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Financial Crisis, National Parliaments and the Reform of the E(M)U

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by
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ABSTRACT

When the Treaty of Lisbon entered into effect in December 2009 most observers stated that the reform process of the EU had come to an end, at least for a long period. Instead, the EU was shattered by the transatlantic shocks originating from the Lehman Brothers' bankruptcy and underwent an unexpected transformation of a new kind. This transformation continues, and it seems to push the EU in the opposite direction: complexity instead of transparency, cumbersome negotiation processes instead of efficient decision-making, executive federalism instead of democratic control and legitimisation. The impact of the very deep-reaching reforms, from the six-pack and the two-pack over the ESM and the Fiscal Compact up to the banking union and the new activities of the European Central Bank (ECB) on national parliaments is yet to be assessed. Serious tensions are reflected in the recent case law of the

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German Federal Constitutional Court (GFCC) striving to enhance parliamentary control of the government's action in the newly established regulatory system. In particular, the GFCC's reference to the ECJ on the ECB's Outright Monetary Transactions (OMT) programme raises serious concerns for the protection of the national budgetary autonomy. While the existing structural deficit of the EMU needs repair by a revision of the Treaties in a medium-term perspective, I will argue that more cooperation between EU institutions and national parliaments as well as among national parliaments themselves could remedy some of the efficiency and legitimacy deficits of financial policies in the EU, not least by taking a proactive stance through and beyond already established conferences like COSAC or the new Interparliamentary Conference on Economic and Financial Governance.

INTRODUCTION

Contrary to the expectations of many observers, the Treaty of Lisbon was not the end of the reform process of the European Union – it was not even the end for the following ten years.¹ Almost simultaneously with its ratification process transatlantic shocks originating from the bankruptcy of Lehman Brothers not only hit the European financial markets and banking sector, but also made clear that the architecture of the Economic and Monetary Union (EMU) was not made for difficult political circumstances. In brief, the test of the original asymmetric approach – centralised monetary policy and a common currency based upon the coordination of autonomous economic and financial policies of the Member States and, in particular, on budgetary autonomy of their parliaments – was not passed. This asymmetry, however, was not a mistake in itself. Though the authors of the Treaty of Maastricht agreed with all the economists that the euro must be sustained by a convergence of national economies, it was in the light of the principle of subsidiarity that they decided not to centralise powers upon economic and financial policies, including redistributive policies and social security systems. The “masters of the treaties” believed that legal commitments for coordination and provisions on the independence of national central and budgetary discipline, in combination with prohibitions of monetary financing and privileged access for public authorities to financial institutions, and with the bailout-clause would suffice to ensure the economic convergence of national economies needed. They did not.

Coordination of economic, fiscal and social policies of the Member States proved not to be effective as an instrument for ensuring the functioning of the EMU. The problem here is not one of politics or economics, but it seems to be of a conceptual nature for two reasons.

First, there is a contradiction between the political autonomy and the desired economic convergence. Autonomy means that national governments and parliaments are free to decide upon their respective policies, and freedom means diversity and mutual respect for political preferences one or the other is opting for. Economic convergence, in contrast, means common principles and orientation, constraint, discipline and surveillance. Article 5 (1) TFEU states: “The Member States shall coordinate *their* economic policies *within* the Union...”, whereas according to Article 119 (1) TFEU “the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of *an economic policy*”.² To make this clear, there is a plurality of national economic policies within the Union, on the one side, and there is one EU economic policy, on the other. Articles 121 to 126 TFEU indicate what is meant by the reference to the provisions of the Treaties. They reflect, in particular, what is left of national autonomy and stress the responsibility of each Member State and their budgetary

¹ See however, the secretary of state at that time in the German ministry of economy Joachim Wuermeling, ‘Der Reformvertrag – das Ende der Verfassungsvision?’, in I. Pernice (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung? - Kolloquium zum 10. Geburtstag des WHI* (Nomos 2008), pp. 25

² Emphasis added.

authorities for both, the achievement of the objectives of the treaties and their economic policies, to be regarded “as a matter of common concern” (Article 121 (1) TFEU). These obligations as well as the role given to the EU institutions taken seriously, there should not be any question for the functioning of the EMU. If not, as we have experienced, there is a problem.

Second, autonomy and cooperation are a matter for sunshine and calm water, legally binding rules and institutions are needed for times of economic and political turbulence. Both are based upon mutual trust, while the latter give trust a particular support or insurance. Under the terms of the Westphalian system of 1648 it was believed that peace could be preserved by intergovernmental cooperation among sovereign states. More than three centuries of war among sovereign states in Europe showed that it does not. International law of cooperation does not serve the purpose; Jean Monet and Robert Schuman understood that only common institutions vested with powers to take legally binding decisions, with powers of adjudication and – though very limited – with powers of enforcement, thus: only a supranational setting could do. Recent history seems to confirm that their new approach is working. With the constitution of the European Union war among its Member States became unthinkable. Hence, why should the intergovernmental approach, which is limited simply to cooperation, be effective regarding economic policies and convergence, if it was not in general politics? In a policy field that is rightly considered as fundamental for the achievement of the objectives of the Treaties, how can political leaders continue to believe, even after the experience of the financial crisis in Europe, that cooperation can do the job? To overcome the crisis they just chose for more of the same: cooperation instead of a meaningful institutional reform. What is the reason to believe that Member States will take their meanwhile enhanced commitments more seriously now than they did in the past?

Member States and their governments had no choice to limiting their action to striving at economic convergence by an enhanced cooperation and to legislative measures allowed under the existing Treaties, coupled with supplementary international agreements like the ESM and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, hereafter called the Fiscal Compact. An attempt for a very limited revision of the EU Treaties was finally resisted by the British and the Czech governments and does not seem to be on the political agenda at least in a medium term perspective.

One of the most relevant concerns for such resistance seems to be the idea of national sovereignty or, in more concrete terms, of the self-rule of the peoples of the Member States as expressed by their parliaments; a core issue being having and preserving meaningful political autonomy particularly in the fields of budgetary and re-distributional policies. These concerns are shared by governments and by people in most of the Member States.³ They are particularly prominent in the jurisprudence of the GFCC developed on the Treaties of Maastricht and Lisbon, and with regard to the measures taken to preserve functioning of the euro and the EU, such as the Euro Plus Pact, the ESM or the OMT programme of the ECB. Of course, these concerns must be taken seriously. But there seem to be good reasons also to scrutinize the options available: Are the measures taken or planned for rescuing the Euro effective and in conformity with the principles of transparency and democracy? What are their implications on national parliamentary autonomy? How can democratic legitimacy and control be enhanced within the Treaties, or by a revision of the Treaties’ provisions on the

³ For a new medium term attempt see, however, the „5 Presidents Report“: Completing Europe’s Economic and Monetary Union, Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Maria Draghi and Martin Schulz, of 22 June 2015, designing three stages of development from a genuine Economic Union towards a Financial Union, a Fiscal Union and, finally, a Political Union, available at: http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf, summary: European Commission press release http://europa.eu/rapid/press-release_IP-15-5240_en.htm (last access 16 July 2015).

EMU? Are there constitutional limits for further integration, and what are they in the light of the jurisprudence of the GFCC and other constitutional courts?

To answer these questions, this chapter first discusses some essential propositions developed by the GFCC regarding the protection of the German parliament (*Bundestag*) and the principle of democracy at large against challenges from the developments of the EMU (infra I) before some of the most important implications of the EMU development for the autonomy of the national parliaments are depicted (infra II). With a view to remedying the existing or possible shortcomings in terms of transparency and democratic legitimacy, finally, some reform ideas to be implemented within the framework of the Treaties or requiring a revision of the Treaties will be developed (infra III).

I THE *BUNDESTAG* AND THE DEMOCRATIC RIGHTS OF THE GERMAN PEOPLE

At least since its 1993 judgment on the Treaty of Maastricht the German Federal Constitutional Court has developed a particular concern for the democratic rights of the citizens, the powers and the responsibilities of the German parliament, the *Bundestag*. It is a particular feature of the German constitutional system, and a result of our experiences with totalitarian regimes in the recent history, that the judiciary has the power to review the compatibility of legislative acts not only upon applications of other constitutional organs or in federal disputes, or on references made by ordinary courts in cases of doubt, but also upon “constitutional complaints” brought by individuals directly to the GFCC if they consider their fundamental rights directly and individually to be affected by the public authority. Step by step the GFCC has developed, on that basis, a jurisprudence interpreting the right to vote in Article 38 (1) of the Basic Law (BL) as a fundamental right to democracy. The judicial protection of the *individual* against the legislature was so turned into a protection of the *legislature* against itself. Thereby, using individual constitutional complaints the GFCC excludes excessive self-restraints of the *Bundestag* through its consent given under Article 23 (1) BL to treaties conferring new powers on the EU or to supplementary international agreements in European matters, like the ESM and the Fiscal Compact, to decisions of the executive acting within the framework of the ESM or to financial guarantees given for credits accorded to Greece and other Member States within the framework of the Euro rescue measures taken since May 2010. The reference of the GFCC to the ECJ in the case of the OMT programme seeks to extend this protection of the parliamentary powers even to acts – or announcements – of the European Central Bank. Had these legal demands been accepted by the ECJ – what finally did not happen,⁴ the result could have been that not only a minority fraction within the *Bundestag*, but that via an *actio popularis* any German citizen could bring a case to the GFCC allowing the GFCC to exercise a constitutional review possibly of every act not only of the *Bundestag* but also of any European institution.⁵ The GFCC reference on the OMT programme suggests that even an alleged omission of certain acts – or even a thorough debate – of the German parliament could become the subject of consideration of the Constitutional Court.

