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Taking budgetary powers away from national
parliaments?

On parliamentary prerogatives in the Eurozone crisis

Cristina Fasone

European University Institute
Department of Law

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Constitutional Change through Euro-Crisis Law

This paper was first delivered at a conference held at the European University Institute in October 2014 presenting some initial results of the project on Constitutional Change through Euro Crisis Law. This project is a study of the impact of Euro Crisis Law (by which is meant the legal instruments adopted at European or international level in reaction to the Eurozone crisis) on the national legal and constitutional structures of the 28 Member States of the European Union with the aim of investigating the impact of Euro Crisis law on the constitutional balance of powers and the protection of fundamental and social rights at national level. An open-access research tool (eurocrisislaw.eui.eu) has been created, based on a set of reports for each Member State, that constitutes an excellent resource for further, especially comparative, studies of the legal status and implementation of Euro Crisis law at national level, the interactions between national legal systems and Euro Crisis law and the constitutional challenges that have been faced. The project is based at the EUI Law Department and is funded by the EUI Research Council (2013-2015).

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Abstract

This paper analyses if and how the position of national parliaments has changed after the adoption of Euro-crisis measures and their first enforcement and tries to draw some conclusions on whether these changes are just temporary or, rather, are likely to endure in the long term and hence to represent a permanent transformation of national constitutional systems. The paper challenges the mainstream assumption that the powers of national parliaments in budgetary procedures have been annulled. It is argued that once the ratification/application and implementation of the most contested Euro-crisis provisions – Fiscal Compact, European Stability Mechanism Treaty and rescue packages – have taken place, in reaction to the most acute phase of the crisis, the combination of national and EU rules, for example on the European Semester are likely to preserve the budgetary powers of national parliaments compared to the pre-crisis period. Parliamentary passivity does not derive, or at least not primarily, from the Euro-crisis legal measures; rather from the political context that the Euro-crisis has triggered. Thus any analysis of the role of parliaments in the Eurozone crisis has to take into account parliamentary institutions ‘in context’, which are influenced by the peculiar political and economic situation of each country. 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 constitutional arrangements.

Keywords

Euro-crisis measures, national parliaments, comparative constitutional law, budgetary powers, Euro-national austerity coalitions.

Table of contents

INTRODUCTION.....	1
THE RISK OF TECHNOCRATIC DOMINATION, THE EURO-NATIONAL AUSTERITY COALITIONS AND THE LACK OF RESPONSIBLE PARLIAMENTARY OPPOSITIONS: AN INTRODUCTION.....	3
PARLIAMENTS AND CITIZENS IN THE CONSTITUTIONALIZATION OF THE BALANCED BUDGET RULE	7
PARLIAMENTS VS GOVERNMENTS	10
Governments' loss of powers	11
Governmental plans overturned by parliaments.....	12
Parliamentary powers on 'unconventional' Euro-crisis measures	15
Intergovernmental agreements outside EU law.....	15
Rescue packages.....	18
Parliamentary powers within the European Semester	20
The (unexploited) potential of fiscal councils	23
The deparliamentarization of political conflicts.....	25
PARLIAMENTS AND CONSTITUTIONAL COURTS	27
CONCLUSIONS	31

Introduction*

‘No taxation without representation’ is a landmark principle of modern constitutionalism which conceives of parliaments as the budgetary authorities *par excellence*. In principle, parliaments are able to reconcile the position of citizens, which they directly represent, with that of tax-payers.

This is certainly a simplification of the actual operation of budgetary procedures at least since the second half of the twentieth century in Europe, where the constitutional arrangements of parliamentary systems have favoured tight control of the budgets by the executive branch.¹ Not only are budget bills proposed by the governments, who exercise substantial control over parliamentary procedures and amendments shaping the annual budget; the fiscal cycle is also characterised by the adoption of other acts, sometimes in the form of executive decrees, highly heterogeneous in their content (*omnibus* acts) and with considerable financial implications, with little influence on the part of parliaments. Although transformed over time, the relationship between parliaments and citizens/tax-payers remains in place, on the one hand, by means of elections, and on the other, by the powers parliaments ultimately retain to amend or reject the budget – and related acts – and, in all EU countries (except for Cyprus), to force the executive to resign, for instance in cases of budget mismanagement.

