



CENTRO STUDI SUL FEDERALISMO

research paper

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A MULTI-SPEED EU?

AN INSTITUTIONAL AND LEGAL ASSESSMENT



December 2015

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ABSTRACT

Asymmetry has frequently been experimented within federalising processes, especially in those federal or quasi-federal contexts characterised by the coexistence of different legal and cultural backgrounds (Canada, for instance). By adopting a comparative approach, this paper offers a reflection on asymmetry as an instrument of differentiated integration in the current phase of the EU integration process. It aims to show the potential of the concept and some of the risks connected to its use.

Keywords: European Union | EU integration | EU institutions | EU law | Federalism

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Many thanks to Giacomo Delledonne and Leonardo Pierdominici.

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Paper prepared within the context of “Governing Europe”, a joint project led by Centro Studi sul Federalismo (CSF) of Turin and the Istituto Affari Internazionali (IAI) in the framework of the strategic partnership with Compagnia di San Paolo, International Affairs Programme.

1. Why asymmetry should not be treated as an F-word - 2. Why asymmetry might be good for the European Union federalising process - 3. How asymmetry works in EU law and the role played by the constitutional safeguards provided for in the EU Treaties - 4. The institutional impact of asymmetry in the current phase of the European integration process - 5. Policy recommendations

1. Why asymmetry should not be treated as an F-word

The aim of this paper is to offer a reflection on asymmetry as an instrument of differentiated integration¹ in the current phase of the EU integration process. Leuffen, Rittberger and Schimmelfennig have defined the EU as a “system of differentiated integration”² and have argued that “differentiation is an essential and, most likely, enduring characteristic of the EU. Moreover, differentiation has been a concomitant of deepening and widening, gaining in importance as the EU’s tasks, competencies and membership have grown.”³

Against this background, asymmetry can be conceptualised as an instrument of differentiated integration useful to guarantee unity without jeopardising the constitutional diversity that inspires the European project (in light of what now Art. 4.2 TEU provides for concerning the duty to “respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”). However, despite this, “differentiated forms of European integration tend to be viewed sceptically by many scholars and policy-makers.”⁴ Indeed, differentiated integration has frequently been seen as “a challenge to the authority of the Union; to its *telos*; to the unity of its policies, laws and institutions; and to any prospect of it developing into a political community based on shared rights and obligations of membership.”⁵

¹ As Fossum pointed out, differentiation and differentiated integration are not synonymous: “We might understand differentiation as a wider concept that includes, yet goes beyond, differentiated integration. In other words, it encompasses traditional understandings of differentiated integration as mainly consisting of the same integration only at different speeds. Yet it also includes two new differences between member states that are likely to be wider and more lasting: first, cases where some states integrate more closely whilst, at the same time and for connected reasons, others disintegrate from their previous levels of involvement with the Union; and second, cases where even notionally full members come to be regarded as having different membership status.” John Erik Fossum, “Democracy and Differentiation in Europe”, in *Journal of European Public Policy*, Vol. 22, No. 6 (2015), p. 800.

² Dirk Leuffen, Berthold Rittberger and Frank Schimmelfennig, *Differentiated Integration. Explaining Variation in the European Union*, Basingstoke, Palgrave Macmillan, 2013.

³ Frank Schimmelfennig, Dirk Leuffen and Berthold Rittberger, “The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation”, in *Journal of European Public Policy*, Vol. 22, No. 6 (2015), p. 764-782.

⁴ Alex Warleigh-Lack, “Differentiated Integration in the European Union: Towards a Comparative Regionalism Perspective”, in *Journal of European Public Policy*, Vol. 22, No. 6 (2015), p. 871.

⁵ As Lord recalls, “differentiated integration has been transformed from taboo to one of the main sources of pragmatic compromise in EU politics”. See Christopher Lord, “Utopia or Dystopia? Towards a Normative Analysis of Differentiated Integration”, in *Journal of European Public Policy*, Vol. 22, No. 6 (2015), p. 784. See also Rebecca Adler-Nissen, “Opting Opting Out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty”, in *West European Politics*, Vol. 34, No. 5 (2011), p. 1092-1113.

The literature on differentiated integration and multi-speed Europe is huge,⁶ and this explains why the ideas of differentiated integration and asymmetry have been extended and adapted to many different processes by scholars over the years. However, in order to avoid misunderstandings I would like to make clear that in this work I shall analyse those forms of asymmetries which are allowed and carried out only when the respect of an untouchable core of integration is guaranteed.

This is crucial to conceive of the flexibility ensured by asymmetry as an added value to the integration phenomenon. Against this background, flexibility gives “something more” to the life of a political system only when the identity of this system is preserved; otherwise, flexibility would lead to a revolution in a technical sense, i.e. a transformation of the identity of the legal system. In order to avoid this, a legal system allowing asymmetry presents some constitutional safeguards, as we will see.

2. Why asymmetry might be good for the European Union federalising process

Asymmetry has been frequently experimented with within federalising processes,⁷ especially in those federal or quasi-federal contexts characterised by the coexistence of different legal and cultural backgrounds (Canada, for instance). One should take this into account before conceiving, for instance, of enhanced cooperation as a form of “constitutional evil” conducive to a “disintegrative” multi-speed Europe.

