Powers of Parliaments in Euro-crisis budgetary reforms

Cristina Fasone (Max Weber Postdoctoral Fellow in Law, EUI)

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1. Introduction

It is widely acknowledged that the budgetary autonomy of national parliaments has been negatively affected by the reform of the economic governance in the EU.[1] After regaining some of the authority lost throughout the process of European integration thanks to the Treaty of Lisbon, just a few years after, the legal reaction to the Eurozone crisis at first look appears to have marginalized national parliaments again. The way the new budgetary procedures are designed, shaped by the interplay between supranational and domestic institutions and, among the former, either by the intergovernmental or by the most technical and not even indirectly democratically legitimated institutions, i.e. the Commission and the European Central Bank (ECB), makes parliamentary oversight extremely troublesome. To ascertain who is ultimately responsible and accountable for adopting budgetary decisions and structural reform is anything but easy.

Moreover, the EU law stemming from the reform of the economic governance, from the amendment of Article 136 TFEU to the six-pack and the two-pack, almost completely disregards national parliaments. By contrast, it is one of the most criticized instruments adopted in the aftermath of the crisis, the Fiscal Compact (FC),[2] an international agreement signed by all EU member states but the UK, the Czech Republic, and Croatia outside the EU legal framework, which explicitly recognizes a role for national parliaments of the contracting parties in controlling the implementation of the treaty together with the European Parliament (Art. 13 FC). Moreover, Art. 3.2 of this intergovernmental agreement states, in its last sentence, that the 'correction mechanism shall fully respect the prerogatives of national parliaments'. Thus whether parliaments are actually guaranteed or not mainly depends on national law.

This implies that the position of parliaments in the Member States is likely to be asymmetric, with some parliaments placed in a stronger position vis-à-vis the executive compared to the legislatures in other countries. The asymmetry is increased if one looks at the divide between Eurozone and non-Eurozone countries, whereas the former and in turn their parliaments face tougher budgetary constraints than the latter. Furthermore, within the Eurozone countries parliaments of the Member States receiving financial assistance and support are even more affected in their budgetary

[1] See M. Poiares Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice', *RSCAS Policy Paper*, n° 11, EUI, Florence, 2012, p. 6 ff., B. Crum, 'Saving the Euro at the Cost of Democracy?', *Journal of Common Market Studies*, vol. 51, n° 4, 2013, p. 614-630; K. Tuori & K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, Cambridge University Press, 2014, 195.

[2] On the Treaty on stability, coordination, and governance in the European and Monetary Union, so-called 'Fiscal Compact', see P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', *European Law Review*, vol. 37, 2012, 231 ff.

autonomy because of the strict conditionality imposed. Particularly in these countries the political discretion of parliaments within the budgetary process has been almost annulled; it has been not only challenged by the new ordinary European obligations stemming from the European Semester, but also by the actual impossibility to amend what governments propose, based on the rescue packages agreed, without putting into question the obligations contracted and thus the financial assistance.

This paper analyses if and how the position of national parliaments in some national constitutional systems has changed after the adoption of the Euro-crisis law and of its first enforcement. The paper challenges the mainstream assumption that national parliaments have been substantially undermined in their budgetary autonomy and powers by the Euro-crisis law and tries to depict parliaments in their complex inter-institutional dynamic with other national institutions, governments, fiscal councils and Constitutional Courts, which is influenced by the peculiar economic situation of each country, by the constitutional protection of parliamentary powers in budgetary procedures and in EU affairs, by the information at disposal of parliaments, and by the judicial response. Thus, far from being a uniform category, national parliaments in the Eurozone crisis show asymmetries and a significant variety of positions and powers, since their role depends primarily on national law.

Five national parliaments have been selected for the analysis, namely the French, the German, the Italian, the Portuguese, and the Spanish Parliaments, being all of them within Eurozone countries which however face different economic conditions and fiscal constraints, starting from Germany as the country leading the reform of the EU economic governance, to Portugal, which suffered from the most evident limitations of its financial sovereignty.[3] Indeed, Germany is often seen as a model of fiscal performance, although nowadays shows signs of macroeconomic imbalances;[4] France is at risk of a macroeconomic imbalances procedure and since 2009 has been subject to an excessive deficit procedure;[5] Italy has been able to close the excessive deficit procedure in 2013, but is experiencing macroeconomic imbalances and received financial support from the ECB in 2011;[6] Spain is subject to excessive deficit and macroeconomic imbalances procedures and received

[3] The paper has benefited from the information collected in the national reports on France, Germany, Italy, Portugal and Spain, in the framework of the 'Constitutional Change through the Euro-Crisis Law' project, run by the Law Department of the European University Institute and funded by the EUI Research Council (2013-2015). In particular, Robin Gadbled and Diane Fromage drafted the report on France; Sabine Mair, the report on Germany; Leonardo Pierdominici, the report on Italy; Rita De Brito, Daniele Gallo, Benedita Queiroz Maria Luisa & Ribeiro Lourenço, the report on Portugal, forthcoming; Leticia Diez-Sánchez, Mireia Estrada Canamares & Germán Gomez Ventura, the report on Spain.
In this paper the analysis is mainly focused on the lower chambers, since the second chambers – except in Italy – are excluded from the confidence relationship with the executive. Portugal, instead, has a unicameral legislature.

[4] On Germany, see European Commission, Economic and Financial Affairs, *Macroeconomic imbalances –Germany*, Occasional Papers 174, March 2014, Brussels, http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp174_en.pdf .

[5] See European Commission Recommendation regarding measures to be taken by France in order to ensure a timely correction of its excessive deficit, Brussels, C(2014) 1498 final, 5.3.2014, http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/other_documents/2014-03-05_fr_commission_recommendation_en.pdf

[6] See European Commission, Economic and Financial Affairs, *Macroeconomic imbalances –Italy*, Occasional Papers 182, March 2014, Brussels, http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp182_en.pdf.

financial assistance for the banking sector;[7] finally, Portugal is under excessive deficit procedure and, following the bailout, has been subject to strict conditionality until May 2014, when it exited the financial assistance programme.[8]

2. The stability of the constitutional framework regarding parliamentary powers

In spite of the threat that the Eurozone crisis represented for the autonomy of parliamentary institutions, budgetary and fiscal powers in the five Parliaments have not been protected by means of constitutional reforms nor parliaments have been committed to adapt their internal rules to the new legal reality. Only constitutional judgments and just in the German case have acted as a counterbalance to the loss of parliamentary powers (paras 3 and 5). Although the risk of undermining parliamentary democracy by means of the implementation of Euro-crisis law was discussed in Parliament also in France, in Italy, in Portugal and in Spain not subsequent constitutional amendments were adopted, as this was not perceived as a priority in the dramatic aftermath of the crisis.[9]

In Italy and in Spain, where constitutional reforms were passed with the attempt to constitutionalize the balanced budget clause, this opportunity was not properly used for strengthening in parallel parliamentary prerogatives.[10] In Italy, for the first time ever constitutional law 1/2012 – which introduced the balanced budget clause into the Italian Constitution – ensured constitutional protection to parliamentary oversight on the balance between revenues and expenditures and on the quality and quantity of the public administrations' expenditures. However, this vague acknowledgment has not been subsequently substantiated by amendments of parliamentary rules of procedures, as requested by constitutional law 1/2012. Therefore it has remained a general statement without clear effects in practice. Rather both in Spain and in Italy the timing of the constitutional reforms was so constrained that parliamentary debates almost did not take place and parliamentary amendments to constitutional bills either were not discussed or were rejected.

In Spain from the proposal of the constitutional bill to its publication on the Official Journal (BOE) only thirty-two days elapsed, from the end of August to the end of September 2011.[11] The constitutional bill was examined by means of the urgency procedure and in *lectura única* – i.e. directly debated and adopted by the *plenum* without prior scrutiny by standing committees –, all the amendments tabled were rejected, except those aiming to correct the wording of the provisions, and

[7] See European Commission, Economic and Financial Affairs, *Macroeconomic imbalances –Spain*, Occasional Papers 176, March 2014, Brussels, http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp176_en.pdf.

[8] See the Council Recommendation with a view to bringing an end to the situation of an excessive government deficit in Portugal, 10562/13, Brussels, 18 June 2013, http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/126-07_council/2013-06-21_pt_126-7_council_en.pdf; on the financial and assistance programme for Portugal, see the programme reports, subject to eleven reviews, http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm. Portugal is currently under Post-Programme Surveillance.

[9] See, for example, the answers to questions III.8, VII.3, VII:9, and IX.5 in the reports on France, Italy, Portugal, and Spain: http://eurocrisislaw.eui.eu/

[10] See G. Boggero, P. Annichino, '*Who Will Ever Kick Us Out?': Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact*, European Public Law 20, 250, 2014, and V. Ruiz Almendral, 'The Spanish Legal Framework for Curbing the Public Debt and the Deficit', *European Constitutional Law Review*, vol. 9, n. 2, 2013, p. 189-204.