However, it has been argued that the legal measures adopted within the framework of the reform of the economic governance in the EU have substantially jeopardized parliamentary prerogatives.² 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 glance appears to have once again marginalized national parliaments. The way the new budgetary procedures are designed, shaped by the interplay between supranational and domestic institutions and, in the case of the former, either by the intergovernmental or by the most technocratic and not even indirectly democratically legitimated institutions, e.g. the European Central Bank (ECB), makes parliamentary oversight extremely difficult. To ascertain who is ultimately responsible and accountable for adopting budgetary decisions and structural reforms is anything but easy.

The setting up of a collective intergovernmental system of ‘peer’ review of national public accounts, inspired by the dogma of austerity, together with a more obscure though equally substantive control of the ECB, in the name of price stability, was a sanction against the failure of individual parliaments and governments to properly perform their role as budgetary authorities. In an attempt to restore credibility and stability in the financial markets and ‘to do whatever it takes to save the euro’, it happened that budgetary powers – it is commonly argued – were taken away from national parliaments (and governments) as the institutions responsible for the bailout in some EU Member States. This implies that the position of Member States’ parliaments is asymmetric, first of all according to the divide

* A first version of this paper was prepared for the ‘Constitutional Change Through Euro-Crisis Law’ Workshop, EUI Law Department, 17-18 October 2014. A revised version was presented at the Thematic Group on Governance, Constitutionalism and Democracy, EUI, Max Weber Programme, on 4 December 2014. The author would like to thank Or Bassok, Richard Bellamy, Thomas Beukers, Edoardo Chiti, Bruno De Witte, Diane Fromage, Nicola Lupo, Afroditi Marketou, Hans Micklitz, Giorgio Monti, Eric O’Connor, Leonardo Pierdominici, Ruth Rubio Marin, Martin Schoonvelde, Florian Stoekel for the insightful comments provided and Aoife Nannery for the editorial work done. The usual disclaimer applies. Comments are welcome at cristina.fasone@eui.eu

¹ See A. Schick, ‘Can National Legislatures Regain an Effective Voice in Budget Policy?’, *OECD Journal on Budgeting*, vol. 1, no.2, 2001/2002, p. 15-42 and P. Posner & C. Keun-Park, ‘Role of the Legislature in the Budget Process: Recent Trends and Innovations’, *OECD Journal of Budgeting*, vol. 7, no.3, 2007, p. 1-26. See also V. Ruiz Almendral, ‘A Myopic Economic Constitution? Controlling the Debt and the Deficit Without Fiscal Integration’, in M. Cremona, B. De Witte & C. Kilpatrick (eds.), *Constitutional Change Through Euro-Crisis Law*, EUI Working Paper Series, LAW 2015/12, p. 18.

² See M. Poiars 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, p. 195.

between Eurozone and non-Eurozone countries, as the former and in turn their parliaments face tighter budgetary constraints than the latter. Secondly, within the Eurozone countries, parliaments of the Member States receiving financial assistance and support (e.g. Greece, Italy, Portugal and Spain) are even more affected in their budgetary autonomy because of the strict conditionality imposed. In these countries in particular, the political discretion of parliaments within the budgetary process has *de facto* been essentially impaired; it has been primarily challenged by the actual impossibility of amending what governments have proposed, 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 has changed after the adoption of the Euro-crisis measures and their first implementation and tries to draw some conclusions as to whether these changes are just temporary or, rather, are likely to endure in the long term and hence whether a permanent transformation of national constitutional systems will occur. The paper challenges the mainstream assumption that the powers of national parliaments in budgetary procedures have been annulled. It is argued that once the ratification/application and implementation of the most contested Euro-crisis provisions – the Fiscal Compact, the European Stability Mechanism (ESM) Treaty, the Memoranda of Understanding (MoU) – have taken place, in reaction to the most acute phase of the crisis, the combination of national and EU rules, for example on the European Semester - which, in contrast to the former, are part of the *acquis communautaire* - are likely to preserve the budgetary powers of national parliaments and their involvement in EU affairs compared to the pre-crisis period.