On the contrary, asymmetry might even serve as an instrument of constitutional integration, as comparative law shows. For instance, flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory: “Federal symmetry refers to the uniformity among member states in the pattern of their relationships within a federal system. ‘Asymmetry’ in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units.”⁸ However, asymmetry does not refer to mere differences of geography, demography or resources existing among the components of the federation or to the variety of laws or public policies present in a given territory.⁹ Looking at this

⁶ Alexander C.-G. Stubb, “A Categorization of Differentiated Integration”, in *Journal of Common Market Studies*, Vol. 34, No. 2 (June 1996), p. 283-295; Alex Warleigh-Lack, “Differentiated Integration in the European Union”, cit., p. 876.

⁷ Francesco Palermo, “Divided We Stand. L’asimmetria negli ordinamenti composti”, in Alessandro Torre et al. (eds.), *Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all’Europa)*, Torino, Giappichelli, 2007, p. 149-170; Roland L. Watts, “A Comparative Perspective on Asymmetry in Federations”, in *Asymmetric Federalism Series*, No. 2005/4 (2005), <http://www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/WorkingPapers/asymmetricfederalism/Watts2005.pdf>.

⁸ Roland L. Watts, “A Comparative Perspective on Asymmetry in Federations”, cit., p. 2.

⁹ The word asymmetry has acquired a variety of meanings: when talking about asymmetry one can distinguish between financial and constitutional asymmetry, or between *de jure* and *de facto* asymmetry. *De jure* asymmetry “refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, *de facto* asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and, as Tarlton noted, is typical of relations within virtually all federations” (Roland L. Watts, “A Comparative Perspective on Asymmetry in Federations”, cit., p. 2). The debate on the concept of asymmetry originates from

debate is also very useful in order to find many of the intuitions developed in the current discussion about flexibility and uniformity in multi-tiered (not only in fully-fledged federal) systems, including a certain scepticism towards asymmetrical arrangements, which we will find even in European studies.¹⁰ As Burgess pointed out, within two broad types of preconditions for asymmetry (called “socio-economic” and “cultural-ideological” preconditions), it is possible to refer to a variety of factors that might lead a given polity to rely on asymmetry (political cultures and traditions, social cleavages, territoriality, socio-economic factors, demographic patterns).¹¹ When listing the pros and cons of asymmetry Bauböck recalls that: 1) asymmetry can affect cohesion, that is, “the glue binding the component parts together”;¹² 2) asymmetric powers can translate “unequal representation of citizens in federal government and thus can be seen to violate a commitment to equal federal citizenship”;¹³ and 3) asymmetry may be perceived as a threat to the quality of the democratic debate, making the polity less understandable to citizens¹⁴ and creating “incentives for bargaining that will generate even more asymmetry.”¹⁵

At the same time asymmetry is a resource for a polity that wants to recover disadvantaged minorities and that respects the equal dignity of its components. In other words, asymmetry is a game between centripetal and centrifugal forces, and here again one can find interesting clues from comparative studies. Indeed, the debate on the possible negative implications of asymmetry leads to the identification of a constitutional core of principles and values whose respect makes asymmetry “sustainable”: this is also the rationale of asymmetry in EU law, as we will see, for instance, when dealing with Art. 326 TFEU.

As comparative law shows, asymmetry works as a safety valve of some tensions generated by the coexistence of different cultures. Canada is emblematic from this point of view, and a good example of this is given by social policies, as we will see.

While comparative lawyers still treat asymmetry as an exception in the life of federal polities (and this can be explained by conceiving of the *foedus* as a contract between parties put on an equal footing), actually this concept has progressively acquired a key role in the history of federalism. In other words, today asymmetry is the rule rather than the exception in this field.¹⁶

comparative studies in the 60s after the publication of a seminal article by Charles D. Tarlton, “Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation”, in *Journal of Politics*, Vol. 27, No. 4 (November 1965), p. 861-874.

¹⁰ Charles D. Tarlton, “Symmetry and Asymmetry as Elements of Federalism” cit., p. 874.

¹¹ Michael Burgess, “Federalism and Federation: A Reappraisal”, in Michael Burgess and Alain G. Gagnon (eds.), *Comparative Federalism and Federation. Competing Traditions and Future Directions*, Toronto, University of Toronto Press, 1993, p. 3-14; Michael Burgess and Franz Gress, “Symmetry and Asymmetry Revisited”, in Robert Agranoff (ed.), *Accommodating Diversity. Asymmetry in Federal States*, Baden-Baden, Nomos, 1999, p. 43-56.

¹² Rainer Bauböck, “United in Misunderstanding? Asymmetry in Multinational Federations”, in *IWE Working Papers*, No. 26 (May 2002), p. 17, <https://eif.univie.ac.at/downloads/workingpapers/IWE-Papers/WP26.pdf>.

¹³ *Ibid.*, p. 20.

¹⁴ “Highly asymmetric federations become opaque for their citizens.” *Ibid.*, p. 16.

¹⁵ *Ibid.*

¹⁶ Francesco Palermo, “La coincidenza degli opposti: l’ordinamento tedesco e il federalismo asimmetrico”, in *Federalismi.it*, 7 February 2007, <http://www.federalismi.it/nv14/articolo-documento.cfm?artid=6991>.

3. How asymmetry works in EU law and the role played by the constitutional safeguards provided for in the EU Treaties

As recalled at the beginning of the paper, when dealing with differentiated integration scholars in EU studies also recall other phenomena that are partly connected with the focus of this paper.¹⁷

These studies confirm the importance that integrated differentiation has in the European integration process. Scholars have conducted in-depth studies of the contours acquired by the idea of differentiation in EU law and its main sources, distinguishing several models.¹⁸ Others have harshly criticised the asymmetric option, looking at it as incompatible with an integration process. Finally, another group of authors has insisted on the positive implications of a multi-speed Europe to overcome the difficulties present in the enlarged Union.¹⁹

The EU already knows some forms of asymmetry:²⁰ the opting-out mechanism,²¹ the open method of coordination,²² and enhanced cooperation²³ are just some examples. The instrument of enhanced cooperation is particularly useful in understanding the important role played by those constitutional safeguards aimed at making asymmetry sustainable and thus functional to the goals of integration.