[11] See F. Balaguer Callejón, 'Presentación', *Revista de derecho constitucional europeo*, n. 16, 2011.

a referendum was not requested (Art. 167 Sp. Const.).[12] The overall majority of the two Chambers agreed on the reform, whereas only some left-wing parties, like *Izquierda Unida*, showed their discontent. Indeed a group of MPs from *Izquierda Unida* lodged an appeal before the Constitutional Court given the disputable use of the urgency procedure for a constitutional reform, claiming the unconstitutionality of the procedure and, as a consequence, of the constitutional amendments. The appeal was declared inadmissible and basically this was the only significant parliamentary reaction against the reform.

Although the timing was slightly more relaxed, also for the Italian standard, the constitutional reform went very fast. It took longer, from September 2011 to April 2012 for the final approval of constitutional law n. 1/2012, because the Italian procedure for constitutional amendments needs the adoption of the same text by each Chamber in two deliberations at intervals of no less than three months (Art. 138 It. Const.). The approval of the reform in the second deliberation showed such a level of consensus – beyond the two thirds majority required – that not even a constitutional referendum could be requested.[13]

In France and in Portugal, for different reasons, no constitutional amendment was passed. In France, where a first attempt to modify the Constitution as to insert a 'golden rule' failed in March 2011, the French Constitutional Council of 9 August 2012 (Decision n° 2012-653) considered the constitutionalization of the balanced budget clause unnecessary and consequently its inclusion in an organic law sufficient;[14] by contrast, in Portugal the constitutional amendment did not find enough support in Parliament – two-thirds majority of MPs (Art. 286 Pt. Const.) – to be approved. The parliamentary reaction, in this event, consisted in the rejection of a constitutional balanced budget clause perceived as a further confirmation of the austerity policy imposed by the government. Nonetheless, the constitutional bill did not foresee any enhancement of parliamentary powers.

In the five countries, including also Germany, where the reform of the Basic Law concerning budgetary procedures had already taken place in 2009, becoming later on a source of inspiration for the constitutionalization of the balanced budget clause in the Eurozone, parliaments relied on the pre-existent budgetary powers protected by the Constitution and, if any,[15] on the constitutional prerogatives they already had in EU affairs. Indeed, during the Eurozone crisis in Germany (Art. 23

[12] A referendum on a constitutional amendment passed by the *Cortes Generales* can be requested by one tenth of the members of either House within fifteen days after its passage (Art. 167.3 Sp. Const.).

[13] According to Art. 138 It. Const. the condition for presenting a request for a constitutional (confirmatory) referendum by 500000 citizens, five regional Councils, or one fifth of the members of a House, is that the threshold of two thirds of the members in each Chamber in the second deliberation is not reached, but only the absolute majority of MPs and senators voted in favour.

[14] Art. 34 Fr. Const., provides: 'Social Security Financing Acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an Institutional Act.' However, as pointed out by G. Carcassonne, *La Constitution*, 11 ed., Editions du Seuil, Paris, 2013, §232-233, this provision has always been interpreted simply as fixing a mere objective rather than an immediately enforceable rule. On 13 July 2012 the President of the French Republic, François Hollande, requested the *Conseil constitutionnel* to decide on whether the authorization to the ratification of the Fiscal Compact had to be preceded by a constitutional reform (Art. 54 Fr. Const.), whose process had already started at that time. By contrast, organic laws (also called 'institutional acts') are passed by each House by absolute majority in the cases provided by the Constitution and automatically referred to the Constitutional Council for constitutional review before their promulgation (Art. 46 and 61 Fr. Const.). The balanced budget rule was finally included into the Organic Law on the Programming and Governance of Public Finances, *Loi organique* n. 2012-1403, 17 December 2012.

[15] The Italian and the Spanish Constitutions are devoid of constitutional clauses on the participation of the Parliament in EU affairs.

GG), in France (Art. 88-4 to 88-7 Fr. Const.), and in Portugal (Arts. 163.f and 197.i) the constitutional provisions protecting the participation of the Parliament in EU procedures or in EU-related procedures have been used extensively and much more that those on the budgetary process to protect the 'right' of the Parliament to be informed by the Government in the different stages of the the European Semester and to oversee Government's activity at EU level. As the whole budgetary process has become Euro-national, in contrast with its merely national scope before the reform of economic governance, these latter procedures have been seen by Parliaments as particularly suitable to cope with the new challenges of complying with 'external' budgetary constraints.[16] The exchange of documents and programmes, stability and national reform programmes, and the negotiations between national and European institutions within the budgetary process has led Parliaments to make use of the ordinary procedure of scrutiny and oversight on EU matters.[17] In other words, this has been treated by Parliament like 'business as usual',[18] which has not requested either the adoption of new constitutional provisions for the protection of parliamentary prerogatives or the adaptation of the internal rules of procedure to the Euro-crisis measures.

However, to have constitutional provisions that protected parliamentary prerogatives within the national budgetary process and in the scrutiny of EU affairs already in force, before the Eurozone crisis, has not assured *per se* that the powers of the Parliament were preserved. For example, by looking at the Portuguese Constitution, in theory the position of the Portuguese Parliament was secured in both the budgetary process and in relation to EU affairs. The budget is drawn up on the basis of the multi-annual planning options adopted by the Parliament, upon governmental proposal (Art. 105.2 t. Const.); the execution of the budget is scrutinized by the Assembly and the Court of Auditors (Art. 107 Pt. Const.); the parliamentary authorization is required for the Government to contract and grant loans and other lending operations, also for 'setting the upper limit for guarantees to be given by the Government in any given year' (Art. 161.h Pt. Const.), which seems particularly relevant in the present context of the Portuguese bailout. Moreover, the Portuguese Parliament has been granted a constitutional protection as for its participation in EU decision-making process and the Government must inform the Parliament 'in good time' about any development of the EU integration process (Arts. 163.f and 197.i Pt. Const.).

During the bailout, however, these constitutional powers of the Portuguese Parliament have been systematically neglected both during the negotiation of the rescue package and during its implementation, which in turn has affected the ability of the Parliament to influence budgetary procedures (paras 3 and 5).

3. Parliaments v Governments

The loss of powers of the governments

Likewise national parliaments also national governments, in particular of the Eurozone countries that received financial support, suffered from a loss of autonomy. They are no anymore independent

[16] 'External' here means deriving from a negotiation with non-domestic institutions, like the European Commission, or, as in the case of the bailout countries, with European and International institutions.
[17] See K. Auel & O. Höing, 'Parliaments in the Euro Crisis: Can the Losers of Integration Still Fight Back?', *Journal of Common Market Studies*, August 2014 (early view), p. 3 ff.
[18] Ivi.

in setting the general and specific directions of the financial and economic policies. A series of duties falls on national executives, to fix and to comply with a medium-term budgetary objectives, to consistently reduce the public debt, to correct macroeconomic imbalances, if any. The achievement or the approach to these targets has to be proved before European institutions, *in primis* the Commission, and before the other national governments. After the two pack, even draft budgetary plans, before there are passed by national Parliaments as the annual budget for the next fiscal year, need to seek the approval of the Commission and, if so requested, they are amended.

Thus the budgetary constraints of the new economic governance of the EU has limited the fiscal autonomy of national governments more than that usually recognized to national parliaments. The Euro-crisis law has put another 'external' constraint upon parliamentary powers in budgetary procedures, in addition to the limited margin of manoeuvre that parliaments traditionally had in this field within parliamentary (Germany, Italy, and Spain) or semi-presidential (France and Portugal) forms of government. Some parliaments, like the German and the Italian ones, had been more successful and influential than others – like the Spanish and the French parliaments – in amending the budget or money bills, but since decades national governments have directed and shaped these procedures.

Within the Eurozone crisis, not only parliaments but also many national governments are now forced to accept solutions that are at least in part imposed from the outside.[19] Although the strength of intergovernmental institutions has certainly increased at supranational level, this does not imply that the powers of each national government have been extended alike, rather the opposite for the government of the Member States receiving financial support. The weakening also of national executives individually as a consequence of the Euro-crisis law sheds a new light on the inter-institutional relationship between parliaments and governments at national level. National parliaments are not the only and perhaps not the primary 'victims' or 'losers' of the Eurozone governance.

Parliaments forcing the governments to resign

If one looks at national parliaments in the Euro-crisis from the perspective of their relationship with national executives, each parliament still remains perfectly able to force its government to resign given their underlying confidence relationship. However, for the sake of political stability and of the normal functioning of a parliamentary or a semi-presidential form of government the withdrawal of the confidence from the government can be used only as an *extrema ratio*, as a 'nuclear option'.

Indeed, at the peak of the Eurozone crisis only the Portuguese and the Italian Parliaments forced the resignation of the government in office by defeating the government's position on economic and fiscal measures that had a highly political significance or that were required for the fulfillment of the European Semester's obligations, rather than by adopting a proper motion of no confidence.