However, the legal account of the crisis must be combined with a closer look at the political dynamics at domestic level, which in the short term reveal, besides the politicization of the national debates on EU issues as a new trend,³ also a deparliamentarization of political conflicts. Political conflicts have often been channeled outside parliaments through mass protests, new extra-parliamentary political movements, and courts. This ‘politicization without democratization’⁴ – it is supported in this paper – does not derive, or at least not primarily, from the Euro-crisis legal measures; rather from the political context that the Euro-crisis has triggered. Thus any analysis of the role of parliaments in the Eurozone crisis has to take into account parliamentary institutions ‘in context’, which are influenced by the peculiar political and economic situation in each country. Far from being a uniform category, national parliaments in the Eurozone crisis display asymmetries and a significant variety of positions and powers, since their role – as it will be shown – depends primarily on national law, party systems, and politics. For instance, it is evident that grand coalitions or minority governments which have been ruling in the last few years and the creation of Eurosceptic anti-system parties influence the way parliaments cope with their budgetary powers. The formation of large coalitions, as to include right and left-wing parties together, in combination with anti-European and anti-system parties, able to lead popular protests outside the parliaments and later on to be represented in parliaments, has affected the ability of these institutions to be the *locus* of political confrontation, as the nature and the role of the political opposition has changed. Likewise the alliance created between grand coalitions in power in some Eurozone countries and European and national technocracies with a specific expertise in financial and economic matters risks being detrimental for democratic legitimacy, as it exacerbates the reaction and the claims of the Eurosceptic and anti-system oppositions in place.

³ See S. Hutter & A. Kersch, ‘Politicizing Europe in Hard Times: Conflicts over Europe in France in a Long-Term Perspective 1974-2012’, *Journal of European Integration*, vol. 36, no. 3, 2014, p. 267-282; Miklin, E. (2014) ‘EU Politicisation and National Parliaments: Visibility of Choices and Better Aligned Ministers?’, *The Journal of Legislative Studies*, vol. 20, no. 1, 78-92; S. Kröger & R. Bellamy, ‘Beyond Constraining Dissensus?: The Role of National Parliaments in Politicizing European Integration’, forthcoming.

⁴ See N. Scicluna, ‘Politicization without democratization: How the Eurozone crisis is transforming EU law and politics’, *ICON*, vol. 12, no. 3, 2014, p. 545-571.

The degree to which the politicization of the debate on the EU, i.e. Euro-crisis, issues taking place mainly outside parliaments will be brought back to representative institutions depends on the normalization of the functions of the opposition. By normalization it is meant the ability of opposition parties to be engaged in a constructive political debate with the majority along the classical left-wing/right-wing positions and to legitimately compete to become the majority in the next elections without the risk of subverting the democratic order and the participation in the EU. In addition to this, in order to resume traditional party lines and to marginalize or normalize anti-system parties, credit has to be given to competing views on how to exit the crisis. Fostering investments and growth, for example, also to combat current deflation, can be seen as a legitimate option, whereas so far it has been sidelined and priority given to restoring financial sustainability through spending cuts and higher taxation.

The position of some Eurozone parliaments will be analyzed, mainly focusing on the French, the German, the Italian, the Portuguese, and the Spanish Parliaments as a sample of national legislatures operating under different sets of economic, political, constitutional and budgetary constraints in the Euro area.