Enhanced cooperation aims to ensure, at the same time, unity and diversity. In fact, it allows Member States to experiment with different forms of integration without “shutting the door” to those unwilling to take steps towards deeper integration in specific areas (openness is at the heart of Art. 331 TFEU). Enhanced cooperation can be conceived as a sort of *extrema ratio* to be exploited when the Council realises that the goals of integration cannot be achieved within a reasonable period by the EU as a whole. The procedures to be followed in this case ensure the

¹⁷ See, for instance, the examples of differentiated integration treated by Funda Tekin, “Opt-Outs, Opt-Ins, Opt-Arounds? Eine Analyse der Differenzierungsrealität im Raum der Freiheit, der Sicherheit und des Rechts”, in *Integration*, No. 4 (2012), p. 237-257; as translated into English by Wolfgang Wessels, “How to assess an institutional architecture for a multi-level Parliamentarism in differentiated integration?”, in *Challenges of Multi-Tier Governance in the EU*, Brussels, European Parliament, October 2012, p. 24-29, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-AFCO_ET%282013%29474438.

¹⁸ Matej Avbelj, “Differentiated Integration. Farewell to the EU-27?”, in *German Law Journal*, Vol. 14, No. 1 (January 2013), p. 193-194.

¹⁹ Jean-Claude Piris, “It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members”, in *Jean Monnet Working Papers*, No. 5/2011 (2011), <http://jeanmonnetprogram.org/paper/it-is-time-for-the-euro-area-to-develop-further-closer-cooperation-among-its-members>.

²⁰ Watts, for instance, mentions the EU in his writings on asymmetry. See: Ronald L. Watts, “The Theoretical and Practical Implications of Asymmetrical Federalism”, in Robert Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States*, Baden-Baden, Nomos, 1999, p. 29.

²¹ Lee Miles, “Introduction: Euro outsiders and the politics of asymmetry”, in *Journal of European Integration*, Vol. 27, No. 1 (March 2005), p. 3-23.

²² Fritz W. Scharpf, “The European Social Model: Coping with the Challenges of Diversity”, in *MPIfG Working Papers*, No. 02/8 (July 2002), <http://www.mpifg.de/pu/workpap/wp02-8/wp02-8.html>. See also Mark Dawson, “Three Waves of New Governance in the European Union”, in *European Law Review*, Vol. 36, No. 2 (2011), p. 208-226.

²³ José María Beneyto (ed.), *Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation*, Madrid, CEU Ediciones, 2009, <http://www.ceuediciones.es/documents/ebookceuediciones1.pdf>; and Carlo Maria Cantore, “We’re One, but We’re not the Same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU”, in *Perspectives on Federalism*, Vol. 3, No. 3 (2011), p. 1-21, http://on-federalism.eu/attachments/103_download.pdf. See in general, Gráinne de Búrca and Joanne Scott (eds.), *Constitutional Change in the European Union. From Uniformity to Flexibility?*, Oxford, Hart, 2000.

intervention and control of the other EU institutions (Commission, Parliament) guaranteeing the *common agents' control*.²⁴ After the entry into force of the Lisbon Treaty the *passerelle* mechanism may be applied to enhanced cooperation with some exceptions, namely, decisions on defence matters or decisions that have military implications.²⁵

Enhanced cooperation under EU law also counter-balances (partly at least)²⁶ Bauböck's argument on the lack of transparency of asymmetrical dynamics, since according to Art. 330 TFEU, "[a]ll members of the Council may participate in its deliberations." Finally, enhanced cooperation is conceived for specific areas, and this is "a guarantee not only for those Member States without the political will to join enhanced cooperation from the beginning, but also for those which do not meet the objective requirements for joining the enhanced cooperation scheme."²⁷ As mentioned previously, the discipline of enhanced cooperation under the EU is emblematic of how asymmetry can perform an integrative function. The governing provisions are Arts. 330-333 TFEU and Art. 20 TEU. As Fabbrini pointed out,²⁸ all these rules can be traced back to three groups of norms: those concerning the activation (minimum number of Member States, role of the Commission, Parliament and Council), those regarding the functioning of enhanced cooperation (regular use of the EU institutions, application of particular rules for the working of the Council, use of the *passerelle* clause) and, finally, those governing the possibility to step in the cooperation for the "non-original parties." More generally, when analysing these provisions it is possible to infer limits and conditions – what Fabbrini calls both *ex ante* and *ex post* caveats²⁹ – of enhanced cooperation in EU law (for instance, exclusion of areas covered by the EU's exclusive competence, the necessity to rely on it as a last resort, compliance with the EU Treaties).

All these elements serve as constitutional safeguards since they make the asymmetry produced by enhanced cooperation sustainable under EU law.³⁰

A particular form of cooperation is the permanent structured cooperation in the field of common foreign and defence policy involving "[t]hose Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions,"³¹ whose conditions are listed in Art. 42.6 and 46 TEU and Protocol 10 to the Lisbon Treaty. It is also possible to recall other forms of differentiation like those governed by Arts. 42 and 45 TEU, again in the field of common security and defence policy – Art. 184 TFEU within the implementation of the multi-annual framework programme, or Art. 86 and 87 TFEU in the field of judicial cooperation in criminal matters and police cooperation.