⁴ Formally, the ECJ *has* accepted these demands in its Judgement of 16 June 2015, C-62/14 – OMT, no. 24-31. It is noteworthy, however, that the guiding principle was that “it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.” So, despite several arguments regarding the admissibility, the ECJ following its usual strand not to really assess the background of the case – so one could argue – it did not address the concerns raised above.

⁵ For an extense discussion of the reference see the fourteen contributions in the Special Issue 2014 of the German Law Journal, available at <https://www.germanlawjournal.com/index.php?pageID=2&vol=15&no=2> (last access 16 July 2015).

Some brief examples shall illustrate how the GFCC developed these positions in the attempt to safeguard – through the empowerment and encouragement of the *Bundestag* – also the democratic rights of the citizens against excessive European constraints.

1. POWERS OF THE *BUNDESTAG*: TOWARDS AN INDIVIDUAL RIGHT TO DEMOCRACY

The basis of the relevant strand of jurisprudence is Article 38 (1) BL. This provision states that “Members of the German *Bundestag* shall be elected in general, direct, free, equal and secret elections”. With the judgment on the Treaty of Maastricht⁶ this provision became the anchor for a general control of EU related agreements as well as of acts of the EU. It was interpreted in the light of Article 20 (1) BL which defines Germany as a democratic and social federal state,” and Article 79 (3) BL excluding constitutional amendments as far as they affect, in particular the principles laid down in Articles 1 and 20 BL, including human dignity and the principle of democracy.

In the judgement of 18 March 2014 on the ESM/Fiscal Compact the GFCC confirmed its jurisprudence in stating that Art. 38 sec. 1 GG is equal to a fundamental right and guarantees the self-determination of the citizens and, in particular free and equal participation in the exercise of public power in Germany as requirement of democracy within the meaning of Articles 20 and 79 (3) BL. The GFCC understands these principles as belonging to the identity of the Constitution to be protected even against interference by the constitution-amending legislature, and holds that the legislature must take sufficient measures to be able to permanently meet its responsibility with respect to integration (“Integrationsverantwortung”). In particular, the legislature may not relinquish its right to decide on the budget.⁷

The right to vote, thus, can be invoked by any German citizen whenever she alleges her right to “self-determination” or the “free and equal and secret participation in the exercise of public power in Germany” to be affected.⁸ This guarantee is not only extremely vague and broad, but also – as being based on the principle of democracy and, consequently, being an element of Germany’s constitutional identity – it is given an extraordinary and absolute value and protection. The Court so strives to protect the powers of the *Bundestag*: first, with regard to the preservation of substantial political responsibilities so that federal elections remain meaningful (this is what the responsibility with respect to integration is about); and second, regarding in particular the protection of the budgetary autonomy of the *Bundestag*.

Both aspects imply, nevertheless, a considerable control of the policies of the parliament by the Court, yet with the explicit aim to preserve the democracy against EU constraints of the powers of the *Bundestag*. Regardless of any contradictions imminent in this approach, it is clear that it is motivated by the concern to preserve sovereign self-determination for the German people against threats from Europe – a concern that the GFCC seems to share with the UK government. The constitutional constraints so established are particularly relevant with regard to the measures taken or planned facing the financial crisis in Europe.

2. OBLIGATIONS OF THE *BUNDESTAG*: RESPONSIBILITY WITH RESPECT TO INTEGRATION

The concept of “responsibility with respect to integration” (*Integrationsverantwortung*), developed by the GFCC already in the judgment on the Treaty of Lisbon of 2009, aims at

⁶ GFCC, Order of 31 March 1998 - 2 BvR 1877/97 (BVerfGE 89, 155) – Maastricht, note 159.

⁷ GFCC, Judgment of 18 March 2014, 2 BvR 1390. 1421. 1438. 1439, 1440, 1824/12. 2 be 6/12 – ESM/Fiskalpakt, para. 159, references omitted.

⁸ For a discussion of the concept with a view to criticism in the literature see GFCC Judgment of 7 September 2011, 2 BvR 1099/10 (BVerfGE 129, 124, 169) – Euro Rescue Package, p. 169-70, where the GFCC limits the right based upon Article 38 BL to take effect only in cases of an evident risk that the competences of the present or future *Bundestag* are eroded to an extent that a parliamentary representation of the will of the people, directed to the implementation of the political will of the citizens is made legally or practically impossible (ibid., p. 170).

encouraging the *Bundestag* – like other institutions – to be aware of and keep control on the limits of European powers as defined by the Treaties according to the principle of conferred competences. With regard to the measures undertaken to rescue the Euro and to safeguard the stability of the EMU, the GFCC is going so far as to deduce from Article 38 (1) BL two important obligations of German constitutional organs. First, they ought to refrain from participating in the decision-making on *ultra vires* acts of the EU and from implementing them. Second, they are obliged to take action, as far as possible, against excessive uses or transgression of the powers conferred to the EU. The GFCC states with regard to the OMT programme, which it finds clearly *ultra vires*, that the German institutions have the constitutional obligation to oppose actively to, and not participate in any “manifest and structurally significant transgressions of powers by the European organs”, to refrain from their implementation and “actively pursue the goal to reach compliance with the integration programme”. This could be reached, the Court stresses, by an amendment of the Treaties or, insofar as this is not feasible or wanted, by pursuing the reversal of acts that are not covered by the integration programme with legal or political means.⁹

In addition, the GFCC does not hesitate to suggest a procedural component to the substantive right to vote holding itself competent to admit constitutional complaints, thus, “if the right to vote is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people”. The Court, thus, takes the right to intervene, upon the constitutional complaint of any citizen, if the “democratic self-government of the people – embodied in particular in the German *Bundestag* – is permanently restricted in such a way that vital political decisions can no longer be made independently”.¹⁰

While excluding a general “right that reaches beyond safeguarding the above-mentioned rights and that would let citizens have the legality of decisions taken by a democratic majority reviewed by the Federal Constitutional Court”,¹¹ the GFCC places it nevertheless into the hands of the citizens to supervise their parliament, and it reserves for itself the power to review what measures the *Bundestag* is taking in a given case with a view to remedying *ultra vires* acts of European institutions: It understands it as a “safeguard against an erosion of the legislature’s substantial scope of action”, implying that a citizen becomes a guardian of democracy defending it against *ultra vires* acts of the EU: Via the constitutional complaint, she can “demand that the *Bundestag* and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal”.¹²

⁹ GFCC, Order of 14 January 2014 - 2 BvR 2728/13 – OMT, note 49: „It is derived from the responsibility with respect to integration that the German *Bundestag* and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest and structurally significant transgressions of powers by European Union organs, to not only refrain from any participation and implementation, but to actively pursue the goal to reach compliance with the integration programme. To this end, they can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law that adheres to the limits of Art. 79 sec. 3 GG, and by formally transferring the exercised sovereign powers in proceedings pursuant to Art. 23 sec. 1 sentences 2 and 3 GG. However, insofar as this is not feasible or wanted, they are generally obliged within their respective powers, to pursue the reversal of acts that are not covered by the integration programme with legal or political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible”.

¹⁰ *Ibid.*, note 52.

¹¹ *Ibid.*

¹² *Ibid.*, note 53: „Vis-à-vis manifest and structurally significant transgressions of the mandate by the European institutions, this safeguard against an erosion of the legislature’s substantial scope of action consists not only of a substantive, but also of a procedural element. In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right, deriving from Art. 38 sec. 1 sentence 1 GG, to have a transfer of sovereign powers only take place in the ways envisaged in Art. 23 sec. 1 sentences 2 and 3, Art. 79 sec. 2 GG. The democratic decision-making process, which these regulations guarantee in addition to the necessary specificity of the transfer of sovereign powers, is undermined when there is a unilateral usurpation of powers by institutions and other agencies of the European Union. A citizen can therefore demand that the *Bundestag* and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal”, references omitted.