The paper is structured as follows. First of all the features and the problem of the Euro-national austerity coalitions and the risks of technocratic domination are examined (section 2). Secondly, the relationship between protection of parliamentary prerogatives and constitutional amendments is considered (section 3). Thirdly, the analysis focuses on the loss of powers on the part of governments and on the reaction of parliaments to a variety of Euro crisis measures, from intergovernmental agreements and rescue packages to EU law (section 4), in order to point out that at least EU secondary law has not diminished parliamentary powers. Fourthly, the focus is on political conflicts ending up before Constitutional Courts and a short overview of the case law of these Courts affecting parliamentary powers is provided to determine whether national parliaments in the Euro-crisis are protected or undermined by judges (section 5). Finally, conclusions are presented regarding the contingency of the Euro-crisis, its *extra ordinem* nature and the implications for national parliaments in the short and in the long term (section 6).

The risk of technocratic domination, the Euro-national austerity coalitions and the lack of responsible parliamentary oppositions: an introduction

Since 2010 austerity policies in the European constitutional system have been endorsed by heterogeneous Euro-national austerity coalitions of institutional and political actors, under the leadership of Germany and of the ECB. The Barroso Commission, the then President of the Eurogroup, Jean-Claude Juncker, the then President of the European Council, Herman Von Rumpuy, as well as the former and the incumbent President of the ECB, Jean-Claude Trichet and Mario Draghi, all agreed that this was the only way out to save the euro. The Euro-Plus Pact, the six-pack, the ESM, and the Fiscal Compact embedded this political agreement into EU and international obligations, while the bilateral loan agreements and rescue packages in favour of the bailout countries further strengthened this commitment.

This reading of the crisis and of its solution showed a widespread agreement amongst the governments of Eurozone countries, while it placed creditor and debtor countries in a very asymmetric position. Thus these coalitions, depending on the State, were composed of national executives, some of which had a negligible negotiating power being debtor countries, and EU and international institutions, in particular the most technocratic institutions not subject to the usual accountability model in place for political institutions.

Non-majoritarian independent institutions and bureaucracies which derive their legitimacy from professional economic expertise have played a key role in the management of the Euro-zone crisis. Indeed, the European debt crisis was perceived as an outcome of ‘irresponsible’ political institutions

which had failed to guarantee fiscal stability and financial sustainability for present and future generations. It followed the need to put politics under control and to allow experts to orient economic policies. How does this bureaucratization affect the implementation of Euro-crisis measures from the viewpoint of national parliaments? It is argued that it does have implications as long as political decisions are *de facto* taken by these technocratic actors.

The ‘assault of supranational technocracy’, *in primis* the ECB on its own and together with the European Commission and the International Monetary Fund (IMF) as the Troika, has increased the democratic disconnect with national politics and has endangered the legitimation of decision-making via representative government.⁵ National parliaments exercise almost no control on these institutions.⁶ Yet the Commission’s instructions on national stability programmes, for example, – although called ‘recommendations’ – are considered to be binding. Not to mention the conditions imposed on Member States, like Greece, Portugal and Spain that received financial support and assistance. In particular in the case of Memoranda of Understanding, since they were agreed between the national government and the Troika, the Troika carefully monitored its implementation in the Member State concerned through review missions.

This element calls into question one of the fundamental features of constitutional systems based on the separation of powers, namely the separation between politics and functionally specialized bodies. The division of roles between Euro-crisis law making and implementation, however, is extremely blurred. For example, in the framework of the banking union, which is inherent to the Eurozone governance, the ECB enacts hundreds of legal acts every year – primarily regulations and decisions – that substantially influence financial markets, but whose nature frequently is atypical compared to the classification of the sources of EU law.⁷ Often these acts are not disclosed, while they have been announced in press releases, like the ‘famous’ OMT programme on 6 September 2012. It is not simply the growing rule-making power of the ECB that triggers a serious reflection, but even more so the fact that these powers are exercised without any effective mechanism of control and accountability on the part of EU and national institutions, while they ‘could yield large returns’.⁸

The confusion between politics and technocracy also takes place at national level. Italy and Greece, for example, appointed so-called ‘technical governments’ during the crisis, i.e. governments whose legitimacy derives from the professional competence of their members who are not MPs or elected politicians, like the Monti Government (2011-2012). This practice is formally in compliance with constitutional law, since the appointment of Ministers who have not been elected as MPs is not forbidden either by the constitutional text or by constitutional conventions in these Member States.