²⁴ See Massimo Bordignon and Sandro Brusco, "On Enhanced Cooperation", in *Journal of Public Economics*, Vol. 90, No. 10-11 (November 2006), p. 2063-2090; and Carlo Maria Cantore, "We're One, but We're not the Same", cit. p. 15.

²⁵ Art. 333 TFEU.

²⁶ Partly because the author mainly refers to the participation of citizens in the public debate.

²⁷ Carlo Maria Cantore, "We're One, but We're not the Same", cit., p. 16.

²⁸ Federico Fabbrini, "The Enhanced Cooperation Procedure: A Study in Multispeed Integration", in *CSF Research Papers*, October 2012, <http://www.csfederalismo.it/en/publications/research-papers/998>.

²⁹ *Ibid.*, p. 8-9.

³⁰ *Ibid.*, p. 12.

³¹ Art. 42.6 TEU. On this see: Marise Cremona, "Enhanced Cooperation and the Common Foreign and Security and Defence Policy of the EU", in *EUI Law Working Papers*, No. 21/2009 (December 2009), <http://hdl.handle.net/1814/13002>.

The use of enhanced cooperation in the field of divorce, patents and financial transaction tax,³² on the one hand, and the adoption of the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), on the other, have been giving new blood to the debate on asymmetry in the life of the Union. When looking at the new economic governance through the perspective of the TSCG, scholars observe two important factors of constitutional mutation: the increased asymmetry of the picture and the increase of intergovernmental dynamics. Fossum has stressed this point by arguing that:

The crisis has raised serious questions about the assumption that all EU member states will continue to move in the same integrationist direction [...] One possible outcome of the crisis is that member states may come to occupy permanently different roles and statuses in the EU, a situation that could manifest itself in differentiated authority structures and patterns of decision-making. Thus, rather than seeing further (uniform) integration, the EU may become more differentiated through a *combination* of differentiated integration and differentiated disintegration.³³

This aspect has been pointed out by those who wrote that the “crisis has changed all this. It is now much harder to assume that differentiated integration may just be ‘noise’ around an underlying trajectory towards more uniform forms of integration.”³⁴

Within the new European economic governance the asymmetric dimension of the EU has been amplified due to two main factors. First, some of the measures mentioned at the beginning have been adopted outside the frame of EU law, namely via the conclusions of international agreements. This choice has permitted the creation of a set of rules shared by a group of the EU Member States in the form of a public international law treaty. The second reason concerns the discipline of the enhanced cooperation mechanism in the TSCG.

Against this background, the TSCG is peculiar for many reasons, the most evident being the fact that the TSCG intervenes in a situation already dominated by asymmetry, adding another pattern of differentiation. For instance, besides the already existing asymmetry between Euro and non-Euro members, this second group will be differentiated, from now on, between those who signed the new Treaty and those who did not. For instance, building on Rossi’s work,³⁵ it is possible to argue that the TSCG has created a system characterised by various concentric circles.

A first circle is represented by those EU Member States of the Eurozone that have ratified the TSCG (at least “twelve Contracting Parties whose currency is the euro,” according to Art. 14

³² Council Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, 12 July 2010; Council Decision 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection, 10 March 2011; Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax, 22 January 2013.

³³ John Erik Fossum, “Democracy and Differentiation in Europe”, cit., p. 799-800.

³⁴ Benjamin Leruth and Christopher Lord, “Differentiated Integration in the European Union: A Concept, a Process, a System or a Theory?”, in *Journal of European Public Policy*, Vol. 22, No. 6 (2015), p. 756.

³⁵ Lucia Serena Rossi, “Fiscal Compact e conseguenze dell’integrazione differenziata nell’Ue”, in Gianni Bonvicini and Flavio Brugnoli (eds.), *Il Fiscal Compact*, Roma, Nuova Cultura, 2012, p. 29-34 (Quaderni IAI 5), <http://www.iai.it/en/node/1162>.

TSCG).³⁶ A second group consists of those States that do not belong to the Eurozone but that have ratified the TSCG.³⁷ A third circle includes those States that do not participate in the Euro Plus Pact but that have ratified the TSCG.³⁸

It is clear from this scenario that the TSCG is going to amplify the variable-geometry Union, emphasising the asymmetric feature of EU economic governance.

Partially different is the European Stability Mechanism – another international Treaty – which was signed by 19 Member States, i.e. all those States belonging to the Eurozone,³⁹ but even within them one should distinguish “those receiving and those granting financial assistance and those which detain the largest share capital of the fund and those that subscribed a minimal share.”⁴⁰ In other words, these new economic measures taken together have made scholars wonder about their impact on the principle of equality of EU Member States.⁴¹

Indeed, another source of asymmetry in the new European economic governance is represented by the provisions included in the TSCG and devoted to the enhanced cooperation mechanism, namely Art. 10 TSCG.

4. The institutional impact of asymmetry in the current phase of the European integration process

What is the institutional impact of these forms of asymmetry?⁴² The answer varies depending on the specific mechanism and the EU Institution taken into account. When dealing with enhanced

³⁶ Art. 14.2: “This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier.” For more information on the ratification process see the European Council website: <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2012008>.

³⁷ For instance Poland.

³⁸ For instance Hungary.