Further explanations given in the reference make very clear that the GFCC sees the OMT as such an “unilateral usurpation of powers”, for it understands it as a matter of economic policy and a violation of the prohibition of monetary financing of the budget enshrined in Art. 123 TFEU.¹³

One may ask whether this audacious construction in the reference under Article 267 TFEU is finally motivated by the wish to give the ECJ an opportunity to decide on the compatibility of the ECB’s OMT programme with the EU Treaties – thus establishing a new path for individual action against acts of the European institutions, circumventing the restrictions of Article 263 TFEU¹⁴ –, and much less by its preoccupation for the democratic powers of the *Bundestag*. What does it mean exactly for the *Bundestag*, “to deal with the question...”, if the result is not precisely defined? As Judge Lübbe-Wolff rightly emphasises in her dissenting vote, already the constitutional review of an omission to act is precarious and limited to very exceptional cases of clearly defined obligations to act; even more difficult it seems to be for a court to define the contents of any policy the parliament would be bound to undertake.¹⁵

What remains, is the clear concern of the GFCC to compel the *Bundestag* to defend its sovereign rights, in the name of the people, and the citizens’ right to democracy rooted in the guaranty of human dignity, against any acts abandoning key elements of political self-determination and thus depriving the citizens of their possibilities of political participation.¹⁶

It should be noted, however, that this attempt is at the cost of the autonomy and independence of the parliament vis-à-vis the Court itself, and of the balance of powers among the institutions established by the Basic Law.

3. CONSTRAINTS ON NATIONAL FISCAL POLICIES AND BUDGETARY AUTONOMY

More precise, however, are the limits the GFCC imposes on the *Bundestag* regarding the preservation of national budgetary autonomy. This autonomy is clearly what the Court sees to be the heart of democracy. The principles are summarised as follows:

Art. 38 sec. 1 GG is violated in particular if the German *Bundestag* relinquishes its budgetary responsibility with the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget on its own. Deciding on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself. The German *Bundestag* must therefore make decisions on revenue and expenditure with responsibility to the people. In this context, the right to decide on the budget is a central element for shaping opinions in a democratic society, which must also be adhered to in a system of intergovernmental governing.¹⁷

The GFCC emphasises that the budgetary autonomy has to be preserved and defended not only against threats from EU institutions, but is to be respected “even in a system of

¹³ *Ibid.*, notes 55 to 98.

¹⁴ See already the comments by Ingolf Pernice, ‘Guest Editorial: A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU’, *Maastricht Journal of European and Comparative Law* (2014), p. 3, 4; see also the dissenting opinion of Judge Gerhard, GFCC, Order of 14 January 2014 - 2 BvR 2728/13 – OMT, note 137, 139.

¹⁵ Dissenting opinion of Judge Lübbe-Wolff, *ibid.*, notes 117-129.

¹⁶ See the wording in GFCC Judgment of 7 September 2011, 2 BvR 1099/10 (BVerfGE 129, 124, 169) – Euro Rescue Package, p. 169: „Der letztlich in der Würde des Menschen wurzelnde Anspruch des Bürgers auf Demokratie...“. In the aftermath of the Judgement of 16 June 2015, C-62/14 – OMT, it has been noted that the ECJ delivers a very “calm” decision. Its quite short decision was not only evaluated with respect to its content (a programme such as the OMT is compatible with Articles 119, 123 (1), 127 (1) and (2) TFEU and Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank), but also with respect to the „dialogue“ level. So, while the ECJ cannot see an acting *ultra vires* – contrary to what the GFCC seems to believe – it also does not catch up with the GFCC’s kind of rhetoric (principles of democracy and human dignity at stake). Rather, the ECJ delivers a very „technical“ decision – thus maybe designed to allow the GFCC to construct a subsequent decision without losing its face.

¹⁷ GFCC, Judgment of 18 March 2014, 2 BvR 1390. 1421. 1438. 1439, 1440, 1824/12. 2 be 6/12 – ESM/Fiskalpakt, note 161; references omitted.

intergovernmental governing”, such as the first Euro Rescue Package for Greece,¹⁸ the EFSF or the ESM.¹⁹ This does not exclude, however, agreements on the European or international level restricting the discretion of German institutions in fiscal policies or a commitment of the budget-setting legislature to a particular budget and fiscal policy made under European Union or international law.²⁰ What is required, however, is that “the legislature makes its decisions on revenue and expenditure independent of Union institutions and of other Member States of the European Union”, so that the “German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, including those with regard to international and European liabilities”.²¹ These statements, of course, need explanation. The GFCC had already stated in its judgment on the Treaty of Lisbon that the principle of democracy would be violated “if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent”.²² So, a limited supranational power of taxation would be acceptable. The concern, here, is a general loss of control through a liability for debts arising from policies of other Member States: Accordingly, the Court stresses that “the German *Bundestag* may not transfer its budgetary responsibility to other entities through imprecise budgetary authorisations.” It so concludes that the *Bundestag* is constitutionally bound not to “submit itself to financially significant mechanisms which... can result in incalculable burdens on the budget, be they expenses or losses of revenue, without first having given its constitutive consent”.²³

Indirectly, these statements seem to exclude any kind of Euro-bonds that might imply liabilities or guaranties the amount of which are not determined and predictable, automatic or in any other respect beyond control or influence of the *Bundestag*.²⁴

While the GFCC, thus, lays down strict principles regarding any EU or international restriction of the parliament’s budgetary autonomy, it nevertheless allows the political institutions a broad margin of appreciation accepting that an “ultimate limit following directly from the principle of democracy could only be exceeded if payment obligations and liability commitments took effect in such a way that the budget autonomy was not merely restricted, but suspended for at least a considerable period of time”. This could only happen, the Court adds, “in case of a manifest overstepping of ultimate limits”.²⁵

This overstepping has clearly not happened in the case of the ESM,²⁶ nor does the GFCC consider the Fiscal Compact to “affect the overall budgetary responsibility of the German *Bundestag* and ... force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed”.²⁷ The main instruments for rescuing Member States in trouble and for a better coordination of the economic and fiscal politics of the Member States, thus, have been found to leave the *Bundestag* sufficient budgetary autonomy and political discretion as to comply with the constitutional requirements in Germany.

¹⁸ See insofar GFCC, Judgment of 7 September 2011, 2 BvR 1099/10 10 (BVerfGE 129, 124, 178) – Euro Rescue Package, headnote 2.b) and note 124.

¹⁹ GFCC, Judgment of 18 March 2014, 2 BvR 1390. 1421. 1438. 1439, 1440, 1824/12. 2 be 6/12 – ESM/Fiskalpakt, note 162.

²⁰ Ibid., note 168, 170.

²¹ Ibid., note 162, 164.

²² GFCC, Judgment of 30 September 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022 1259/08, 182/09 (BVerfGE 123, 267, 361) – Lisbon, note 256.

²³ Ibid., note 163.

²⁴ Ibid., note 164, where Eurobonds are not mentioned, however: „it follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag*’s control and influence”.

²⁵ Ibid., note 174.

²⁶ Ibid., notes 183-222.

²⁷ Ibid., note 244.

In turn, in respect of the requirements and principles developed by the jurisprudence of the GFCC the role and practical control of the government by the *Bundestag* was considerably strengthened in the following respects:²⁸

- First, the budgetary rights of the *Bundestag* extend to systems of intergovernmental governing with the effect that commitments of the government at the European or international level cannot be undertaken without the constitutive parliamentary consent including the authorisation of each individual tranche of financial assistance of relevant size accorded to other countries in an international or European context.²⁹
- Second, the German government has to inform promptly and comprehensively the parliament in all matters concerning the European Union, and before participating in legislative acts of the European Union the Federal Government has to provide the *Bundestag* with an opportunity to state its position and take account of its position in the negotiations. Assuming that the ESM and the Fiscal Compact are “matters concerning the European Union” the GFCC has extended these requirements to international treaties that do not amend but simply supplement the European Treaties.³⁰
- Third, with a view to allowing the *Bundestag* properly to meet its budgetary responsibilities the GFCC has strengthened and extended the right of information of the *Bundestag* with regard to all European and international measures having an effect upon the national budget. This is particularly important with regard to the international agreements like the ESM. Usually, in an international framework the parliament is limited to allow or not to allow the ratification of an agreement negotiated by the government; for the ESM, however, also operational decisions with financial implications to be taken under the agreement cannot be agreed to by the German representative without prior parliamentary authorisation.

II. THE FINANCIAL CRISIS: NEW CONSTRAINTS ON NATIONAL PARLIAMENTARY AUTONOMY?

With the financial crisis it is said that parliaments have lost much of their power through a new kind of “Europeanisation”: governments have taken over and what they decide leaves little room for parliaments to shape policies. The result seems to be “crisis management ‘by summit’”.³¹ In addition, the European Commission is said to have gained considerable new power, namely for its supervisory functions both in the preventive and the corrective branches of coordination of economic and fiscal policies.

To adequately assess the political influence, if not the control, reserved to the national parliaments in the field of the coordination of economic and fiscal policies at all levels, three areas need to be distinguished: Measures adopted with a view to rescue Member States that are or risk to be insolvent (infra 1.); procedures and provisions aiming at a closer coordination in order to ensure the convergence of the economies of the Member States (infra 2.); and policies striving to secure the functioning of the financial markets and the effectiveness of the monetary policy of the ECB (infra 3).