[19] These constraints imposed upon national governments have been described as one of the causes of the 'democratic default' in the EU, although these governments (formally) participate in the negotiations where such constraints are agreed. See G. Majone, 'From regulatory state to democratic default', *Journal of Common Market Studies*, August 2014, early view, p. 6, who claims that 'most national governments are forced to accept the solutions proposed by a few leaders representing the major stockholders of the ECB'.

On March 2011 in Portugal Prime Minister José Sócrates was forced to resign after the rejection of the governmental amendments to the Stability Pact 2011 to be transmitted by every Eurozone country to the European Commission by mid-April. On 6 April 2011 the resigning Prime Minister declared the bailout and the day after he notified to the European Commission, to the Eurozone countries, and to the International Monetary Fund the request for financial assistance, which was granted in May. The general elections for the Parliament were held on 5 June 2011, led to the defeat of the then ruling majority and in particular of the socialists. The center-right Social Democratic Party – which had also conquered the Presidency of the Republic in January 2011 – became the first party of the country and its leader, Pedro Passos Coelho, was appointed as the Prime Minister on 16 June 2011. However, the change of the majority has not stabilized politics in Portugal. Since then the life of the government has been characterized by several reshuffles, by tensions with opposition parties who proposed to vote motions to withdraw the confidence, especially on the implementation of the new economic governance through the budgetary process. The harsh political struggle in parliament, which is also a consequence of the unpopular decisions the Government had to take to implement the rescue package, proved that a parliament in principle always has the chance to defeat the government in office, but this cannot become the routine.

In Italy the resignation of the IV Berlusconi's government in November 2011 was linked to the financial troubles experienced by Italy, although also issues of purely internal politics played a role. The rejection by the parliament of the law adopting the annual audit report of the State, a financial document that does not introduce any new provision into the legal system, but which is highly symbolic as it shows how the budget of the government has been implemented, was at the origins of the process that led to the resignation. The unsuccessful attempts – on 10 October 2011 and on 8 November 2011 – to let the audit report passed in parliament, were preceded by the government's secret negotiation with the European Commission and the ECB about the adoption of very restrictive measures for the labour market and territorial autonomy in exchange for the financial support provided to Italy through the Securities Market Programme by the ECB.

Formal and substantial veto powers

The five Parliaments also have veto powers on their governments in specific but important fields of the Eurozone governance. One of them regards the acknowledgment of the exceptional circumstances that allows the temporary deviation from the medium term budgetary objective (MTO). The exceptional circumstances and events at stake are already outlined by EU Regulation n° 1177/2011 of the six-pack, although these provisions can be complemented at national level. In particular the resort to these peculiar situations – i.e. natural disasters or any unusual event outside the control of a Member State – as to justify the lack of compliance with the MTO must be authorized by the Parliament by absolute majority in Germany, Italy, Portugal and Spain, whereas in France it is possible to update the MTO at any point in time by amending the Programming Act, where the MTO is contained, by simple majority.[20] Reaching the absolute majority is not a problem for legislatures where the majority party or coalition is stable and can count on a number of MPs beyond the absolute majority; however, it might become a problem if a minority government is in

[20] In France the possibility provided by Art. 11 of Council Directive 2011/85/EU to revise the MTO has not been regulated and further specified at domestic level. The category of the 'programming act' was introduced by the latest great constitutional reform in France, in 2008. Programming Acts have exactly the same force of law as the budget acts: see the decision of the French Constitutional Council n° 2012-658 of December 2012 and the case note by R. Bourrel, 'La validation par le Conseil constitutionnel de la «nouvelle Constitution financière» de la France', *AJDA*, 2013, p.2.

office or if the ruling coalition is not particularly cohesive (in Italy and Portugal, for example). However, given the consensual spirit which has inspired so far the Parliaments in the implementation of the reform of the economic governance in the five countries and the serious threat posed by one of the exceptional circumstances to be invoked, it is unlikely that a Parliament would reject the proposal of the Government to resort to this instrument.

The rejection is also unlike for the way these procedures are managed, with the aim to avoid parliamentary involvement on the issue. Both the Italian and the French Government announced to deviate from the MTO objective foreseen in 2014. In Italy, however, Finance Minister Pier Carlo Padoan sent a letter to the European Commission announcing the deviation on 16 April 2014, before seeking parliamentary authorization on the decision, as it is requested by Art. 6 Law 243/2012.[21] The Government interpreted Art. 6 as implying the consent of the European Commission on the deviation first and subsequently a retroactive and formal authorization by the Parliament, which however is deprived of a real power to endorse or veto this deviation. Likewise in France so far the postponement in reaching the target of 3% of relationship between deficit and GDP from 2015 to 2017 was announced by the Finance Minister Michel Sapin in a press conference on 10 September 2014 before taking any formal action before the Parliament, like the proposal of amendments to the Programming Act as to revise the MTO.[22]

Another area where the five Parliaments are in principle entitled to exercise veto powers is the payment of the installment of the ESM paid-in capital. On the basis of the German example and of the path traced by the German Constitutional Court since the decision of 7 September 2011 and of 28 February 2012,[23] which was treated like a benchmark in France, in Italy, in Portugal and in Spain, also a parliamentary assent, usually in the form of a law and in particular through the annual Budget Act, is requested for the payment of the installments. However, unlike the German Parliament, first of all the consent of the Parliaments in the other four countries is not needed for disbursement of on-call capital and secondly the potential veto of these parliaments on their governments, as it was discussed especially in the Spanish Parliament, is not able to block the functioning of the ESM, given the decision-making rule of the ESM governing bodies which is based on the subscription of share capital per country. Asymmetries among parliamentary veto powers arise clearly in this field. Since the voting rights of each ESM Member shall be equal to the number of shares allocated to it in the authorized capital stock of the ESM (Art. 4.7 and Annex II ESM Treaty), the veto of the German or of the French parliaments can indirectly affect the ESM, whereas the parliaments of countries with a limited share capital do not enjoy such a power.

Parliamentary information and scrutiny on 'unconventional' Euro-crisis measures

The 'right' of the five parliaments to be informed by the government and to oversee its action have been strengthened in the aftermath of the Eurozone crisis, but to a different degree depending on the financial situation of the country and on the Euro-crisis measures at stake. Indeed, while

[21] The text of the letter is available here: http://www.mef.gov.it/doc-finanza-pubblica/def/2014/documenti/Lettera_a_commissario_Kallas_-_16_April_2014.pdf

[22] See 'Budget: la France «ne change pas de trajectoire», *Liberation*, 10 September 2014: http://www.liberation.fr/economie/2014/09/10/le-gouvernement-abaisse-sa-prevision-de-croissance-a-04-pour-2014_1097249

[23] See German Constitutional Court, Second Senate, BVerfG 2, BVR 987/10, 7 September 2011, and BvE 8/11, 28 February 2012.

parliaments have been able to adjust smoothly to the European Semester, also using the existing procedures for the participation in EU affairs, much more difficult has been for them to scrutinize the action of their government during the negotiation of intergovernmental agreements – the Fiscal Compact and the ESM Treaty – and of rescue packages.

Fast track procedures or the merger in a single debate and instrument of implementation or ratification of the 'unconventional' Euro-crisis measures has been the rule in the five Eurozone Parliaments. In France, for example, the act approving the amendment of Art. 136 TFEU authorized at the same time the ratification of the ESM Treaty, following a joint debate of the two measures and the use of the accelerated procedure (Art. 45 Fr. Const.). By this procedure the legislative process is shortened and only one reading in each Chamber takes place before a joint committee between the National Assembly and the Senate is summoned, in the event of disagreement. Therefore the whole process was very short and the debate extremely limited. No parliamentary debate took place in the French Parliament about the EFSF Framework Agreement, which was not even submitted to Parliament for the authorization of the ratification. Indeed, when the Council of State was asked by the Government if the EFSF framework agreement and its amendments could be legitimately ratified without parliamentary authorization although the framework agreement could fall within those treaties 'committing the finances of the state (Art. 53 Fr. Const.)', the Council stated that the approval of the Parliament was not necessary.[24] Nevertheless, it clarified that the information right of the Parliament had to be protected; when implementing the framework agreement, the consolidated version of the treaty as well as subsequent modifications had to be transmitted to the Parliament. Moreover, the amending Budget Act adopted on 7 June 2010 (Law n° 2010-606 *de finances rectificative pour* 2010) – the first act to implement the EFSF in France – required that the standing Committees on finances in both Chambers had to be duly informed of any loans and funding granted via EFSF.[25]

In Portugal the Fiscal Compact and the ESM Treaty were debated jointly and by means of two different parliamentary resolutions their ratification was authorized on the same day, 13 April 2012. In spite of the support of the major political parties, criticism arose as for the lack of parliamentary involvement during the previous negotiations as well as the absence of debate in Parliament about two different though intertwined Euro-crisis instruments. Moreover, the proposals of the opposition to apply Art. 295 Pt. Const., which allows to hold referenda prior to the ratification of treaties 'aimed at the construction and deepening of the European Union', like the Fiscal Compact and the ESM Treaty although they are not part of EU law, were disregarded.