³⁹ The Preamble of the ESM Treaty states that: “All Euro area Member States will become ESM Members. As a consequence of joining the Euro area, a Member State of the European Union should become an ESM Member with full rights and obligations, in line with those of the Contracting Parties.” As Bianco pointed out: “It is an obligation that suggests a chronological precedence of the membership in the Eurozone before adhering to the ESM treaty. Art. 2(1) confirms this. Yet, such an obligation would be rather difficult to enforce once the country has already been admitted to the Eurozone. What appears more realistic from a practical point of view is that it is dealt with during the negotiations on the accession to the Euro area of a new country. The latter will be required to commit to ratifying the ESM treaty as a condition to adopt the Euro, albeit the ESM stands outside of the EU legal order. In this regard, the Court of Justice in Pringle maintained that the ESM concerns economic policy and not monetary policy. This is because the Mechanism has the objective of safeguarding financial stability and granting financial assistance, and not of maintaining price stability, setting interest rates or issuing Eurocurrency (which characterise the ECB’s work, and thus monetary policies). Some commentators have noted the ‘legal formalism’ of this reasoning, which fails to recognise that the stability of the Eurozone – the objective of the ESM – is a prerequisite for price stability in that area.” See Giuseppe Bianco, “EU Financial Stability Mechanisms: Few Certainties, Many Lingering Doubts”, in *European Business Law Review*, Vol. 26, No. 3 (2015), p. 464.

⁴⁰ Cristina Fasone, “Eurozone, Non-Eurozone and ‘Troubled Asymmetries’ Among National Parliaments in the EU. Why and to What Extent this is of Concern”, in *Perspectives on Federalism*, Vol. 6, No. 3 (2015), p. 4, http://www.on-federalism.eu/attachments/004_Volume%206%20-%20issue%203%20-%202014.pdf.

⁴¹ Ibid.

⁴² On this topic see: Cristina Fasone, “Il Parlamento europeo”, in Andrea Manzella and Nicola Lupo (eds.), *Il sistema parlamentare euro-nazionale. Lezioni*, Torino, Giappichelli, 2014, p. 73 et seq.

cooperation, for instance, Art. 330 TFEU expressly makes a distinction by stating that “[a]ll members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. Unanimity shall be constituted by the votes of the representatives of the participating Member States only.” Another important set of provisions is represented by Protocol No. 14 on the “Euro-Group” that was annexed to the Lisbon Treaty, which provides for some meetings among the ministers of the Member States whose currency is the euro “to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission” (Art. 1). Art. 2 of this Protocol also reads that “[m]inisters of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States.” Since the TSCG applies to Euro- and non-Euro countries, its Art. 12 of the TSCG⁴³ distinguishes between Contracting Parties whose currency is the Euro and the other Contracting Parties.⁴⁴

Another interesting provision is given by Art. 13 of the TSCG, which should be as a part of a broader trend fed by Protocol 1⁴⁵ to the Lisbon Treaty, of which Art. 9 and 10⁴⁶ are devoted to inter-parliamentary cooperation. More generally, today inter-parliamentary cooperation in the EU develops through different channels (Conference of Community and European Affairs committees of parliaments of the European Union-COSAC; joint parliamentary meetings, joint

⁴³ Art. 12 of the TSCG: “1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings. The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office. 2. Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area.”

⁴⁴ Art. 12 of the TSCG: “3. The Heads of State or Government of the Contracting Parties other than those whose currency is the euro, which have ratified this Treaty shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of this Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. [...] 6. The President of the Euro Summit shall keep the Contracting Parties other than those whose currency is the euro and the other Member States of the European Union closely informed of the preparation and outcome of the Euro Summit meetings.”

⁴⁵ Protocol on the Role of National Parliaments in the European Union.

⁴⁶ Art. 9: “The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.”

Art. 10: “A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.”

committee meetings, meetings of sectoral committees, etc.), but it is sufficient to refer to recent works here without going into detail.⁴⁷

More recently, new “second generation”⁴⁸ arenas have been created: the Inter-parliamentary Conference for the Common Foreign and Security Policy and the Common Security and Defence Policy (CFSP/CSDP),⁴⁹ which gathers delegations from the national Parliaments of the EU member states and the European Parliament.⁵⁰

Art. 13 of the TSCG reads: “the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty.”

The nature and functions of this conference have been discussed after the entry into force of the TSCG and only partly clarified after a meeting of the speakers of Parliament of the founding Member States of the European Union and the European Parliament, held in Luxembourg on 11 January 2013. That meeting was characterised by the emergence of different views concerning the role of the inter-parliamentary cooperation in the EU. On that occasion a working paper was discussed which stated that “this conference would discuss topical issues of Economic and Monetary Union, including agreements in the framework of the European Semester, in order to reinforce dialogue between the national Parliaments and with the European Parliament. Yet binding decisions could only be taken at the responsible level.” Moreover, it was added that “[t]he Conference will meet at least twice a year, notably before the European Council in June, before or after the adoption of the relevant documents – namely the recommendations on the stability and reform programmes, the orientation of economic policies, the Growth Survey and the Alert Mechanism Report.”⁵¹ At the beginning it was not clear whether the delegations of the UK, the Czech Republic and Croatia (countries that have not signed the TSCG) were part of this conference, but an agreement was then found⁵² at the Conference of Speakers of EU Parliaments

⁴⁷ Cristina Fasone, “Interparliamentary Cooperation and Democratic Representation in the European Union”, in Sandra Kröger and Dawid Friedrich (eds.), *The Challenge of Democratic Representation in the European Union*, Basingstoke, Palgrave Macmillan, 2011, p. 41-58.