²⁸ For the following see: Katrin Auel, ‘The Europeanization of national parliaments’, in José M. Magone (ed), *Routledge Handbook of European Politics* (Abingdon/New York 2015), p. 366, 378-80; Oliver Höing, ‘Differentiation of parliamentary powers. The German Constitutional Court and the German *Bundestag* within the financial crisis’, in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and Subsidiarity in the EU: National Parliaments, Regions and Civil Society in the Decision-making Process* (Rome LUISS 2013).

²⁹ GFCC, Judgment of 7 September 2011, 2 BvR 1099/10 10 (BVerfGE 129, 124, 178) – Euro Rescue Package, note 128.

³⁰ GFCC, Judgment of 18 March 2014, 2 BvR 1390. 1421. 1438. 1439, 1440, 1824/12. 2 be 6/12 – ESM/Fiskalpakt, note 232. See accordingly § 1 (3) and § 5 (1) no. 11 of the Law on the Cooperation between the Government and the *Bundestag* in matters concerning the European Union (last amended 4 July 2013, BGBl. I p. 2170). The relevant provisions of the Basic Law for this are Article 23 (2) and (3) BL.

³¹ See Auel (note 28), p. 381. For more references see Höing (note 28), p. (...)

1. THE ESM: RESCUING THE EMU

With the outbreak of the financial crisis in 2010, the first concern of the European Commission and the governments was to avoid the insolvency of Greece and some other Member States. Beginning with the first Euro Rescue Package of May 2010, followed by the establishment of a “permanent crisis mechanism to safeguard the financial stability of the euro area as a whole” in October 2010 which has been replaced in 2012 by the Treaty establishing the European Stability Mechanism (ESM), the members of the Euro-Group have taken action. These actions aimed to „mobilise funding and provide stability support, under strict conditionality“, as Article 3 ESM points out, for „Members which are experiencing, or are threatened by, severe financial problems if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States“.

The „if“ is of utmost relevance, since the inclusion of this condition was the only way to envisage the assistance without infringing the bailout-clause of Article 125 TFEU.³² As was made clear in the new provision of Article 136 (3) TFEU, introduced following the simplified amendment procedure of Article 48 (6) TEU, it is not for the sake of the Member State in question, but to ensure the financial stability of the euro area as a whole, that the ESM may be mobilised. The mechanism was established, and it should be managed, thus, in the spirit of solidarity of all contracting parties, including the countries with difficulties.³³

Given the imminent threats of the crisis for the EMU as a whole, in spite of the financial and democratic implications of the ESM, including the financial volume and the implied conditionality, the national parliaments of the states acceding to the ESM had no choice but to agree to its establishment. Some of them were forced to undertake important financial commitments because of the risk that the EMU would otherwise break down with unpredictable consequences for the economies of all Member States and beyond. The others had no choice but to accept assistance with strict conditionality, for the possibly catastrophic consequences of an insolvency for their own economy and people. Only as a common effort towards a common goal could these measures be taken, and only the stabilisation of the Euro area as a whole can possibly justify any constraints entailed for the national parliaments consenting to the system. But can it really?

The constraints – which are thrashed out in a memorandum of understanding to be negotiated between the Commission, the ECB and the IMF in collaboration with the government in question, for each given case³⁴ – are considerable. Moreover, the control powers exercised by the Troika seem to reach deeply into internal politics and administrative structures. The case of Greece is a telling example. It is true that these constraints would not be applicable without the consent of the Member State concerned in conformity with its constitutional requirements. However, the restrictions for national parliaments and, thus, on democratic self-determination – despite some opportunity for discussion or economic dialogue with the Commission and the European Parliament³⁵ – go certainly far beyond what the GFCC could ever admit as compatible with the principles, outlined above, of democracy understood as an expression of human dignity in Germany. The German *Bundestag*, in view of the principles developed by this jurisprudence, could never agree to such restrictions. Could it agree to such restrictions to be imposed to another democratic country in the EU? Do the emergency situation and the

³² See ECJ Judgement of 27 November 2012, C-370/12 – Pringle.

³³ See for the concept of solidarity: Ingolf Pernice, ‘Solidarität in Europa. Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union’, in Christian Calliess (ed), *Europäische Solidarität und nationale Identität - Überlegungen im Kontext der Krise im Euroraum* (Mohr Siebeck 2013), p. 25-56, also available as WHI-Paper 01/2013.

³⁴ Article 13 (3) ESM.

common goal – rescuing the euro area as a whole – suffice to justify such an extraordinary instrument? This is difficult to believe! But the question is if there is an alternative.

2. ENHANCING ECONOMIC GOVERNANCE IN THE EUROPEAN UNION

Compared to the constraints on national parliamentary autonomy involved for countries in crisis, constraints resulting from the Euro Plus Pact and the new legislative measures taken by the EU seem to be less important. They are said to already constitute the European “economic government”³⁶ and to leave little room for autonomous budgetary policies of the national parliaments.

Both hypotheses entail serious problems for two reasons. If acts of secondary legislation really do establish an economic government with meaningful powers regarding areas of national competence like economic and fiscal policies, the question is that of their compatibility with the general approach of the Treaties leaving economic and fiscal policies within the ambit of national competence. If autonomous budgetary policies and parliamentary discretion at the national level are indeed constrained to a considerable extent, there is a legitimacy problem at least insofar as there is no compensation through an effective parliamentary participation and control.³⁷

a. The Euro Plus Pact

The first step undertaken towards enhanced cooperation at least within the Euro-zone has taken the form of the Euro Plus Pact. It paved the way for the subsequent legislative measures aiming at strengthening the Stability and Growth Pact of 1997, but also contains some of the leading ideas agreed upon in the Fiscal Compact of 2012.

The Euro Plus Pact was agreed among the members of the Eurogroup and some other Member States. It lays down their common priorities for closer cooperation. It is published as an annex to the Conclusions of the European Council of April 2011,³⁸ national parliaments were not involved directly. Its introduction specifies: “This Pact focuses primarily on areas that fall under national competence and are key for increasing competitiveness and avoiding harmful imbalances“. This makes clear that significant competences of the Union are not involved. Nevertheless, reference is made to the European Parliament in the first of the „four guiding rules“ laid down in the Pact: “it will play its full role in line with its competences“. The guiding rules include the goal of competitiveness and convergence, objectives to be agreed among the Heads of State or Government, commitments to be undertaken by each of them and their implementation to be monitored on the basis of a report of the Commission. Member States also commit in the Pact “to consult their partners on each major economic reform having potential spillover effects before its adoption“. If there is no mention of the national parliaments,³⁹ the question of their involvement seems to be left to the individual Member States. They are free to provide for adequate involvement of their respective parliaments before any commitment is undertaken, but it is difficult to see to what extent the parliaments effectively participate in the process. As the Euro Plus Pact includes politically

³⁵ Article 3 (8) and (9), Article 7 (11) of Regulation 472/2013 of the European Parliament and the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability OJ 2013 L 140/1.

³⁶ See Carlino Antpöhler, *Emergenz der europäischen Wirtschaftsregierung. Das Six Pack als Zeichen supranationaler Leistungsfähigkeit*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2012), pp. 353, 362-368.

³⁷ Christina Fasone, ‘European Economic Governance and Parliamentary Representation. What Place for the European Parliament?’ *European Law Journal* (2014), pp. 164-185.

³⁸ Conclusions of the European Council of 20 April 2011, EUCO 10/1/11 Rev. 1, Annex 1.

³⁹ See, in however para. 1.5 of the Conclusions (note 38): „In implementing these policies, and in order to ensure wide ownership, close cooperation will be maintained with the European Parliament and other EU institutions and advisory bodies (ESC, CoR), with the full involvement of national parliaments, social partners, regions and other stakeholders“.

sensitive issues like wages and ensuring “costs developments in line with productivity”, labour market reforms to promote “flexicurity”, tax reforms, aligning the pension systems and limiting early retirement schemes as well as the idea of a “debt brake”, the lack of even mentioning the national parliaments is even more striking.

Depending of the respective constitutional or legal arrangements in the Member States, their parliaments participate nevertheless more or less decisively. Commitments of the German government have to be understood, in terms of Article 23 (2) and (3) BL, as “matters concerning the European Union”, with the effect that, according to the provisions of the Law on the Cooperation between the Government and the *Bundestag* in matters concerning the European Union, the government is bound to inform the *Bundestag* before undertaking any commitment and to take the parliament’s comments as a basis for its position.⁴⁰

b. The Six-Pack and the Two-Pack

The need for parliamentary involvement has been made more explicit in the provisions of the Six-Pack⁴¹ and the Two-Pack⁴². The Six-Pack primarily aims to strengthen the Stability and Growth Pact and the economic governance in the EU including provisions on the European Semester, while the Two-Pack was adopted in 2013 for the Eurogroup with a view to gradually strengthening surveillance and coordination and completing the European Semester for economic policy coordination. Two new instruments deserve special mentioning: It first sets up a timeline for synchronising the key steps in the preparation of national budgets.⁴³ Second, it provides for enhanced surveillance and, if necessary, for “enhanced economic policy coordination” through the requirement of “macroeconomic adjustment programs” for Member States in the euro area which are “experiencing or threatened with serious difficulties with respect to their financial stability, likely to have adverse spill-over effects on other Member States in the euro area”,⁴⁴ or which have requested financial assistance from the ESM or others.⁴⁵ As recital no. 9 of Regulation 1177/2011 points out, “the strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments”, and recital no. 16 of the same Regulation promises that

in line with the legal and political arrangements of each Member State, national parliaments should be duly involved in the European Semester, and in the preparation of stability programmes, convergence programmes and national reform programmes in order to increase the transparency and ownership of, and accountability for the decisions taken.