In Italy the lack of information for the parliament during the government's negotiations of the Fiscal Compact and of the ESM Treaty, led the parliament to include *ad hoc* provisions for this purpose in Law n. 234/2012, passed in December 2012. Although the Government can invoke the confidentiality of the information transmitted, this confidentiality cannot ultimately impair the right to information and participation of the Italian Parliament in EU affairs, based on protocol I to the Treaty of Lisbon (Art. 4, sections 4, 6, and 7 - law n. 234/2012). Art. 5.1, law n. 234/2012, states that 'the Government promptly informs the Chambers about any initiative aiming to the conclusion of agreements with other EU member states on the creation and the strengthening of the rules of

[24] The opinion of the Council of State was adopted in its capacity as an advisory body of the Government: see Conseil d'Etat, *Rapport public 2012 - Volume 1: activité juridictionnelle et consultative des juridictions administratives*, p. 145.
[25] On the parliamentary debates related to the EFSF, see in detail. C. Closa & A. Maatsch, 'In a Spirit of Solidarity? Justifying the European Financial Stability Facility (EFSF) in National Parliamentary Debates', *Journal of Common Market Studies*, vol. 52 (4), 2014, 826-842.

fiscal and monetary policy or able to produce significant effects on the public finance.' The objective here is to avoid that in the future the parliament will be completely excluded, like in 2011, from the negotiations of intergovernmental agreements.

The secrecy of the procedures and the lack of parliamentary involvement also featured the adoption of the crucial measures of financial support and assistance for Italy, Portugal, and Spain. The inclusion of Italy in the Securities Market Programme of the ECB was officially disclosed by the Italian Government only in late 2011 and was never debated by the Parliament, although it certainly affected the change of the government and in spite of the publication of the ECB letter of 5 August 2011 that formed the basis for the adoption of structural reforms in the newspapers.[26] By the same token, only a few months ago, former Prime Minister of Spain José Zapatero disclosed to the public the letter received by the ECB in August 2011 rightly before the constitutional reform was adopted and whose existence he had always refused to admit.[27]

The ability of the parliaments to oversee promptly the strict conditions negotiated in exchange for financial assistance was severely jeopardized in Portugal and in Spain. Indeed, once the bailout was declared, the Portuguese and the Spanish Parliaments did not examine the content of the Memorandum of Understanding and of the Financial Assistance Facility Agreement nor they were involved during the negotiations. In Spain the government chose to consider these agreements as treaties not subject to parliamentary approval before the ratification (Art. 94.2 Sp. Const), whereas in Portugal they were not even treated as formal international agreements, which explains why they were not subject to ex ante review of constitutionality by the Portuguese Constitutional Court (Arts. 197.1.c, 200.1.d, 278 Pt. Const.).[28] The Spanish Parliament has only been able to debate and pass legislation implementing the measures agreed through the Memorandum of Understanding, mainly by means of decree-laws issued by the executive and converted into law, without amendments, by the *Cortes Generales* (Art. 86 Sp. Const.).[29] Due to the political crisis and elections in 2011, the Portuguese Assembly was not able to debate the Memorandum of Understanding and the Financial and Economic Assistance Programme immediately, but it did it only one year after their adoption, when the measures agreed with the Troika (ECB, IMF, and European Commission) were included into the annual Budget Act.

In the Portuguese Parliament, however, given the extraordinary situation of the bailout, the attempt to strengthen the oversight on the implementation of the rescue package has led to use measures that are usually not connected to the budgetary process and that were not adopted in the other Parliaments. Since 2011 the Portuguese Parliament has established several committees of inquiry in order to investigate issues related to the reform of the economic governance.[30] According to Art.

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[26] See L. Pierdominici, Paper on this file. The letter was published on *Corriere della Sera* http://www.corriere.it/economia/11_settembre_29/trichet_draghi_italiano_405e2be2-ea59-11e0-ae06-4da866778017.shtml and on *IlSole24Ore* http://www.ilsole24ore.com/art/notizie/2011-09-29/testo-lettera-governo-italiano-091227.shtml?uuid=Aad8ZT8D, on 11 September 2011.

[27] Significantly the letter was published as an annex to his biography: J. L. Rodríguez Zapatero, *El Dilema: 600 Días de Vértigo*, Barcelona, Planeta, 2013, p. 405-408.

[28] See F. Pereira Coutinho, 'A natureza jurídica dos Memorandos da "Troika"', Themis, ano XIII, n. 24/25, 2013, 147-179. This interpretation is however disputed and the Portuguese Constitutional Court has always confirmed the binding value of the *Memoranda* and of the Financial and Assistance Programme (judgments no. 187/2013, 413/2014, 574 and 575/2014). On their legal nature and justiciability before courts, see C. Kilpatrick, Paper on file.

[29] See L. Diez-Sanchez, Paper on file.

[30] *Comissão Parlamentar de Inquérito ao Processo de Nacionalização, Gestão e Alienação do Banco Português de Negócios S.A., Comissão Parlamentar de Inquérito à Contratualização, Renegociação e Gestão de todas as Parcerias*

178 Pt. Const., committees of inquiry can be formed *ad hoc*, only for the duration of the inquiry – thus having a temporary nature –, and 'shall possess the investigative powers of the judicial authorities.' Moreover a special Committee to support the implementation of the measures of the Financial Assistance Programme for Portugal has been in operation since the parliamentary term started in 2011. This committee, composed of MPs from all political parties, controls the compliance of the national measures with the MoU and the correct implementation of the Memorandum by the Government. It has also regularly met *in camera* with the Troika's representatives during the review missions.

Even in Germany, where the *Bundestag* has been traditionally protected by means of constitutional case law, the debate in Parliament was definitely constrained in time. The bills authorizing the ratification or approving the amendment to Art. 136 TFEU, the Fiscal Compact and the ESM Treaty were introduced on the same day, debated together as if they were one single measure, and adopted almost contextually, in June 2012. The only fierce opposition was that of *Die Linke* that basically challenged the validity of these measures by means of an *Organstreit* proceeding before the German Constitutional Court.

Indeed, the position of the *Bundestag* has been strengthened by the German Constitutional Court's judgments, whereas in France, in Italy, in Portugal and in Spain there is no comparable judicial safeguard for parliaments. Relying on its past case law going back to the ruling of 30 June 2009 on the Treaty of Lisbon,[31] this Court has gradually reinforced the involvement of the *Bundestag* in the Euro-national procedures of implementation of the new economic governance. The judicial protection of the *Bundestag* is built upon a peculiar interpretation of Art. 38.1 GG on the right to vote for the *Bundestag* as a 'right to democracy'– right that would be irremediably impaired if the powers and the autonomy of this chamber, where people are represented, were severely limited – in conjunction with Art. 20.2 GG, which identifies the source of the state authority in the people and in the elections, and Art. 79.3 GG, the eternity clause, which preserves the democratic principle as part of the German constitutional identity.

In its judgment of 7 September 2011, about the Greek bailout and the EFSF, the German Constitutional Court clarified which standard had to be followed to grant the *Bundestag* the power to control and orient the government during the Eurozone crisis (BVerfG, 2 BvR 987/10). The reasoning of the Court from this judgment onward has been based on the argument of the overall budgetary responsibility of the *Bundestag.*[32] The fact that the *StabMechG* (Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, Euro Stabilisation Mechanism Act) of 22 May 2010 simply requested the Government to 'try to involve' the *Bundestag*, through its Committee on budget, before issuing the guarantees for the EFSF led to a violation of the *Bundestag*'s power to make decisions on revenue and expenditure with responsibility to the people. People are democratically represented by this institution which in turn would be deprived by the *StabMechG* of the right to decide, should the Government make the

Público-Privadas do Sector Rodoviário e Ferroviário, Comissão Parlamentar de Inquérito à Celebração de Contratos de Gestão de Risco Financeiro por Empresas do Sector Público.

[31] The reasoning of the Court was initially and partially developed in the *Maastricht Urteil* of 12 October 1993 (BVerfGE 89, 155). The literature on the Lisbon decision is endless. For a comparative overview of the *Lissabon Urteil* with other decisions of Constitutional or Supreme Courts on the same Treaty, see M. Wendel, 'Lisbon Before the Courts: Comparative Perspectives', *European Constitutional Law Review*, vol. 7, n° 1, 2011, 96-136.

[32] On this case law, see in detail, M. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: Te German Federal Constitutional Court's OMT Reference', *EuConst*, 10, 2014, 263-284, in this file.

agreement of the *Bundestag* unnecessary in order to issue guarantees. As a consequence of this case law the *StabMechG* has been amended starting a process of incremental strengthening of the decision making powers of the *Bundestag* in the financial procedure. The Government must obtain the consent of this Chamber before it acts.