⁴⁸ Diane Fromage, “Parlamento Europeo y Parlamentos nacionales después del Tratado de Lisboa y en un contexto de crisis: ¿Un acercamiento de grado diverso según el ámbito?”, in Paz Andrés Sáenz de Santa María and Juan Ignacio Ugartemendia Eceizabarrena (eds.), *El Parlamento europeo: ¿Esta vez es diferente?*, Bilbao, IVAP, 2015, p. 223-249 (European Inklings 5).

⁴⁹ Decisions of the Conference of Speakers of the European Union (EU) Parliaments at its meetings in Brussels, on 4-5 April 2011 and in Warsaw, on 20-21 April 2012, establishing an Inter-parliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), <http://www.europarl.europa.eu/webnp/cms/pid/1932>.

⁵⁰ Jan Wouters and Kolja Raube, “Europe’s Common Security and Defence Policy: The Case for Inter-Parliamentary Scrutiny”, in *KU Leuven Centre for Global Governance Studies Working Papers*, No. 90 (April 2012), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp81-90/wp90.pdf.

⁵¹ Working paper of the meeting of the Speakers of Parliament of the Founding Member States of the European Union and the European Parliament in Luxembourg on 11 January 2013, http://www.eerstekamer.nl/eu/documenteu/_working_paper_of_the_meeting_of.

⁵² Compare this conference with the so-called Arthuis Report. Jean Arthuis, *Avenir de la Zone Euro: l’integration politique ou le chaos*, 2012, <http://www.ladocumentationfrancaise.fr/rapports-publics/124000129/index.shtml>.

held in Nicosia on 21-23 April 2013.⁵³ Another potential form of institutional asymmetry could be represented by a unified Eurozone external representation in international organisations like the International Monetary Fund. As Koedooder recalled,⁵⁴ from a legal point of view Art. 138.2 TFEU – applicable to Eurozone Member States only – reads “[t]he Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.” However, the legal picture is more complicated under EU law, as Koedooder suggests, and another issue is represented by a possible IMF membership, since according to Art. II, section 2 of the IMF Articles of Agreement,⁵⁵ the IMF only accepts “countries” as members, and an amendment of this provision has been suggested in this sense.⁵⁶

Another form of institutional asymmetry identified by scholars is that concerning the equality of national parliaments and leading to “an unequal distribution of powers amongst these legislatures, due to a peculiar combination of international, EU and national law.”⁵⁷

Fasone identifies three cases of asymmetries concerning national parliaments: the first regards those parliaments “able to block or veto the adoption and implementation of Euro crisis measures even though their Member State is not bound by them,”⁵⁸ exemplified by the participation of non-Eurozone parliaments in the amendment procedure followed to change Art. 136 TFEU. The second case refers to “the power of some national parliaments, and first of all of the German Bundestag, to block the functioning of collective mechanisms, like the ESM, as a consequence of constitutional case law, constitutional rules and national legislation,”⁵⁹ demonstrating the great variety of parliamentary powers at the national level. Finally, Fasone mentions the case of those parliaments of “countries subject to strict conditionality.”⁶⁰

These are just examples, but as I wrote at the beginning of this section, it is not easy to find a univocal trend towards institutional differentiation as a product of the increased asymmetry in the EU; it is sufficient to look at the role of the European Parliament to have a confirmation of this. As, once again, Fasone pointed out, the European Parliament “has traditionally been indifferent towards differentiated integration,” although a debate concerning the possibility of a differentiated representation has been discussed widely.⁶¹ The European Parliament itself has dealt with the issues sometimes: for instance, in a resolution dated 2013, it stated that “any formal differentiation of parliamentary participation rights with regard to the origin of Members of the European Parliament represents discrimination on grounds of nationality, the prohibition

⁵³ The Presidency Conclusions of the Conference of Speakers of EU Parliaments held in Nicosia on 21-23 April 2013, available here: http://www.senate.be/event/20130422-Nicosia/Conclusions_Speakers_ConferenceEN_24-4-2013.pdf.

⁵⁴ Chris Koedooder, “Will the Juncker Commission Initiate Unified Eurozone External Representation?”, in *European Law Blog*, 13 November 2014, <http://europeanlawblog.eu/?p=2592>.

⁵⁵ International Monetary Fund, *Articles of Agreement of the International Monetary Fund*, <https://www.imf.org/external/pubs/ft/aa>.

⁵⁶ Chris Koedooder, “Will the Juncker Commission Initiate Unified Eurozone External Representation?”, cit.

⁵⁷ Cristina Fasone, “‘Eurozone, Non-Eurozone and ‘Troubled Asymmetries’ Among National Parliaments in the EU” cit., p. 33.

⁵⁸ *Ibid.*, p. 34.

⁵⁹ *ibid.*

⁶⁰ *Ibid.*

⁶¹ On this see: Cristina Fasone, “Il Parlamento europeo”, cit., p. 80.

of which is a founding principle of the European Union, and violates the principle of equality of Union citizens as enshrined in Article 9 TEU.”⁶² This point seems to be too univocal to leave margins open for a change the near future at least. Moreover, it is not yet clear whether such a differentiation should be limited to the activities connected to the new economic governance or should be extended to all the cases of multi-speed Europe.⁶³

5. Policy recommendations

After having recalled the origin and function of asymmetry and its limits provided for under EU law, it is possible to draw some policy recommendations:

- *Bringing the Fiscal Compact “home”*. I have explored the implications of the financial crisis, which has increased the resort to asymmetric instruments and then mentioned the discipline governing enhanced cooperation ex Art. 10 TSCG.