⁴⁰ See supra note 30, in particular §§ 7 (1) (11) and 8 of the Law.

⁴¹ Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306/1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306/8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance and coordination of economic policies, OJ L 306/12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306/25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306/33; Council Directive 2011/85/EU of 8 November on requirements for budgetary frameworks of the Member States, OJ L306/41.

⁴² Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L140/1; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the member States in the euro area, OJ L 140/11.

⁴³ Art. 4 of Regulation EU No. 473/2013 of the European Parliament and the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ 2013 L 140/11.

⁴⁴ Art. 2 of Regulation (EU) No 472/2013 (note **Fehler! Textmarke nicht definiert.**).

⁴⁵ Art. 7 of Regulation (EU) No 472/2013 (note **Fehler! Textmarke nicht definiert.**).

⁴⁶ See similarly Article 15 of Regulation 473/2013 (note 40).

Yet, the relevant Article 2-a of Regulation 1466/97 as amended by Regulation 1177/2011 only provides for the involvement of the European Parliament, “in particular by the means of the economic dialogue” according to its new provisions of Article 2-ab. The economic dialogue, introduced throughout the Six-Pack on the request of the European Parliament, only includes the institutions of the EU, and it allows the invitation of “a Member State which is the subject of a Council recommendation under Article 6(2) or 10(2) to participate in an exchange of views” (Article 2-ab (3)).⁴⁶ But the national parliaments are not mentioned in the relevant provisions. As the obligations regarding the European Semester in this regulation address the Member States, it is left to them to organise how their national parliaments shall be involved. The European Semester is understood as a specific tool giving effect to the provisions on the coordination and multilateral surveillance of the economic policies of the Member States in Article 121 TFEU, with the relevant decisions to be taken by the Council.

In practice national parliaments indeed used their opportunity to significantly improve their position in budgetary processes compared to the situation before the euro crisis either through national legislation or with the help of constitutional courts.⁴⁷

c. National Parliaments under enhanced surveillance: The revised European Semester

Yet, the Two-Pack Regulation 473/2013 goes a step further. It is based upon the understanding that particularly within the euro area spillovers of the economic and fiscal policy from one Member State on the others may create tensions. This is why Member States of the Eurozone are requested under Article 6 (3) subpara. 2 of Regulation 473/2013 to pay, when communicating their draft budgetary plans to the Commission, “particular attention... to major fiscal policy reform plans with potential spillover effects for other Member States whose currency is the Euro”. What was a political commitment in the Euro Plus Pact, thus, became a legally binding obligation. Recital no. 19 explains this in extending the obligation a step further:

Member States whose currency is the euro are particularly subject to spill-over effects from each other’s budgetary policies. Member States whose currency is the euro should consult the Commission and each other before adopting any major fiscal policy reform plans with potential spill-over effects, so as to allow an assessment of the possible impact for the euro area as a whole. They should also consider their budgetary plans to be of common concern and submit them to the Commission for monitoring purposes in advance of their becoming binding....

Among numerous criteria to be observed by the Member States when establishing and making public, within the timeframe laid down in the Regulation, their national medium-term fiscal plans Article 4 requires that such plans “shall be presented together with their national reform programmes and the stability programmes”. These obligations seem to put in binding form what is explained in the recital. The more detailed the guidance and recommendations of the Council issued at the beginning of the cycle are, the more restrictive are the constraints following from them for national budgetary policies.

In turn, Article 6 of Regulation 473/2013 provides, among the rules governing the assessment of the draft budgetary plans of the Member States, for the opinion of the Commission to be made public and be presented to the Eurogroup; “thereafter, at the request of the parliament of the Member State concerned or of the European Parliament, the Commission shall present its opinion to the parliament making the request”. The importance of this direct dialogue between the Commission and national parliaments cannot be overestimated. It is not only a matter of

⁴⁶ See similarly Article 15 of Regulation 473/2013 (note 40).

⁴⁷ See Davor Jancic, ‘Parliamentary Involvement in the Economic and Monetary Union after the Euro Crisis’, in Nicola Lupo and Christina Fasone (eds), *Interparliamentary Cooperation in the Composite European Constitution* (Hart Publishing, forthcoming 2016), section III..

mutual respect and understanding. While an *ex ante* consultation of – or with – each national parliament concerned would have been the more adequate and democratic solution,⁴⁸ it may help the Commission’s opinion to be well understood and eventually followed by the budgetary authorities of a Member State, in particular in cases where the Commission identifies problems such as non-compliance with budgetary policy obligations laid down in the Stability and Growth Pact or any other obligations and requests a revised draft budgetary plan according to Article 7 (2) of the Regulation. Surprisingly, Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances⁴⁹ only allows, within the framework of the Economic Dialogue, the competent committee of the European Parliament to “offer the opportunity to participate in an exchange of views to the Member State which is the subject of a Council recommendation or decision under Article 7(2) or Article 10(4)”. National parliaments are not involved, though recital no. 5 of the Regulation clearly and rightly refers to them: “The strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments.”

d. Dialogue with National Parliaments as Part of Surveillance and Coordination Schemes

This dialogue including the national parliaments concerned, though, should become a regular part of the surveillance and coordination processes for economic and fiscal policies of the Member States. It is not sufficient to make it part of the European Semester and of the regime governing the specific situation of a Member State with serious financial difficulties or receiving financial assistance. It is needed, in particular, to raise the awareness of the members of national parliaments of any possible spillover effects of their decisions on other Member States. Insofar as similar provisions on an “exchange of views” or an “economic dialogue” can be found in Article 3 (7) and (8) of Regulation 472/2013 on enhanced surveillance and macroeconomic adjustment programmes in cases where, following the conclusions of the Commission that the financial and economic situation of a Member State “has significant adverse effects on the financial stability of the euro area of its Member States”, the Council recommends to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme, and in Article 3 (9) of this Regulation generally “during the course of the enhanced surveillance process”. Similar provisions apply also in cases of a Member State requesting or receiving financial assistance and subject, therefore, to the application of a macroeconomic adjustment programme for discussing “the progress made in the implementation of its macroeconomic adjustment programme”. The dialogue does not alleviate the constraints and pressures put on the national parliaments in question, but it facilitates clarification and mutual understanding of the decision-making process and may lay bare the fact that national financial policies – within the internal market or at least within the euro area – can no longer be seen as a matter of self-determination of the people in one Member State in isolation from those of the other Member States.⁵⁰

3. THE FISCAL COMPACT AND THE DEBT BRAKE

The Fiscal Compact is an attempt to make legally binding many of the commitments undertaken by the Member States of the euro area and some others with a view to an enhanced economic policy coordination. One of the most important provisions is Article 3 on the balanced budget or the debt brake. As paragraph 2 of the provision states, contracting parties are bound to incorporate this rule into “provisions of binding force and permanent

⁴⁸ See Jancic (note 47), at IV. A.

⁴⁹ Regulation (EU) No. 1176/2013 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25.

⁵⁰ Mark Dawson and Floris De Witte, ‘Self-Determination in the Constitutional Future of the EU’, *European Law Journal* (2015), pp. 371-383.

character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes”. There must be a correction mechanism as well as independent institutions responsible at national level for monitoring compliance with the rules so established.

The obligation to incorporate the debt brake as stated in Article 3 (1) of the Fiscal Compact in national – constitutional – law, supports and somewhat strengthens the provisions of Articles 2a and 5, 6 and 9 of Regulation 1466/97 revised by Regulation 1175/2011 regarding the “differentiated medium term objective” for the Member States’ budgetary position, also referred to in Article 5 of Regulation 473/2013 on the monitoring of compliance of the national budgetary plans with fiscal rules within the framework of the European Semester. Indeed, Article 2a (1) of Regulation 1466/97 allows that the “country-specific medium term budgetary objectives” to be established may diverge from the requirement of a close to balance or in surplus position, while providing a safety margin with respect to the 3% of GDP government deficit ratio. But the principle of a balance or surplus position seems to be accepted as a requirement of EU secondary legislation.

Though the last phrase of Article 3 (2) of the Fiscal Compact asserts that “such correction mechanism shall fully respect the prerogatives of national Parliaments”, the provisions on the debt brake diminish national parliaments’ options: Instead of autonomous fiscal decisions their role is defined as executors of determined strict principles of austerity. Yet, such policy may result in a recession instead of in growth, with adverse effects on employment and social conditions. It is difficult to see how, in periods of economic depression, national budgetary authorities would accept this strict rule without losing the support of the electorate.

If Article 16 of the Fiscal Compact envisages the incorporation of its provisions into the European Treaties “within five years, at most, of the date of entry into force of this Treaty”, it does not seem likely that the debt brake will be part of the package, not least for the democratic problems it carries.