In its ruling of 28 February 2012 (2 BvE 8/11), on the *Bundestag*'s right of participation in the EFSF and particularly in authorizing the extension of the guarantees for the fund, the Constitutional Court clarified, based on the usual standards of review – Art. 38.1 GG in conjunction with Art. 20.1. and 2 GG, and Art. 79.3 GG – if and to what extent a temporary limitation of the rights of MPs to be informed could be allowed. According to the *StabMechG* (Art.3.3), in situations of particular urgency and confidentiality, the consent to the extension of the EFSF guarantees was to be provided on behalf of the *Bundestag* by a new parliamentary body, the *Sondergremium*, elected from among the members of the Budget Committee. In cases of particular confidentiality the *Sondergremium* is also informed about the government's operation on the EFSF in the place of the *Bundestag* (Art. 5.7 *StabMechG*). Although the transfer the right to be informed from the plenary to a minor parliamentary bodies was not found in violation of Art. 38.1 GG, the rights of the every MP to be informed can be restricted 'only to the extent that is absolutely necessary in the interest of the Parliament's ability to function.' Therefore an interpretation of the provision in conformity with the Constitution is required: the right to be informed can be only temporarily suspended as long as the reasons for keeping the information confidential remain. Once the reasons for the confidentiality have ceased, the Government must inform the entire *Bundestag.*

The reasoning used in this decision about the right to information was further developed in a subsequent judgment of the German Constitutional Court of 19 June 2012 (2 BvE 4/11). The Federal Government had violated the right of the *Bundestag* to be informed in connection with the European Stability Mechanism (ESM) and the Euro Plus Pact on the basis of *Organstreit* proceedings brought by MPs.[33] In particular, the Court acknowledges that Article 23.2 sentence 2 GG, which obliges the Federal Government to keep the *Bundestag* informed, comprehensively and at the earliest possible time, 'in matters concerning the European Union', also applies to international treaties and political agreements negotiated outside the EU legal framework though linked to the European integration. According to the Court, the Government failed to provide the relevant information to the Parliament even though it was the initiator of those pacts together with France. The *Bundesverfassungericht* set also specific standards of quality and quantity for the information to be transmitted to the *Bundestag.* The Parliament must be informed comprehensively and at the earliest possible time, so that the *Bundestag* can contribute effectively to shape the government's position (the Parliament must have a direct influence on it). The disclosure of information also 'serves the publicity of parliamentary work', a condition that the Court derives from the protection of the democratic principle embedded in Art. 20.2 GG. Moreover, the more complex a matter is and the more intrusive on Parliament's legislative power a measure is, the more intensive and detailed the information to be provided will be. The duty to inform does not regard only governmental acts or documents, but also official materials of the EU institutions, of international organizations, and of other Member States, and must be supplied in written form as a general rule. Furthermore, the information must be transmitted step by step and not 'in an overall package', once the decision-making process has been completed. In particular, information must

[33] On the constitutional judgments on the ESM, see S. Bardutzky & E. Fahey, 'Judicial review of Eurozone law: the adjudication of postnational norms in the EU courts, plural—a case study of the European Stability Mechanism', *Michigan Journal of International Law*, vol. 34, 2013, 101-111.

reach the Parliament whenever the Government dominates the entire procedure, as it was for the negotiation of the Euro Plus Pact and the ESM Treaty.[34] There are evidence, provided by the Court itself in the judgment, that the Government had information available well in advance to the cloture of the negotiation and which should have submitted to the *Bundestag*.

As a consequence of these decisions, the *Act on Financial Participation in the European Stability Mechanism* (*ESMFinG*) and *Law to the Contract on March 2, 2012 on Stability, Coordination and Governance in the Economic and Monetary Union*, about the Fiscal Compact, both adopted on 29 June 2012, set higher thresholds as for the quantity and the quality of the information to be provided to the *Bundestag*. In the decision of 12 September 2012 the Court has expressly connected the right to information to the performance of the overall budgetary responsibility by the *Bundestag*. The latter is dependent upon the former (§ 215).

> 'The German *Bundestag* cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the **d**ecisions with budgetary implications for which is accountable. The principle of democracy under Article 20 (1) and (2) of the Basic Law therefore requires that the German *Bundestag* is able to have access to the information which it needs to assess the fundamental bases and consequences of its decision (…). The core of the right of parliament to be informed is therefore also entrenched in Article 79 (3) of the Basic Law. Sufficient information of parliament by the government is therefore a necessary precondition of an effective preparation of parliament's decisions and of the exercise of its monitoring function.'

Parliamentary scrutiny within the European Semester

The lack of a judicial protection comparable to the one assured by the German Constitutional Court to the *Bundestag* limited the French, the Italian, the Portuguese and the Spanish Parliament, and particularly the latter due to the bailout, in their (weak) ability to control the negotiation, ratification/application and implementation of the 'unconventional' Euro-crisis law measures. By contrast the participation of parliaments in the European Semester, provided by the six-pack and the two-pack, has become now the routine and sees parliaments actively involved in the budgetary procedures. With this purpose reforms were passed to protect the role of parliaments and *ad hoc* provisions were entrenched in ordinary legislation, in organic laws or in similar source of law, amendable by a special majority and integrating the standard for review by Constitutional Courts. In other words a double standard of protection of parliamentary prerogatives is in place. As regards the 'unconventional' measures of the Euro-crisis law, parliaments were largely bypassed and enjoyed a very limited influence during the negotiations and the implementation; within the European Semester, instead, parliamentary powers have been enhanced compared to the pre-crisis regime.

In France, organic law n° 2012-1403 of 17 December 2012 (*relative à la programmation et à la gouvernance des finances publiques*) requests that a detailed report for the Parliament is attached to the programming act, which defines the multi-annual financial framework for the next years, for example in order to explain how the different provisions – policy by policy – of the act can impact on the medium term objective (Art. 5). By the same token, given the coordination of the budgetary

[34] As a consequence of this judgment, see the Declaration on the European Stability Mechanism, Brussels, 27 September 2012, which states: '(…) Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation (…).'

and the economic policies between the member states and the periodical exchange of documents between the national Government and the EU institutions, debates are organized on these subject-matters in the two chambers in due time as to make the transmission of information to the parliament valuable and to allow the Parliament to orient the government's action (Art. 10). To this end, also the procedures for parliamentary participation on EU affairs as to hear Ministers before and after European meetings, are often used.

Also the Italian parliament has taken advantage of the financial crisis to test new procedures and tools for parliamentary scrutiny. The new framework law on the budgetary process, Law n° 196/2009, contained an *ad hoc* section on parliamentary scrutiny. Art. 4.2 promotes forms of bicameral cooperation on scrutiny on public finance and Art. 4.1. allows the chambers to orient the government in the preparation of the budgetary documents. Following the entry into force of the European Semester, Law 196/2009 has been amended as to comply with the new timeline (Law 39/2011), although an overall reform after the constitutional amendments of 2012 is still expected. The Italian side of the Euro-national budgetary process starts by the debate in Parliament of the Document of Economics and Finance (DEF), which sets the multi-annual financial framework and the projections of the macroeconomic variables in the next years. The DEF, which is the first act to orient the conduct of the executive towards the approval of the budget, is adopted by each chamber by resolution. The Minister of Economics is heard before the relevant committees of the Chamber immediately after the European Council provides the policy orientations and a debate takes place on the subsequent drafting of the stability and the national reform programmes. By practice these two programmes are examined by the Parliament before their transmission to the European Commission and although no clear procedure of examination has been formally introduced (Art. 9). Likewise the Italian Parliament is involved in the correction mechanism, as it is informed and consulted throughout the entire process of monitoring the fulfillment and the deviation from the programmatic objectives (Arts. 7 and 8, Law 243/2012).[35]

In Portugal, law 37/2013 – substantially modifying the *Ley de Encuadramento Orçamental* and implementing Directive 2011/85EU – has reinforced the right to information of the Parliament in the budgetary process.[36] The principle of transparency has been introduced has a new general rule that shapes the budgetary process and is linked to the principle of sincere cooperation between institutions which share responsibility in this field (Art. 10-C). The Government must send to the Assembly in a timely manner, every month or every three months, depending on the document, a list of information relevant to oversee the execution of the budget (Art. 59.3 and 4), including the financial flow between Portugal and the EU, i.e. also EFSF, ESM. The list provided within law n. 37/2013 is not exhaustive and can be extended upon request of the Parliament, with the Government bound to comply with this additional request of information (Art. 59.6). Moreover the Government must transmit to the Assembly any other domestic document, though related to the participation in the new economic governance, from the annual debt ceiling (Art. 89) to the annual audit report about the implementation of the national reform programme and of the stability programme, showing the results achieved (Art. 72-A). Of course, one of the problems that might occur, in Portugal as in Italy or in any Member State, is that there is no mechanism for ensuring the compliance of the government with its duty to information, unless there are effective tool for

[35] Law 243/2012 is a new source of law in the Italian legal system, which has a domain reserved by constitutional law 1/2012 and can be approved or amended only by absolute majority.

[36] Law 37/2013 is a budgetary framework law and, as any other framework law in the Portuguese legal system, it is a standard for the Constitutional Court to review the legality of ordinary legislation (Article 280.2 (a, Pt. Const.).

challenging the constitutional validity of the Government's inaction and the duty of information is entrenched in the Constitution.

