaper *Süddeutsche Zeitung* about the necessity of a new foundation of the Eurozone toward a fiscal union.

⁸⁹ From an economic perspective for the pros and cons of the transformation of the ECB into a lender of last resort, see DE GRAUWE, *The European Central Bank as a Lender of Last Resort in the Government Bond Markets*, in *CESifo Economic Studies*, 59, 2013, pp. 520-535. See also BLANCHETON, *supra*, who reviews the history of central bank independence and argues that the system is in continuous evolution having now reached a stadium of low-degree independence for all the relevant central banks (i.e. USA, UK, and EU).

ship between politics and finance, the OMT decision reinforces the independence of the ECB, so (re)affirming the primacy of the technical monetary expertise over the political sphere. It is now up to the Federal German Constitutional Court to rule on the case.