III. ENHANCING DEMOCRATIC LEGITIMACY IN A FUNCTIONING EMU

Given the interdependence of the national economies within the Common Market with a common currency and the mentioned spillover effects, preserving budgetary autonomy and individual responsibility of each Member State for its own debts cannot be the answer to the crisis. A common approach is required, so as to ensure that national parliaments include the European perspective in all decisions taken at the national level. The European Semester can be seen as a first step towards the awareness of the European dimension of national economic and financial policies, and it paves the way for more intensive mechanisms of interaction and coherence between the European and national level. This may include new steps of integration, as far as needed in the light of the principle of subsidiarity for creating an effective political instrument for dealing with problems, which individual and autonomous Member States are unable to solve. Consequently, common economic and fiscal, perhaps even social policies have to be developed on the basis of competences to be conferred to the Union insofar as needed for sustaining the common currency. This might not be compatible with the idea that democratic legitimacy also for EU policies must primarily be founded in the national parliaments. But is this assumption correct? Yes, it might be politically difficult, at present, to achieve the revision of the Treaties required to realise this objective; in this case interim-solutions allowing a more substantive cooperation also among national parliaments are needed. The request of David Cameron to initiate a reform of the Treaties, however, could change the situation, and provide the members of the Euro-group an opportunity for negotiating limited institutional reforms with a view to remedy the problems of the Euro. What, so, are the principles to be followed, what are the model and necessary steps for

overcoming the asymmetry between the economic and the monetary face of the EMU and setting up conditions for a functioning EMU?

1. DEMOCRATIC LEGITIMACY OF THE EUROPEAN POLICIES

Many observers state that strengthening democratic legitimacy would mean strengthening the role of national parliaments in the EU. Fifteen years ago, Joschka Fischer, then German minister of foreign affairs, called in his well-known Humboldt-speech of May 2000 for members of the national parliaments to have a seat also in the European Parliament in order to bridge the gap between the national and the European political elites. There are considerable arguments for this proposition, because it is based upon the understanding that EU policies are part of our daily life, that the EU is part of the political system we are living in, and that the members of our national parliaments carry a particular responsibility also for the political decisions made at the European level. The GFCC is even going so far as to repeat at any occasion that the democratic legitimacy of the EU roots primarily in the national parliaments and that consequently the European Parliament can only play a supplementary and subsidiary role. In short: As long as there is no European people, as long there is no equality of the voting rights of the citizens of the Union and, as a consequence, as long as the European Union is not a state⁵¹ substituting the sovereign statehood of the Member States – a change that is excluded under the German Basic Law⁵², – the democratic legitimacy of the EU basically rests upon the national parliaments.⁵³

This dogmatic approach of the GFCC is questionable, and nothing in the text of the Basic Law supports it. The preamble and Article 23 (3) of the Basic Law, in contrast, suggest a clear departure from the classical concept of sovereign national statehood for Germany: According to the preamble the German people has adopted the Basic Law “inspired by the determination to promote world peace as an equal partner in a united Europe”. And Article 23 (1) specifies that, “with a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union...”.⁵⁴ It remains to be determined what the words “united Europe” mean, but the term is open enough not to exclude even federal statehood.

The idea of European integration, though, does not necessarily follow the model of statehood; Jean Monnet and Robert Schuman rather envisioned a new kind of political organisation, not national, but supra-national, based upon nations and states without itself becoming a nation-state. Walter Hallstein rightly qualified the European Community as a Community based upon the rule of law, or as the ECJ now says, a Union of law; the new approach is the answer to the failure of the Westphalian system of sovereign states that has been unable to preserve peace among the peoples of Europe. If the preamble of the TEU emphasises that the heads of state and government in concluding this Treaty were “resolved to continue the process of creating an ever closer union among the peoples of Europe in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”, nothing in the treaties can be understood to mean that the *finalité* of the EU be federal statehood. Those who just want to copy the nation state at the European level show a deplorable lack of imagination.

⁵¹ A situation that would, however, presuppose the German Basic Law to be replaced by a new constitution.

⁵² GFCC, Judgement of 30 September 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022 1259/08, 182/09 (BVerfGE 123, 267, 348-350) – Lisbon, notes 329-330, 232.

⁵³ *Ibid.*, p. 368 (note 271).

⁵⁴ Translation Christian Tomuschat and David P. Currie, Deutscher Bundestag (ed), 2010, http://www.bundestag.de/htdocs_e/documents/legal (accessed 6 June 2015).

What the GFCC seems to ignore, thus, is the original openness of the Basic Law for a new model of political organisation beyond the state, unifying peoples of states for preserving peace in Europe and beyond. Article 23 (1) of the Basic Law specifies that Germany shall cooperate in establishing a European Union “that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.” The German constitution rightly leaves open what these principles exactly mean in a supranational context. One has to ask whether – as long as the EU is not a state – the concrete meaning of these principles should be constructed identical to their meaning in the national context. The answer is: They cannot.

The Treaty of Lisbon emphasises the principle of subsidiarity and – being the first treaty that does so – confers specific rights and responsibilities to the national parliaments of the Member States, as summarised in Article 12 TEU. Article 10 (2) TEU specifically refers to the Heads of State and the Governments of the Member States “themselves democratically accountable either to their national parliaments, or to their citizens”, as one of the two pillars of “representative democracy” on that the EU is founded –, the other pillar being the “citizens directly represented at Union level in the European Parliament”.

These two approaches, that of a dual basis of democratic legitimacy of European policies and that of the GFCC, are not necessarily incompatible in practice. The Treaties can be understood to establish a composite constitutional system,⁵⁵ in which transparency, public discourse on key political questions, popular participation, and democratic legitimacy and control not only occur at both, EU and domestic levels,⁵⁶ but discourses and political processes at these two levels cannot be separated from each-other. Thus, national parliaments and the European Parliament should exercise the democratic function in the EU by acting in close cooperation, they have a common mission.

The question is to what extent democratic legitimacy in the Union is effectively provided by the national parliaments. After the experience of more than five decades, in how many cases each of them (plenary, not only a commission) had a substantial public debate on specific policies or legislative proposals of the European Commission, such as on the framework directive on data protection or on the Six-Pack or the Two-Pack? And if so, had the parliamentary debate and resolutions a real impact on the legislative measure in question? In how many, and which, cases did a national parliament debate and decide a political initiative to be undertaken by the government on an issue of national interest at the EU level? I would assume that the numbers and cases produced after an examination of these questions to be lead, probably, by political scientists, are not overwhelming.⁵⁷ Though the answer might be different for each of the 28 national parliaments of the EU, there is an increasing need for them to get aware of and exercise their responsibilities more extensively. Article 12 TEU gives them a constitutional role at EU level, though the specific provisions it refers do not confer them substantial powers. This can be understood, since their constituency is focussed primarily on issues that can be dealt with by national institutions and, in particular, the

⁵⁵ For the concept see more in detail: Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, in: 36 *Common Market Law Review* (1999), pp. 703-750 – WHI-paper 04/1999, and id., *The EU – A Citizens’ Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe*, in: José M. Magone (ed.), *Routledge Handbook of European Politics* (2015), pp. 184-201.

⁵⁶ Art. 10 TEU.

⁵⁷ For some analysis see: Katrin Auel/Oliver Höing, *Parliaments in the Euro Crisis: Can Losers of Integration Still Fight Back?*, in: 52 *Journal of Common Market Studies* (2014), p. 1184-1193; Katrin Auel/Olivier Rozenberg/Angela Tacea, *To Scrutinise or Not to Scrutinise? Explaining Variation in EU-related Activities in National Parliaments*, in: 38 *West European Politics* (2015), p. 282-304; Katrin Auel/Olivier Rozenberg and Angela Tacea, *Fighting Back? And, If So, How? Measuring Parliamentary Strength and Activity in EU Affairs*, in: Claudia Heffner/Christine Neuhold/Olivier Rozenberg/Julie Smith (eds.), *The Palgrave Handbook of National Parliaments and the European Union*, p. 60-93.

governments. But the governments have an active role to play in the Council. As Article 10 (2), subpara. 2 TEU stipulates, they are accountable to their respective parliaments. And they can take an proactive role too: The more they become aware of the potential of the EU institutions to deal effectively with issues beyond the national reach, the more they may actively stimulate the EU institutions to take appropriate action at EU level. In particular, it is crucial for democracy in Europe that national parliaments discuss and consider spill-over effects of their policies on other Member States, enter into a dialogue with the other national parliaments and make proactive use of the opportunities offered by the EU for more effective and democratically legitimate action at the EU level where appropriate.

Coordinated economic and fiscal policies, to the extent that national policies impact the economies of other Member States, may become more and more such a matter of common concern and interest.