In Spain, for example, the constitutional protection of the right to information of the Parliament is lacking, unless it is implicitly derived from Art. 23 Sp. Const., which recognizes the right of the citizens to participate in public affairs directly or through elected representatives; that is to say: if, drawing on the case law of the German Constitutional Court, due to the lack of information available, MPs are unable to perform their representative function, then also the right of the citizen to participate in public life is jeopardized. However it is unlikely that such an interpretation will be followed by the Spanish Constitutional Court because there is no explicit right to information in EU matters established at the benefit of the *Cortes Generales* in the Constitution (like Art. 23.2 GG) nor organic law 2/2012 (*de Estabilidad Presupuestaria y Sostenibilidad Financiera*) acknowledges the right to information in favour of the Parliament. Law n. 22/2013, the annual Budget Act for 2014 (*de Presupuestos Generales del Estado para el año 2014*), contains a few provisions about the involvement of the Parliament during the budgetary cycle: the Government must submit to the chambers information about public investments and expenditures, either at State or at subnational level, every six months (Art. 14); about the evolution of the public debt every three months (Art. 51); about the public guarantees – i.e. EFSF and now ESM – every three months (Art. 56), and about the management of national public funds. Moreover, according to organic law 2/2012, the Spanish parliament adopts the medium term objective as well as the stability and the national reform programmes (Art. 23) and defines the stability objectives that orient the Government in drafting the budget (Art. 15). Thus the parliament co-decides with the executive the content of the programmes and the objectives during the European Semester.

Parliamentary passivity

The idea according to which national parliaments have been marginalized in the budgetary reforms also stems from the attitude showed by legislatures when dealing with the Euro-crisis law. Because of the time constraints and the need to adopt these measures as soon as possible parliaments have abdicated to their role of democratic arena for debate. Except for a few parliamentary minorities that expressed their opposition, even the most controversial measures, like the Fiscal Compact, in the five legislatures were passed by overwhelming majorities, often well beyond the parliamentary majority on which the government in office was based.

Such wide parliamentary consensus, on the one hand, was a sign of responsibility of legislatures, given the seriousness of the financial crisis, to fulfil the European and international obligations taken by their government and to please financial markets. Indeed, in the case of Italy, Portugal and Spain the financial systems have been subject to recurrent speculative attacks. On the other hand, however, this apparent cross-sectional support in Parliament, devalued the role of parliamentary institutions as democratic instances during the crisis, where different views can be confronted through political debate.

The immediate consequence for the legitimacy of these Parliaments was not simply the fact that parliamentary majorities in office at the beginning of the Eurozone crisis were all defeated at the first elections Portugal, Spain in 2011, France in 2012, Italy in 2013 with the partial exception of

Germany[37], but also the reaction and protests against Euro-crisis law were channelled through street demonstrations[38] or through constitutional challenges brought before Constitutional Courts rather than by representative institutions directly elected by people.

In the aftermath of the Eurozone crisis some very active Constitutional Courts, like those of Germany and Portugal, also by taking disputable decisions and using different arguments one from the other, appeared to be more empathetic with the claims of citizens than parliaments themselves. Precisely in the OMT referral of the German Constitutional Court to the Court of Justice of 14 January 2014 the issue of parliamentary passivity has been evoked by the (majority) opinion of the Court. According to the Court, it was the inactivity of the parliament (as well as of the government) before the OMT decision of the ECB that would have 'violated the complainants' constitutional rights as well as the legal positions of the German *Bundestag* invoked by the applicant in the *Organstreit* proceedings.'[39] In contrast with the majority view, the dissenting opinion of Justice Lübbe-Wolff claimed that to ascertain whether the federal inaction on the OMT violated the prerogatives of the *Bundestag* amounted to a violation 'of of judicial competence under the principles of democracy and separation of powers'.[40]

The combination of judicial activism with parliamentary passivity in the implementation of Euro-crisis law could irremediably jeopardize the democratic legitimacy of the economic governance in the EU.

4. Parliaments and independent fiscal institutions

The setting up of independent fiscal institutions requested by Directive 2011/05/EU, by the Fiscal Compact (Art. 3.2), and by the two-pack, to provide macroeconomic forecasts for the budget, monitor fiscal performance and/or advise the government and the parliament on fiscal policy matters[41] can represent, on the one hand, a further limit to the budgetary autonomy of parliaments; on the other, they can become source of independent information as to narrow the information asymmetry between legislative and executive branch.

The financial crisis and the legal response through the Euro-crisis law limited the margin of manoeuvre of 'politics' at the benefit of technical expertise and economic/austerity rules, as the former had failed to address properly issues like fiscal sustainability and growth. A sort of technicalization of politics has been promoted in an attempt to put public accounts under control by limiting the discretion of political institutions. Legislatures are far more concerned than governments by this trend towards technicalization. Parliaments, especially in parliamentary or semi-presidential forms of government, are used to rely on technical information and data supplied

[37] Indeed, in the federal election held on 22 September 2013 the CDU/CSU of the Chancellor Angela Merkel improved its previous electoral results and conquered nearly 50% of the seats in the *Bundestag*; however, its coalition partner, the Free Democrats did not reach the threshold of 5% of the votes. As a consequence a new grand coalition between CDU/CSU and Social Democrats (SPD) was formed.

[38] Protests against austerity measures took place in France, Italy, Portugal and Spain in particular starting from 2011. See P. Statham & H.-J- Trenz, 'Understanding the mechanisms of EU politicization: Lessons from the Eurozone crisis', *Comparative European Politics*, advanced online publication, 3 March 2014, p. 1-20.

[39] See BVerfG, 2 BvR 2728/13, the first question referred for a Preliminary Ruling, §33.

[40] On this point, see in detail M. Wendel, 'Exceeding Judicial Competence, p. 281.

[41] On fiscal councils in general, see Lars Calmfors, 'The Role of Independent Fiscal Policy Institutions', *CESifo Working Paper*, n° 3367, February 2011, available at: www.cesifo-group.org/ wp , p. 19-20.

by the executive branch and they do not have specialized bureaucracies and administrations like those of the Ministries.

In Member States, like Portugal and Germany, where the independent fiscal institutions are established within the executive branch, parliaments do not receive any direct benefit from their setting up, also because these fiscal councils, as they are usually called, are devoid of binding powers on the government, should their data and forecasts be different from those of the Finance Ministry. In Portugal and Germany a link between parliament and fiscal council is lacking. In Portugal the Council of Public Finance has been established by Law 22/2011, and appointed one year later, by the Council of Ministers on a joint proposal by the Chair of *Tribunal de Contas* (Court of Auditors) and the Governor of the *Banco de Portugal* (Bank of Portugal). It appears that it is the Court of Auditors the body which entertains a much closer relationship with the Parliament on public finance than this new fiscal council (Art. 214 Pt. Const.; Art. 59, Law n°. 37/2013). In Germany, the Council of Economic Experts, created in 1963, as for its composition and steady relationship with the federal Government, looks much more connected to the executive than the *Bundestag* and the same applied to the Stability Council, established in 2010, immediately after the constitutional reform on the balanced budget rule in 2009, which is particularly focused on the vertical dimension of the public finance, i.e. on the relationship between Federation and *Länder*.[42]

The new French Fiscal Council, instead, is strongly linked to the existing Court of Auditors and provides independent information to the Parliament. The *Haut Conseil des finances publiques* is indeed presided over by the first President of the Court of Auditors and four out of its ten members are magistrates of this Court (Art. 11, organic law n° 2012-1403). The other members are the director-general of the national Institute of statistics and economic studies, one member is appointed by the Economic, Social and Environmental Council, and four members are chosen by the President of the National Assembly, by the President of the Senate, and by the Presidents of the two committees on finances, based on their competence to provide macroeconomic forecasts. Before the Programming Act for setting the multi-annual financial framework is transmitted to the Parliament (and to the Council of State), the Government submits it to the *Haut Conseil* for its assessment in the light of the macroeconomic forecasts and the projection of growth of the gross domestic product.[43] The same assessment is accomplished with regard to the annual Budget Act and the Social Security Financing Act and the opinion of the *Haut Conseil* is also transmitted to the Parliament and made public (Arts. 14 and 15).

Interestingly, based on the assessment of the *Haut Conseil*, the Social Security Financing Act for 2014, law n° 2013-1203, has been challenged before the Constitutional Council by a minority of senators and of MPs who claimed the inconsistency of the content of this law with the opinion of the Fiscal Council (Art. 61 Fr. Const.). In particular, in its opinion the *Haut Conseil* had highlighted that the macroeconomic forecasts on which the Social Security Financing Act was based were not sufficiently reliable. This could have proved to be an opportunity for the Parliament, through its parliamentary minorities, to use independent information to scrutinize closely government's fiscal policy, and, if necessary, to challenge its effectiveness. The Constitutional Council, however, dismissed the constitutional challenge. It held that no evidence supported the hypothesis that the

[42] See, again, C. Fasone & E. Griglio, 'Can Fiscal Councils Enhance the Role of National Parliaments in the European Union? A Comparative Analysis', in B. de Witte, H. Héritier, A.H. Trechsel (eds.) *The Euro Crisis and the State of European Democracy*, Fiesole, EUI, RSCAS and EUDO, 2013, p. 264-305.