⁵ See P. Lindseth, ‘Reconciling Europe and National Parliaments: Reflections on Technocracy, Democracy, and Post-Crisis Integration’, *Amministrazioneincammino*, July 2014, who recalls the Weberian nightmare of technocratic domination.

⁶ Unless one argues that parliaments exercise an indirect democratic control through governments on the IMF and via the new procedures provided by the Treaty of Lisbon on the Commission. The new legal framework emerging from the banking union, however, provides national parliaments with certain oversight and scrutiny powers over the ECB and the Single Resolution Board by giving them the power to address observations or questions to them: see article 21, Council Regulation (EU) no 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 October 2013, and Regulation (EU) no 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225/1, 30 July 2014. See R. Ibrido and A. Pecorario, *The Banking Union and the “Euro-national parliamentary system”*. *Constitutional implications*, paper submitted for the PADEMIA Annual Conference, Brussels, 2-3 July 2015.

⁷ In 2014 the acts adopted, only those published, are available here: <https://www.ecb.europa.eu/ecb/legal/date/2014/html/index.en.html>

⁸ See B. Ackerman, ‘The New Separation of Powers’, *Harvard Law Review*, vol. 113, no. 3, 2000, p. 711, speaking about the large returns, the money flows, and the substantial policy implications non-majoritarian independent institutions are able to mobilize, for example in the case of the US Federal Reserve.

Furthermore these governments remained in office for a limited period, until their mandate to pass specific reforms was fulfilled.⁹

Nevertheless, the dominance of technocracy and the appointment of technical governments raise a series of doubts. First of all these governments were requested, in agreements between EU institutions and national political parties, to implement austerity reforms with severe implications in terms of taxing, spending and borrowing effects for citizens and administrations. The technocracy thus prompted legislative (and constitutional) reforms on behalf of parliaments and governments that had been unable to do so.

Secondly, the intergovernmental Euro-crisis measures and rescue packages supported by Euro-national austerity coalitions (where non-majoritarian technocratic institutions hold a considerable share) in particular were subject to very limited and generalist parliamentary debates. Where discussed in Parliament, they were finally adopted by overwhelming majorities, which either mirrored the composition of the executive, by coalitions of parties, or were able to also gain the support of the opposition and minority groups,¹⁰ in the light of the technical expertise and authority of the Ministers, like in Italy and Greece. Given the need to fulfill European and international obligations promptly in dramatic economic circumstances, which otherwise could have led to a crisis for the single currency, a responsible course of action was taken to overcome the majority and the opposition divide and to vote (or at least abstain) united for those measures.

Thirdly, as an effect of technocratic domination, parliamentary passivity was initially triggered by the depoliticization of parliamentary debates.¹¹ When, after a political failure, austerity was deemed to be the only possible solution by experts in the field, it was very difficult for parliaments to challenge this assumption and to prove it wrong. Notwithstanding the work and the support of parliamentary bureaucracies and despite being budgetary authorities, parliaments are not designed to engage in technical debates based on economic arguments and on the expertise of its members, certainly not in the plenary. Sometimes this can happen in parliamentary committees. Nevertheless, at least in the first period of the Euro-crisis, when bailout programmes were still being implemented, for instance in Portugal and Spain, a trend towards the depoliticization of parliaments developed whereby traditional cleavages in parliamentary debates were neutralized, since someone else already possessed the correct answer to the problems. In parallel with such depoliticization within parliamentary institutions, a re-politicization of the debate on Euro-crisis issues started within civil society, as a form of contestation led by Eurosceptic and anti-system movements.¹²

While the Euro-crisis and the legal and economic response became highly salient issues in the public discourse, in particular through media and new protest movements, then transformed into extra-

⁹ See N. Lupo, 'I "governi tecnici". Gli esecutivi Ciampi, Dini e Monti nel difficile equilibrio tra tecnica e politica', *Rassegna parlamentare*, no. 1, 2015, p. 57-120.