In order to understand the added value that this provision might have, it is necessary to recall the contents of Art. 16 of the TSCG. This article reads, “Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.”

Of course, this incorporation could be done by revising the EU Treaties, but this is not the only option available to the relevant actors. Also, Art. 10 TSCG may play a role in this sense. Art. 10 could represent the pathway for the incorporation into the EU legal order recalled by Art. 16 of the TSCG. In other words, States could use enhanced cooperation ex Art. 10 in order to incorporate some of the provisions enshrined in the TSCG (which is from a formal point of view a public international law Treaty) into EU law. This would confirm the idea that enhanced cooperation can serve a very useful function: guaranteeing the necessary flexibility to overcome the impasse resulting from the difficulty of amending the EU Treaties.

- *Handle with care!* The option suggested above is able to provide Art. 10 with an integrative function; however, one could argue that Art. 10 was not devised for this purpose only. In order to make this second point clear it is necessary to make a premise: legal provisions should not be seen as bothersome obstacles in the avenue for further integration. On the contrary, legal provisions have been drafted to avoid dangerous and misleading uses of the EU Treaties. They are fundamental to make the degree of asymmetry present in the system sustainable and thus to impede the alteration of the institutional equilibrium governed by the Treaties that are, as the Court of Justice of the European Union said many times (even after the so called failure of the European Constitution), the “constitutional charter” of the EU.

⁶² European Parliament, Resolution on constitutional problems of a multitier governance in the European Union (A7-0372/2013), 12 December 2013, par. 29,

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0598&language=EN>.

⁶³ Cristina Fasone, “Il Parlamento europeo”, cit., p. 80.

In this respect, it is possible to express some doubts when comparing the wording of this provision with those of Art. 20 of the TEU and Art. 326 to 334 of TFEU, since Art. 20 TEU describes enhanced cooperation as a “last resort,”⁶⁴ while outside of the EU Treaties enhanced cooperation may be used when “necessary and appropriate.”⁶⁵ It is apposite to have a closer look at Art. 10, which reads “in accordance with the requirements of the European Union Treaties, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro as provided for in Art. 136 of the TFEU and of enhanced cooperation as provided by Art. 20 of the TEU and Art. 326 to 334 of the TFEU on matters that are essential for the smooth functioning of the euro area, without undermining the internal market.”

My argument is a literal one: the idea is that the TSCG might have introduced a sort of inconsistency or at least an evident textual contradiction between the concept of enhanced cooperation in EU law (enhanced cooperation as a “last resort”) and enhanced cooperation outside EU Treaties where – as we saw – this mechanism may be used when “necessary and appropriate,” in spite of the *renvoi* to Art. 20 TEU made in Art. 10 TSCG.

These formulas employed by the TSCG seem to introduce an element of discretion which is very far away from the idea of *extrema ratio*, and this might open the door to a greater leeway for the States in the use of this mechanism. What about the consequences of this inconsistency? Is it possible to solve the antinomy by means of interpretation? It is difficult to say but, in my view, the systematic reading of these two provisions might lead to a relativisation of the very idea of last resort, which is already – *per se* – an ambiguous concept. This could induce a distortion of the *ratio* of enhanced cooperation even in EU law.⁶⁶ The wording of Art. 10 TSCG seems to show the

⁶⁴ Art. 20 par. 2: “The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.”

⁶⁵ Carlo Maria Cantore and Giuseppe Martinico, “Asymmetry or Dis-integration? A Few Considerations on the New ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’”, in *European Public Law*, Vol. 19, No. 3 (2013), p. 463-480.

⁶⁶ An example of this ambiguity is provided by the reading given to this concept in the recent opinion on the case concerning the enhanced cooperation scheme in the field of a unitary patent given by Advocate General Bot. On that occasion, Bot emphasised the ambiguity of the idea of “last resort” and concluded by saying that: “[C]ooperation must come into play as a last resort, when it is established that the objectives pursued by that cooperation cannot be attained within a reasonable period by the Union as a whole.” As said, Bot reads this safeguard mainly as an issue of time. The Opinion of Advocate General Bot joined cases C-274/11 and C-295/11, Kingdom of Spain and Italian Republic v Council of the European Union, 11 December 2012 (see especially par. 108). I indeed agree with Fabbrini when he argues that: “enhanced cooperation can be used only when EU Member States disagree on *whether* to act jointly at the EU level. On the contrary, the procedure cannot be used when Member States agree on the opportunity of expanding integration into a new legal field but disagree on *how* to act at the EU level. While it will be argued that this interpretation restricts the possible room for the use of enhanced cooperation, the article explains that this construction has several advantages, including preserving the integrity of the EU constitutional order, preventing circumvention of Treaty rules and providing the EU judiciary with a manageable standard to review action by the EU political branches.” See Federico Fabbrini, “Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary”, in *Legal Issues of Economic Integration*, Vol. 40, No. 3 (August 2013), p. 199. In its subsequent decision the CJEU rejected the plea in law alleging breach of the condition of the last resort and the actions by the Kingdom of Spain and the Italian Republic were dismissed (CJEU, Judgment of the Court (Grand Chamber) of 16 April 2013, *Kingdom of Spain and Italian Republic v Council of the European Union*, <http://curia.europa.eu/juris/liste.jsf?num=C-274/11>).

hybrid nature of the Treaty itself. Even though it is an international agreement outside the scope of the EU Treaties, it is not completely outside the scope of the EU framework, as it aims to benefit from EU institutions and EU law features.