[43] The *Haut Conseil* also issues opinion on the national stability programme and on the deviation from the medium term-objective.

Act would have impaired the achievement of the national objective about the expenditure for the health care insurance and the government during the legislative process tabled an amendment – which was adopted – aiming at reducing the negative impact on public expenditures. By stating so, the Constitutional Council has provided a narrow reading of the *Haut Conseil*'s powers on the decisions of the government and of the impact of fiscal council's opinions as a standard for the constitutional review of budget and financing acts. Thus government's forecasts prevails anayway.

In Spain and in Italy, finally, independent fiscal institutions have a 'special' relationship with parliaments. The budget office of the Spanish *Cortes General – Oficina Presupuestaria de las Cortes Generales* – is regulated by law n. 37/2010 (besides the rules of procedure) and is based at the General-Secretariat of the Congress. It may be asked by the Chambers to provide any study and report about public accounts is needed and this it is at complete disposal of the *Cortes*. According to law n. 37/2010 and law n. 22/2013 it is primarily by means of this parliamentary budget office that governmental information reach the Chambers and are elaborated, in addition to the independent source of information the office has, given its access to any financial and economic database of the country. During the European Semester the Government must transmit regularly to the *Oficina Presupuestaria*, and indirectly to the two Chambers, several reports about public accounts and the parliamentary budget office will table an annual report before the *Cortes*.

In November 2013, organic law n. 6/2013 established another fiscal council, this time at the Minister of Economy, the *Autoridad Independiente de Responsabilidad Fiscal* (AIRF). This authority is appointed with the consent of the Spanish Congress and provides study, reports, and opinions on request of all public administrations or *ex officio*. Moreover the new authority provides macroeconomic forecasts and a first draft of the annual Budget Act, checks the stability programme and the execution of the budget, assesses the economic and fiscal programmes of the regions. If the recommendations issued by AIRF are disregarded by the administration to which they are addressed, the administration must give reasons for its conduct. The setting up of both fiscal councils and although AIRF is not an ancillary body of the chambers is likely to increase the information available on the state of the public finance. Thus the parliament will have more evidence to evaluate the economic and the fiscal policies of the government on the basis of independent information, whereas so far all the assessment made on public accounts had relied only on the projections and the documents provided by the Minister of Finance.

The Italian fiscal council, the parliamentary budget office established in May 2014, is closely connected to parliamentary activity. This is so on the basis of constitutional law 1/2012, which requested its setting up within the chambers, and of law 243/2012. The three members of the parliamentary budget office are appointed upon agreement of the Speakers of the two Chambers drawn from a list of ten independent experts chosen by the standing committees on budget and finance by two thirds majority. As many other fiscal councils, the parliamentary budget office provides macroeconomic and financial forecasts, the assessment of the compliance with the Euro-national fiscal rules, of the trend in the public finance, of the macroeconomic impact of major bills, of possible deviation from the medium term-objective and of the activation and use of the correction mechanism. The fiscal council also drafts reports and is heard upon request of the parliamentary standing committees. However, no binding powers are granted. In case of 'significant divergence' between the parliamentary budget office's assessment and that of the Government, one third of the member of the Committee on budget cans ask the Government to take a position on

whether and why it is willing to confirm its assessment or it wants to adjust it to the fiscal council's evaluation.

In Italy, Spain and France, where fiscal councils appear as really independent institutions from the government, in spite of the lack of binding effects of their opinions, they are potentially able to strengthen the budgetary autonomy of parliaments by filling part of the information asymmetry between the legislative and the executive branch.

5. Parliaments and Constitutional Courts

In the aftermath of the Eurozone crisis, Constitutional Courts can act as guarantor of parliamentary prerogatives or, at the opposite, can impair their autonomy and their budgetary powers.[44] The German Constitutional Court stood as a protector of the budgetary powers of the German *Bundestag* in a series of case law from 2010 where the democratic principle has been connected to the overall budgetary responsibility of parliament. This Constitutional Court, however, has taken a rather paternalistic stance in this regard, as confirmed in the latest decisions of the the 'saga'. In the judgment of 18 March 2014 (BVerfG, 2 BvR 1390/12), although the Court upheld the constitutionality of the Council decision of 2011 to amend Art. 136 TFEU, of the ESM Treaty, of the Fiscal Compact, and of their national acts of implementation, it did not forget to recall its warning against the marginalization of the *Bundestag* in the budgetary process:

> '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 (BVerfGE 129, 124 <177>; 132, 195 <239>, n. 106). Deciding on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (cf. BVerfGE 123, 267 <359>; 132, 195 <239>, n. 106). The German *Bundestag* must therefore make decisions on revenue and expenditure with responsibility to the people (§161).'[45]

From this decision and even more so from the OMT referral (section 3) became clear that the German Constitutional Court does not safeguard the budgetary powers of the *Bundestag* for the sake to protect the Parliament as an institution, but just because it is the instrument for the exercise of the democratic powers by citizens. Therefore, as soon as Parliament's inactivity – against the ECB decision on the OMT – is challenged as a violation of the democratic principle, the *Bundestag* can easily become the victim of the German constitutional case law that once glorified it. If there is a winner here, it appears the broadening of the jurisdiction of the German Constitutional Court, whose majority seemed willing to subject also Parliament's inactivity, without subsequent specifications, to judicial review.

On the other hand, much more than the Parliament itself the German Constitutional Court has been able to channel and address the discontent created by the Euro-crisis law among parliamentary minorities and citizens by means of constitutional complaints. Although the reasoning used is completely different, a similar attitude can be detected in the highly criticized case law of the

[44] For a more in depth analysis on Constitutional Courts in the Eurozone crisis see C. Kilpatrick, 'Constitutions and social rights in times of European crisis', paper in this file, and M. Wendel, 'Exceeding Judicial competence', paper in this file.

[45] Immediately after the German Constitutional Court has also stated that 'The German *Bundestag* may not transfer its budgetary responsibility to other entities through imprecise budgetary authorisations (§ 163).'

Portuguese Constitutional Court.[46] The Court was accused of judicial activism as it has declared unconstitutional several provisions of the annual Budget Acts since 2012, which were implementing the content of the Memorandum of Understanding and the Financial and Assistance Programme, in particular public wage and pension cuts. As a consequence, especially after judgment 187/2013, the Government was forced to renegotiated the terms under which the rescue package had been agreed. The Court itself was divided in the judgments on the Euro-crisis law as the most controversial decisions were taken by 7-to-6 majority and often every judge was in minority on one of the issues under review while at the same time being part of the majority on the other issues (decisions 187/2013 and 413/2014). Nonetheless, The position of the Parliament, which had merely ratified what the rescue package requested, was not a concern for the Portuguese Constitutional Court. Also in the two cases in which the Court exercised its power to limit the effects of its declaration of unconstitutionality (Art. 278.4 Pt. Const.), the Court did not use this option in a deferential attempt towards the Parliament, but just for the sake to limit the financial impact of its judgments.

The arguments used by the Portuguese Constitutional Court were mainly grounded on the application of the principle of proportional equality and of legitimate expectations, as the Court found itself in a difficult position to agree on something more specific than fundamental principles.[47] Starting from 2012 the Court has systematically annulled the provisions of the parliamentary Budget Acts, which had introduced either a non-reasonable discrimination against public workers and pensioners, year after year permanent curtailment to public wages and pensions, or retroactive measures. The fact that in the implementation of the Euro-crisis law the Portuguese Parliament limited itself to rubber stamp the decision taken by the Troika 'in agreement' with the national government, however acting under strict conditionality, poses some doubts on whether common dilemmas of constitutional review of legislation, like the counter-majoritarian difficulty, really applies to this case law of the Portuguese Constitutional Court. On the one hand, it is not clear what was the 'the majority' that the parliament was actually representing given the limited discretion it had and the transposition of the Troika's requests into the Budget. On the other hand, the most controversial decisions were the result of a broad alliance of bodies and institutions that filed many constitutional challenges on the same Act; a sign that there was a general opposition against the Budget Act. For example, judgment 187/2013 decided jointly four constitutional actions brought before the Court by a variety of actors, the President of the Republic, parliamentary minorities, the ombudsman based on individual complaints. Thus it remained unclear whether the will of the majority was perceived to be better represented by the parliament rather than by the Court.