2. ENHANCING DEMOCRATIC LEGITIMACY WITHIN THE FRAMEWORK OF THE EXISTING TREATIES

Enhancing democratic legitimacy of the policies of the Union and, in particular, of the action the Union is taking under the new framework for the coordination and convergence of the economic, fiscal and social policies of the Member States must include both, the European Parliament and the national parliaments. Accordingly, the Economic Dialogue not only needs to be strengthened, but also, as appropriate in each case, give representatives of the budget committees of the national parliaments concerned a say in order to make their positions and problems heard and to have them taken into account seriously. As long as these policy areas are recognised, as the Euro Plus Pact rightly does, to be within the ambit of national competence, it is not acceptable that discussing and setting up the broad guidelines of the economic policies of the Member States and of the Union as the basis for coordination and surveillance is a matter, according to Article 121 (2) TFEU, for the Commission and the governments only. Given its implications on the budgetary autonomy of the national parliaments they too must have a say in this process.

So far, this parliamentary involvement is organised at the European level with the EP through the Economic Dialogue,⁵⁸ at the national level by each Member State in accordance with the constitutional arrangements regulating the interaction of their respective government and parliament. The participation and control particularly by national parliaments of Council decisions, however, will remain weak and insignificant, as long as the relevant meetings of the Council are not public, and as long as national parliamentarians are not familiar with the procedures at the European level nor with the situation in other Member States. The “Future of Europe Group” – foreign ministers of some Member States – suggest in a Report of 17 September 2012, a “permanent joint committee” of members of the EP and of the national parliaments.⁵⁹ This could be a first step for stimulating mutual information, understanding and cooperation. In this vein, also the “Blueprint” of 30 November 2012, of the European Commission emphasises the role of the national parliaments in a “deep and genuine EMU”:

Whatever the final design of EMU, the role of national parliaments will always remain crucial in ensuring legitimacy of Member States' action in the European Council and the Council but especially of the conduct of national budgetary and economic policies even if more closely coordinated by the EU. Cooperation between the European

⁵⁸ See Jancic (note 47), at IV.A.

⁵⁹ Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain, 17 September 2012, available at (last visit 14 June 2015): http://www.cer.org.uk/sites/default/files/westerwelle_report_sept12.pdf.

Parliament and national parliaments is also valuable: it builds up mutual understanding and common ownership for EMU as a multilevel governance system.⁶⁰

A new Interparliamentary Conference on Economic and Financial Governance has been established the 23 April 2013 under Article 13 of the Fiscal Compact. It has been criticised as a “missed opportunity”, particularly, as there is no clear membership, it has no decision-making powers and meets only twice a year.⁶¹ As a mere forum of occasional discussion it will not attract relevant members of the national parliaments and the impact of its conclusions will, therefore, remain poor. Interparliamentary cooperation, thus, needs to be further developed through more substantial institutional ties among the national parliaments and with the European Parliament, e.g. by giving the Interparliamentary Conference real responsibility and powers,⁶² with due respect, though, of the limits already mentioned of the capacity of national parliamentarians to take seriously their European responsibilities in addition to their tasks in domestic politics.

At this stage the question may be put to what extent it is a task – and should be within the competence – of the Union to organise such an interparliamentary dialogue. As the Commission points out in the blueprint, “one fails to see how parliamentary accountability could be organised for an intergovernmental European level seeking to influence economic policies of individual euro area Member States”.⁶³ Insofar as intergovernmental governing is concerned, democratic accountability seems, thus, to be primarily a matter for national constitutional arrangements, notwithstanding the participation of the European Parliament ensuring that the European perspective is not left out of sight. In turn, the cooperation with the national parliaments is important for the European Parliament when exercising its control of the Commission’s action in particular with regard to the shaping of recommendations on the budgetary policies of the Member States and taking up its responsibilities of monitoring and surveillance in EU economic governance.

3. TOWARDS A DEMOCRATIC ECONOMIC AND FINANCIAL POLICY OF THE EU

As long as the Member States remain the masters of their budgets and economic, financial and social policies are regarded as their genuine competence, this autonomy is equivalent to diversity and imbalances, not convergence. The more effective mechanisms and procedures established with a view to ensuring convergence as the fundament of a functioning common currency, the less will remain left of the autonomy of the Member States and the political room of manoeuvre of their parliaments. The complexity of the system of coordination and surveillance, that consists of common guidelines and principles, reporting, monitoring, recommendations and financial sanctions, of a system established by primary law, further developed subsequently by secondary legislation and political agreements, legislative measures and international treaties, has reached a degree at which people in general, but also political leaders, have problems to understand. The influence of parliaments on fundamental political decisions, including the budget and redistribution, is becoming more and more marginal in spite of certain attempts to allow a discussion. Instead, power is shared among the

⁶⁰ Communication from the Commission. A blueprint for a deep and genuine economic and monetary union. Launching a European Debate, COM(2012) 777 final/2, p. 35.

⁶¹ See Valentin Kreiling, The New Inter-Parliamentary Conference for Economic and Financial Governance, Notre Europe, Policy Paper 100 (2013), p. 17-19, available at (last access 14 June 2015): <http://www.notre-europe.eu/media/interparliamentaryconferencececofinkreilingerne-jdioc2013.pdf?pdf=ok>. See also Jancic (note 47), at IV.B.

⁶² See however the doubts expressed by the European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), para. 32, where it „stresses that this cooperation should not be seen as establishing a new joint parliamentary body, which would be both ineffective and illegitimate from a democratic and constitutional point of view, and reaffirms that there is no substitute for a formal strengthening of the full legitimacy of the European Parliament, as a parliamentary body at Union level, with a view to reinforcing the democratic governance of the EMU“, available at (last access 15 June 2015): <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-0598>.

⁶³ Blueprint (note 60), p. 36.

executives acting, with the support of the European Commission, in a mode of what the GFCC calls “intergovernmental governing”. The democratic deficit of the EMU is tangible and the gap between political decision makers and EU citizens is reaching unsustainable levels. The attempt to remedy the situation by including the parliaments in the debate and by interparliamentary cooperation, as described, does not seem to be sufficient and to bring about democratic legitimacy as needed.

Instead of further fine-tuning the existing system and adding certain channels for information and dialogue with the national parliaments time has come to consider more or less radical alternatives. To better assist Member States in financial difficulties one solution proposed was the mutualisation of debts through the issuance of Eurobonds. Its interest rates would be moderate and allow these states to recover more easily. Apart from the German veto and the consideration of the GFCC that no automatism may be established regarding the liability of Germany for sovereign debts that are beyond control of the *Bundestag*, a very simple principle needs to be of relevance: No common liability without common policy.⁶⁴ The blueprint of the Commission gives a more detailed explanation of this principle. According to the Commission

special challenges to ensure appropriate democratic accountability would arise in case the Treaty is changed to permit the mutualisation of the issuance of sovereign debt underpinned by a joint and several guarantee of all euro area Member States. The underlying accountability problem is that such a joint and several guarantee, if claimed by creditors, may result in considerable financial burden for one individual Member State's finances, for which that Member State's parliament is accountable, although the burden is the result of policy decisions that have been made over time by one or several other Member States under the responsibility of their parliaments. As long as the EU level is not granted very far-reaching powers to determine economic policy in the euro area and the European Parliament is not responsible for deciding on the resources of a substantial central budget either, this fundamental accountability problem cannot be overcome simply by entrusting the management of mutualised sovereign debt to an EU executive even if it is accountable to the European Parliament.⁶⁵

And the Commission also frames a possible solution: New provisions on a common economic and financial policy following the “community method” and thereby establishing conditions where the system of dual legitimacy and accountability to the national parliaments and the European Parliament would be set in place. It suggests that the “problem would no longer arise in a full fiscal and economic union”. This union would “itself dispose of a substantial central budget”, it would have a “targeted, autonomous power of taxation”, as well as the possibility to issue its “own sovereign debt, concomitant with a large-scale pooling of sovereignty over the conduct of economic policy at EU level”. Member States, thus would not be jointly and severally liable for each other's sovereign debt but at most for that of the EU. Regarding democratic legitimacy, the Commission envisages the European Parliament so to “have reinforced powers to co-legislate on such autonomous taxation and provide the necessary democratic scrutiny for all decisions taken by the EU's executive.”⁶⁶

The open question remains of the role of the national parliaments in such a new context. Two aspects need to be considered. First: Does a full fiscal and economic union exceed the constitutional limits set by the budgetary autonomy of the national parliaments (infra a.)? And second: How to design an appropriate participation of the national parliaments in the decision-making at the Union level (infra b.).

⁶⁴ Ingolf Pernice, ‘Währungsunion - Zuerst kommt die europäische Disziplin’, WHI Paper 04/2011, available at (last access 26 May 2015): http://www.whi-berlin.eu/tl_files/documents/whi-paper0411.pdf.

⁶⁵ Blueprint (note 60), p. 40.