It can be said – and, perhaps, this was the intention of the drafters – that Art. 10 TSCG might be, in principle, the pathway for the “communitarisation” of the TSCG through enhanced cooperation schemes. On the other hand, this was already an option before the conclusion of the TSCG, but it was not exploited by the EU Member States at that time.

There is another reason for why the text of Art. 10 is at odds with its correspondent provisions included in the fundamental EU Treaties: Art. 10 TSCG only states that enhanced cooperation shall not undermine the internal market, but internal market is just one of the elements included in Art. 326 TFEU.⁶⁷ One could say that Art. 10 in any case refers to all the relevant norms disciplining the phenomenon in EU law and this is true, but why recall in an expressed manner just one of these elements? I see two possible interpretations here: the last lines of Art. 10 could be either pleonastic (by expressing just one of the elements recalled by the relevant EU Treaties provisions) or maybe “selective,” willing to give a particular value to just one of the elements recalled by the EU Treaties and thus creating something different. This problematic picture is made even more complicated by the uncertain mandate of the CJEU (as we saw, it is not clear from Art. 8 TSCG whether the task of the Court concerns the content of Art. 3 only or all the contents of the TSCG and this of course matters),⁶⁸ one of the most important actors in the process of EU integration, the guardian of those constitutional safeguards that inspire the life of the Union.

- *Is differentiated representation desirable? Yes but...* In the last part of the paper I dealt with some recent proposals concerning the differentiated representation of the Eurozone. When jumping from procedures to institutions, as I tried to make clear when recalling the main scholarly views, there is no univocal trend or solution. The question of whether the EU should give institutional form to these asymmetric forces depends on the particular asymmetric instrument taken into account and on the specific EU institution we have in mind. As we saw, 330 TFEU already provides for special procedures for the functioning of the Council in the field of enhanced cooperation (based on the distinction between participation in the deliberation and participation in the vote), while the European Parliament has traditionally been clear in refusing the possibility of an asymmetric representation which could jeopardise the principle enshrined in Art. 9 TEU.

When reasoning in terms of a European Parliament *à la carte* and making an interesting parallelism with the West Lothian question in the UK,⁶⁹ scholars have identified several options

⁶⁷ Art. 326 TFEU: “Any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.”

⁶⁸ On this see: Victor Ferreres Comella, “Amending the National Constitutions to Save the Euro: Is This the Right Strategy?”, in *The Texas International Law Journal*, Vol. 48, No. 2 (Spring 2013), p. 236, <http://www.tilj.org/content/journal/48/num2/Ferreres223.pdf>.

⁶⁹ “The West Lothian Question refers to the perceived imbalance between the voting rights in the House of Commons of MPs from Scottish, Welsh and Northern Ireland constituencies and those of MPs from English constituencies following devolution. It has been so-called since Tam Dalyell, the former MP for West Lothian, famously raised the question in a debate on devolution to Scotland and Wales on 14 November 1977.” See UK Parliament, “West Lothian question”, in *Glossary*, <http://www.parliament.uk/site-information/glossary/west-lothian-question>.

for differentiation. Among them, one could recall those of 1) a differentiated representation according to the rights of members of the European Parliament by limiting the exercise of the right to vote according to a *ratione materiae* criterion or by attributing a right to vote to the national delegations;⁷⁰ 2) a differentiation within the committee system with the creation of a sub-committee for the Eurozone (but in this case what should its relationship be with the standing committee on economic and monetary affairs-ECON); 3) a new parliamentary Chamber for the Eurozone;⁷¹ 4) a Conference of Eurozone national parliaments (but this could perhaps jeopardise the role of the European Parliament in this field);⁷² 5) a Eurozone Parliament composed by members of the European Parliament elected in Eurozone Countries or a third Chamber of Eurozone national parliaments, perhaps with a veto power on matters decided by the Euro-Group, Commission or Euro Summit;⁷³ 6) a directly-elected Eurozone Parliament recently proposed, among others, by Piketty⁷⁴ but which would perhaps result in increasing the complex architecture in this ambit.⁷⁵

These issues are still debated: scholars have identified different solutions, and for some of them a Treaty revision seems to be unavoidable, making this discussion even more technical and complicated. Moreover, the principle stated in Art. 9 TEU could hardly be circumnavigated. Indeed, this discussion leads us to a more general problem. In other words, the answer to the question about what kind of institutions we want is inevitably connected to the idea of integration we might have in mind and unveils the hard choice to be made between institutional inclusiveness and flexible procedures – the real constitutional dilemma of the EU nowadays.

⁷⁰ Cristina Fasone, “Il Parlamento europeo”, cit., p. 86.

⁷¹ See Jean Arthuis, *Avenir de la Zone Euro*, cit.

⁷² Cristina Fasone, “Il Parlamento europeo”, cit., p. 95 et seq.

⁷³ Ibid, p. 85 et seq. See also: Loukas Tsoukalis, *The Unhappy State of the Union. Europe Needs a New Grand Bargain*, London, Policy Network, March 2014, p. 77, <http://www.policy-network.net/publications/4602/The-Unhappy-State-of-the-Union>.

⁷⁴ Thomas Piketty, “Il faut donner un parlement à l’euro”, in *Le Monde*, 20 May 2014, http://www.lemonde.fr/europeennes-2014/article/2014/05/20/thomas-piketty-la-democratie-contre-les-marches_4421986_4350146.html.

⁷⁵ Cristina Fasone, “Il Parlamento europeo”, cit., p. 96-97.

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