[46] See judgments 353/2012, 187/2013, 474/2013, 602/2013, 862/2013, 413/2014, 574 and 575/2014. See M. Nogueira De Brito, *Comentário ao Acórdão nº 353/2012 do Tribunal Constitucional*, in *Direito & política* 2012, p. 108 ff.; A. Dos Santos, C. Celorico Palma, *O Acordão do Tribunal Constitucional nº 353/2012 de 5 de julho: a prevalência da razão juridica sobre a razão económica*, in *Revista e finanças públicas e direito fiscal* 2012, p. 31 ff.; R. Cisotta & D. Gallo, *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei*, in *Diritti umani e diritto internazionale*, vol. 7, 2013, n. 2, p. 465-480, G. Coelho, P. Caro de Sousa, '«La morte dei mille tagli». Nota sulla decisione della Corte costituzionale portoghese in merito alla legittimità del bilancio annuale 2013', *Giornale di diritto del lavoro e di relazioni industriali*, 3/2013, p. 527-544, and M. Nogueira de Brito, 'Medida e Intensidade do Controlo de Igualdade na Jurisprudência da Crise do Tribunal Constituciona', in *O Tribunal Constitucional e a Crise*, Almedina, 2014, p. 107 ff.

[47] See M. Canotilho, T. Violante & R. Lanceiro, 'Weak rights, strong principles: Social rights in the Portuguese constitutional jurisprudence during the economic crisis', paper presented on the occasion of the IXth IACL World Congress, Workshop 4: Social rights and the challenges of economic crisis, Oslo, 17 June 2014, p. 16.

In Italy and in Spain, by contrast, in the adjudication of the Euro-crisis law Constitutional Courts have maintained a deferential approach towards parliaments – with a few exceptions in Italy – while at the same time they have never endorsed the role of guarantor of parliamentary prerogatives in the budgetary process as the German Constitutional Court did. In the cases that could have put parliamentary autonomy in question, the Spanish Constitutional Court either declared the constitutional challenge inadmissible, like in the case of the constitutionalization of the balanced budget clause (Art. 135 Sp. Const.) or it has not yet decided on the merits, for example on organic law 2/2012.[48]

Even in the cases where the Spanish Constitutional Court decided on the merits the constitutionality of the national legislation is usually upheld. This happened with the constitutional challenge brought by the Parliament of Navarra against the State labour reform of 2012, Law no. 3/2012 (*ley de reforma laboral*), The Court dismissed the constitutional challenge and made an interpretation in conformity with the Constitution. Indeed, in judgment no 119/2014 the Constitutional Court confirmed its previous case law and stated that the Spanish Constitution – Article 37 – does not foresee a specific model of collective bargaining and thus the Parliament enjoys a wide discretion on how to regulate it. Once again the dismissal of the case, also by means of an interpretation in conformity with the Constitution, and the reference to the significant powers that the Parliament has in this field testify that the Court has not departed from its precedents and from its deferential approach to political bodies. Likewise, in judgment 206/2013, where the Court found some legislative provisions of Budget Act for 2009 (*ley de presupuesto* 2/2008) unconstitutional as they were not connected to the typical content of the Budget Act, the allegation against the Budget to be based on too optimistic forecasts and thus to be arbitrary was rejected by the Court. In this decision the Court stated that its role is to check the compliance of legislation with the Constitution without imposing undue restrictions to the legislative power and respecting its political opinions (§ 7).

Likewise the Italian Constitutional Court has usually refrained from striking down legislation enacted to implement reforms of the welfare system and thus entailing considerable financial implications, in line with its past constitutional case law of the 1990s (decisions 310/2013, 7/2014, 154/2014). On a few occasions the Court has declared legislation affecting pension rights unconstitutional, for example because of its retroactive nature and it could negatively impact on intergenerational justice (decision 264/2012). The Court has been severely criticized for the annulment of provisions of decree-law 78/2010 (decisions 233/2012 and 241/2012) and of decree-law 98/2011 (decision 116/2013) which, according to the Court, amounted to a targeted violation of the rights of some pensioners.[49] Indeed, by doing so the Constitutional Court overturned the aim of the Parliament and Government to implement some redistributive measures to drain resources from 'golden pensions' and to other social purposes. These judgments, however, remained an exception in the case law of the Italian Constitutional Court that has more often upheld legislation implementing austerity measures or structural reforms, by also making reference to the political discretion that the parliament enjoys in this field.

[48] See J. García Roca & M. Á. Martínez Lago, *Estabilidad presupuestaria y consagración del freno constitucional al endeudamiento,* Aranzadi, Pamplona, 2013, p. 73 ff. and M. González Pascual, '*Welfare Rights And Euro Crisis - The Spanish Case'*, in C. Kilpatrick & B. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights*' *Challenges Law*, 2014/05, EUI Law Department, p. 95 ff.

[49] See, for example, D. Piccione, 'Una manovra governativa di contenimento della spesa «tra il pozzo e il pendolo»: la violazione delle guarentigie economiche dei magistrati e l'illegittimità di prestazioni patrimoniali imposte ai soli dipendenti pubblici', *Giurisprudenza costituzionale*, n. 5, 2012, p. 3353ff.

Finally, in France the decisions of the Constitutional Council on the Euro-crisis law appear much more oriented to preserve the autonomy and the political discretion of the government than to protecting parliamentary budgetary powers. An outcome that is consistent with the French form of government and system of constitutional review of legislation. Thus the options for the non-constitutionalization of the balanced budget clause (decision n° 2012-653), for the inclusion of the medium-term objective in ordinary legislation, precisely in the Programming Act (decisions n° 2012-658), and for the non-binding effects of the *Haut Conseil des finances publiques* (decision n° 2013-682 and n° 2014-699), are all signals of the will to leave a wide margin of manoeuvre to the government in the economic governance. Moreover, the French Constitutional Council in its decision on the organic law on the Programming and Governance of Public Finances,[50] for the implementation of the Fiscal Compact, clearly stated that the new law did not encroach upon parliamentary prerogatives in budgetary matters (decision n° 2012-658 DC of 13 December 2012, § 12).

6. Preliminary conclusions

In the discourse surrounding the Eurozone crisis the reform of the economic governance has been accused to have severely undermined the budgetary autonomy of national parliaments. They have been described as the main institutional victims of the Euro-crisis law. However, this assessment neglects that the situation is much more variegated and nuanced than one would expect. The reaction of parliaments to the crisis is different according to the measures at stake. While the five legislatures have been able to easily accommodate their activity to the timeline and to the requirements of the European Semester, often applying the ordinary tools used for the scrutiny on EU affairs, much more difficult has been and still is for them to cope with the 'unconventional' sources of the Euro-crisis law – Memoranda of Understanding, ESM Treaty, Fiscal Compact – and to really oversee their implementation.

Far from being a uniform category, there are many asymmetries in the powers and budgetary autonomy of national parliaments, depending on the financial situation, i.e. whether they act under strict conditionality, on constitutional provisions and on their judicial enforcement. In other words, the position of parliaments should be assessed in their dynamic relationship with other institutions, first of all with governments. The Eurozone crisis, on the one hand, contributes to add further constraints on the discretion of parliaments; on the other, provides them with an opportunity to adjust their position towards the executive. For example, the duty of information of the executive in favour of parliaments has been strengthened significantly. Fiscal councils have been set up with the aim to supply parliaments with independent information for a more autonomous assessment of governments' performance. Also the scrutiny and the oversight powers of parliaments have been enhanced by legislative reforms as to guarantee the control of the position of the government before and after its engagement at European level. Parliaments can exercise a veto on some decisions, although this is unlikely to happen or it will be used as *extrema ratio*. Moreover, it cannot be disregarded that, although the role of the executives collectively, through European intergovernmental institutions, has been strengthened, the individual position of national governments often it is not.

[50] *Loi organique n° 2012-1403 du 17 décembre 2012 relative à la programmation et à la gouvernance des finances publiques.*

The role of Constitutional Courts in protecting parliaments during the crisis can make the difference. The German Constitutional Court, for example, set the minimum threshold for the democratic credentials of the new economic governance. The argument raised in its case law about the overall budgetary responsibility of the *Bundestag* forced the government to comply with new obligations and to subject its action to the prior parliamentary consent. On the other hand, as shown by the latest development in the German Constitutional Court's judgments, being the *Bundestag* only an instrument for the safeguard of the democratic principle, its passivity against illegitimate decisions of supranational institutions could be considered as unconstitutional. Furthermore, judicial activism, as in the case of the Portuguese constitutional judgments on the Euro-crisis law, can also led to further undermine the budgetary powers of a parliament compelled to pass legislation directly deriving from the 'external' constraints posed by the rescue package.

More than the marginalization of national parliaments in the Eurozone crisis within the 'power game' with other domestic or European institutions, it appears that the most important weakness of legislatures lies today in their passivity when dealing with the Euro-crisis law, a consequence of time constraints and of European and international obligations to be fulfilled. Most Euro-crisis measures were passed by overwhelming majorities in parliament almost without debate. It is then the representative function of parliaments as institutional forum of public discussion and confrontation of opposite views in the crucial context of the crisis that has failed. Thus the opposition against austerity measures and structural reforms has been voiced otherwise outside parliaments, primarily through demonstrations and mass protests and before Constitutional Courts, depending on the conditions of access to constitutional justice provided in each Member State.