¹⁰ See S. Puntischer Riekmann & D. Wydra, 'Representation in the European State of Emergency: Parliaments against Governments?', *Journal of European Integration*, vol. 35, no 5, 2013, p. 565-582 and E. De Giorgi & C. Moury, 'Conclusions: Great Recession, Great Cooperation?', *The Journal of Legislative Studies*, Special Issue on *Government-Opposition Dynamics in Southern European Countries during the Economic Crisis. Great Recession, Great Cooperation?*, vol. 21, no. 1, 2015, p. 115-120. A. Maatsch, 'Are we all austerians now? An analysis of national parliamentary parties' positioning on anti-crisis measures in the eurozone', *Journal of European Public Policy*, vol. 21, no 1, 2014, p. 96-115 suggests that, if a constant discourse can be detected in parliamentary debates, this is the one pointing to the conflict of interests between debtor and creditor countries.

¹¹ In this regard, it is worth recalling the statement of the Italian President of the Council of Ministers, Mario Monti at that time of the 'technical government', concerning the relationship between parliaments and governments: 'If governments allow themselves to be entirely bound to the decisions of their parliament, without protecting their own freedom to act, a break up of Europe would be a more probable outcome than deeper integration' (*Der Spiegel* 6 August 2012), recalled also by S. Puntischer Riekmann & D. Wydra, cit., p. 566.

¹² 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. 10-12.

parliamentary political parties, the political conflict over the crisis was deparliamentarized by a deliberate choice of the parliamentary institutions themselves. The opposition moved out from unexpectedly cohesive parliaments and thus was not - initially - channeled through representative institutions. The politicization of the Euro-crisis at national level was not paralleled by its parliamentarization. The only examples of considerable representation of Eurosceptic anti-system movements in Eurozone parliaments are so far the five star movement (M5S) in Italy following the elections of 24-25 February 2013 and Syriza in Greece since the elections of 25 January 2015, when it also became the ruling majority.

In parliamentary and semi-presidential systems, having a parliament without a responsible and effective opposition is a serious threat to the balance of powers and to the democratic legitimacy of the government. Indeed, the opposition is expected to foster a constructive dialectic between the parliament as an institution and the executive, and allow the separation of powers to function. In contrast, the lack of a responsible opposition undermines the ability of the parliament to resist against governmental 'oppression'.

Nonetheless, the political weakness of responsible oppositions in parliament, on the one hand, and the rising of anti-system movements, on the other, can be controlled or counterbalanced by parliamentary standing orders and rules of procedure, by electoral rules, by a second Chamber, and by the access to judicial review. Germany is by far the most effective example of 'protected democracy' among the Eurozone countries, which has allowed a responsible parliamentary opposition to survive and so far has prevented Eurosceptic parties from entering the federal Parliament. The German Basic Law protects the right of parliamentary oppositions and the standing orders of the *Bundestag* do the same by giving to minorities the right to set up committees of inquiry. Likewise a minority, a parliamentary body and even each MP can challenge the validity of the legislation passed by the Parliament before the Constitutional Court. There are further elements that go towards limiting the power of the majority to act in an unconstrained manner, for example the federal second Chamber (the *Bundesrat*) and a quite lively debate, in particular after the election of 2013, within the ruling coalition between governing parties.¹³ Also the electoral law, with the high threshold to gain seats in the *Bundestag*, makes it unlikely that new Eurosceptic parties to be represented in Parliament and will become the only real parliamentary opposition.