⁶⁶ Ibid.

a. A Full Fiscal and Economic Union and the National Budgetary Autonomy

Would the national parliaments lose their key responsibility for the budget in a full fledged Fiscal and Economic Union and be deprived of their “overall budgetary responsibility”, contrary to the constitutional limits established by the GFCC?⁶⁷ The answer to this question, as far as limits set under German constitutional law are concerned, can be found in the judgement on the Treaty of Lisbon. The GFCC is very precise here in drawing the red line. The constitutional limits regarding the protection of the budgetary autonomy would be exceeded only “if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent”.⁶⁸ An increased financial capacity of the EU, based upon targeted and, thus, limited powers of taxation at the EU level, thus, would not be contrary to this constitutional requirement. Indeed, the GFCC had made clear already in the judgement on the Treaty of Maastricht, that the asymmetry of the EMU may need to be corrected. It expressly admitted to envisage new steps towards a fully-fledged EMU if needed to safeguard the functioning of the EMU as a stability union. This was confirmed in the recent judgment on the ESM where the Court holds that “a continuous further development of the monetary union may be necessary if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from“. So, it leaves the door open for proceeding beyond the original structure of the EMU with a view to counteract „possible weaknesses of the monetary union“ by amending European Union law.⁶⁹

This is not the place for comprehensively considering amendments to the EU Treaties that might be in conformity with the limits set, nevertheless, by the GFCC⁷⁰ and possibly by a number of other national constitutional courts.⁷¹ Legally binding legislative provisions on, and requirements for national budgets, adopted under the ordinary legislative procedure under Article 294 TFEU could be drafted so as to leave sufficient leeway to the national parliaments for autonomous budgetary policies in accordance with the respective political priorities of each of the Member States. The measures could be limited to the key parameters necessary for ensuring economic convergence and for preventing excessive macroeconomic imbalances, like under the present legislation, but also be more specific, if needed, and impose clear obligations and quantitative limits to the national budgetary authorities. Such restrictive measures could be supported by financial flows through a revised system of structural funds and, in particular, of the cohesion fund with a drastically increased capacity. Other measures could be considered, including financial provisions supporting an enhanced European regional policy of a common scheme of an unemployment insurance with a view to develop comparable living conditions throughout the Union.

Giving up the principle of exclusive national competence within the fields of economic, fiscal and social policies and replacing it by a shared responsibility with limited powers of the EU in these fields following the Community method would considerably simplify the mechanisms established so far. The application of the ordinary legislative procedure would entail the involvement of the European and – as national provisions on the oversight of the governments taking decisions on fiscal and economic policies at the Council may further develop – national

⁶⁷ See the text *supra* around notes 21 to 27.

⁶⁸ GFCC, Judgement of 30 September 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022 1259/08, 182/09 (BVerfGE 123, 267, 361) – Lisbon, note 256.

⁶⁹ GFCC, Order of 12 September 2012, 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 (BVerfGE 132, 195, 244 note 118) - ESM-interim, note 222 (English version).

⁷⁰ See for details Ingolf Pernice, ‘Domestic courts, constitutional constraints and European democracy: What solution for the crisis?’, in Maurice Adams, Federico Fabbrini & Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014), p. 297, 306-18.

⁷¹ For a comprehensive analysis of the jurisprudence of national constitutional courts regarding „the new constitution of EMU“ see: Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, in: 32 *Berkeley Journal of International Law* (2014), p. 64, 74-103, 106.

parliaments, respectively. It would, thus, ensure more transparent decision-making including the usual public participation and debate at the national and European level.

b. Enhanced Participation of the National Parliaments in Decision-Making

Are there ways to enhance the participation of the national parliaments in the decision-making at the Union level related to economic and fiscal policies in a full fledged economic and fiscal Union? The existing treaties contain diverse specific tools allowing enhanced participation or even a veto of national parliaments for matters of particular political sensitivity, to serve as a model for an appropriate differentiated control of the national parliaments of the decisions of the Council. Examples can be found in the involvement of national parliaments under Article 311 (2) TFEU on the own resources of the EU, in the veto for national parliaments in 48 (7) subpara. 3 TEU regarding the general *passarelle*, or the right of national parliaments to make their opposition known to measures envisaged by the Council in the area of family law under Article 81 (3) TFEU. Also the “emergency break” under Articles 82 (3) and 83 (3) regarding measures to be taken under the ordinary legislative procedure in the area of judicial cooperation in criminal matters can be understood as giving each national parliament some control on the legislative activities of the Council, though it would be indirect and need to convince its own government to submit the relevant request to refer the draft to the European Council.

Such instruments, however, are rather defensive and negative. They do not really include the national parliaments to positively participate and contribute in the decision-making processes. More promising seem to be mechanisms of “legitimate and accountable joint decision-making”⁷² that reflects the impact of the decisions made both, at the national level regarding the budgetary autonomy as well as economic and distributional politics and at the European level with regard to the common responsibilities for stability, growth and convergence and for the proper functioning of the EMU based upon the economic and social cohesion of the Union. Because of the need to accommodate the key democratic responsibilities of the individual Member States and their respective parliaments with the common EU interest of achieving together the objectives laid down in Article 3 TEU and, in particular, the well-being of the people (§ 1), sustainable development based upon balanced economic growth and price stability (§ 3) and a functioning Economic and Monetary Union (§ 4 and Article 119 TFEU), special provision for joint decision-making giving the national parliaments a real stake is needed.

The German “Glienecker Gruppe” proposed a new “Euro-Treaty for the Euro-Union”, establishing a “Euro-Parliament” that consists either of members of the European Parliament or of the national parliaments, to choose and scrutinise a “Euro-Government”.⁷³ A similar proposal has been made by the French “Groupe Eiffel” with a manifesto for a “Euro-Community”, though the “assembly” would consist of deputies directly elected by the peoples of the participating states on the same day and according to the same rules.⁷⁴ It is questionable, however, whether the Euro-Group should create its own constitutional framework, given that the Treaties view the EMU with the common currency as an element of the European Union as a whole, provide for diverse obligations regarding economic and fiscal policies for all the Member States and so take account of the fact that special policies of the

⁷² See Fabbrini (note 71), p. 121.

⁷³ Glienecker Group, Towards a Euro Union, October 2013, available at (last access 15 June 2015): <http://www.glieneckergruppe.eu/english.html>.

⁷⁴ Groupe Eiffel, For a Euro Community, February 2014, available at (last visit 15 June 2015): <http://www.groupe-eiffel.eu/our-manifesto/>. A recent announcement by the French President Hollande indicates a similar direction, see: “Hollande fordert Parlament für Eurozone”, Zeit Online of 14 July 2015, available at: <http://www.zeit.de/politik/ausland/2015-07/griechenland-francois-hollande-euro-zone-parlament> (last access 16 July 2015).

Eurozone have a strong impact also on Member States that do not have the Euro. A separation does not seem to comply with the principles of the Treaties setting a common objective for the Union as a whole and requiring all the Member States, including those who have not (yet) the Euro, to cooperate for achieving this objective.

The second problem of these proposals is the institutional separation of the Euro-Parliament, whatever its composition, from the national parliaments. Joint decision-making would require that there is a “Joint Assembly” encompassing the budgetary committees of the EP and those of the national parliaments meeting in plenary where decisions of general character are taken, but also meeting in country-specific composition as far as country-specific decisions are at stake. This assembly should have the power of co-decision with the European Council on general guidelines and of the Council for any specific decisions related to the economic and fiscal policies of the Union having an impact on national budgetary, economic and re-distributional policies.

It is true that the European Parliament should be the primary source of democratic legitimacy for European policies, as the national parliaments play this role for domestic policies. Given the interdependence of policies in a multilevel polity like the EU with an internal market and, for most of the Member States, a common currency, and recognising the spill-over effects of internal economic and fiscal policy decisions at the national level as well as the increasing restrictive effects of the coordination and discipline of national policies required for the functioning of the EMU, however, special arrangements for the inclusion of the national parliaments responsible for their respective economic and fiscal policies in the control of EU decisions regarding the common framework of these policies need to be established.

CONCLUSIONS

What do all these findings and ideas tell us with regard to the general title of this conference, resilience or resignation: National Parliaments and the EU? Resignation could seem to be the most likely attitude in situations where Member States are under the threat of bankruptcy and negotiate a memorandum of understanding under the ESM for receiving assistance; not much is left of the budgetary or political autonomy of the national parliament also in cases where, under the enhanced coordination and surveillance mechanisms introduced by the Six-Pack and the Two-Pack, the heads of state and government in the European Council, the ministers in the Council and the Commission establish principles and guidelines regarding national economic and re-distributional policies, to be followed by the national authorities without direct participation or effective control of the national parliaments in these decision-making processes.

Remedies to such increasing executive federalism exist, however, both at the national and at the Union level. This is the time of resilience. National parliaments may correct the situation by increasing their political control on, and the accountability of their respective governments by appropriate mechanisms of consultation, direction and reporting through adequate constitutional or legislative arrangements. Regarding the European level, they may initiate appropriate amendments of the relevant provisions of secondary law as well as, if so required, of the EU Treaties with a view to establishing a system of joint decision-making through a “Joint Assembly”, as proposed, that controls the executives in their action coordinating and guiding the economic, fiscal and social policies of the Member States. With such mechanisms in place, resilience of the national parliaments will replace resignation, and the EMU will be prepared to tackle the challenges of the financial markets more effectively and more democratically.