In other Eurozone countries parliamentary minorities and the parliament itself as an institution independent from the executive are not equally protected. In Spain, for example, although the electoral system usually limits the chance of anti-system parties to enter the national parliament and parliamentary minorities can challenge the legislation before the *Tribunal constitucional*, this Court however shows an highly deferential approach towards the choice of the majority. Nor are parliamentary minorities effectively protected in the daily activities by the standing orders, in terms of procedural rights that can be activated (e.g. preliminary motions) or in using traditional oversight tools like questions and hearings.¹⁴ The situation is similar in France, despite the attempt to enhance the protection of parliamentary minorities since the constitutional reform of 2008. In practice parliamentary procedures in both France (*procédure accéléré*) and Spain (*lectura única*) grant leeway to avoid the second Chamber playing an opposition role. Also, in contrast with Germany, lacking a coalition government in power, the intra-party dialectic within the executive has usually been limited.

In Portugal, although the coalition governments that have been ruling the countries since 2008 have been quite divided internally and this led to internal oppositions and reshuffles, the main player in

¹³ See S. Hutter & E. Grande, 'Politicizing Europe in the National Electoral Arena: A Comparative Analysis of Five West European Countries, 1970–2010', *Journal of Common Market Studies*, vol. 52, no. 5, 2014, p. 1002–1018 and H. Kriesi, S. Hutter & E. Grande, 'Politicizing Europe', paper presented at the SPS-EUDO Dissemination Joint Conference in honor of Adrienne Héritier, European University Institute, 20 November 2014.

¹⁴ See D. Fromage, *Parlement et Gouvernement espagnols: quelles relations après le Traité de Lisbonne?*, forthcoming, 2015.

limiting the ‘expansion’ of the Euro-national austerity coalition has been the Constitutional Court; a coalition that, as the actions brought before this Court demonstrate, did not really represent the majority will in the country (section 5). Parliamentary minorities, besides the President of the Republic and the ombudsman, filed several constitutional challenges against the legislation implementing the conditions posed by the rescue package and the Constitutional Court repeatedly struck down the relevant provisions of the Budget Acts. Precisely for those reasons, the reaction of the Euro-national austerity coalition, whose unity was threatened by the Portuguese constitutional case law, was very swift and straightforward. The rescue-package with the Troika was re-negotiated and the Portuguese government renewed its loyalty to the Euro-national coalition by committing to new public spending cuts.¹⁵

Finally, in Italy the lack of a dissenting voice to speak out against the Government and to present a real alternative is patent. Italy has been ruled since November 2011 by very grand coalitions, which have had the external support of responsible oppositions as well.¹⁶ Thus almost the entire political spectrum was allied with the austerity coalition and parliamentary minorities that could have an incentive to challenge the legislation passed by these widespread coalitions (the Five Stars Movement and the *Legha Nord*) cannot access the Italian Constitutional Court, according to the Constitution.

Parliaments and citizens in the constitutionalization of the balanced budget rule

The reform of the economic governance in the EU also triggered a process of ‘higher law making’, ‘higher’ only in the sense that Constitutions could be amended in their crucial provisions on budgetary limits and sovereignty, but the direction of the change was already fixed in the Fiscal Compact, namely to introduce a balanced budget clause. Thus it was not an open-ended process which left discretion to the Parliament on how to amend their fundamental law. Rather the opposite, as the budgetary powers of Parliaments could only be constrained by the constitutionalization of a balanced budget clause¹⁷ and citizens were not involved at all through referendums,¹⁸ even where in theory this was constitutionally possible.

However, as in the version of the Fiscal Compact finally agreed to on 2 March 2012 the constitutionalization of that clause was encouraged – ‘preferably’ – but not imposed; most Eurozone Member States did not change their Constitutions. France and Portugal, for instance, did not pass a constitutional amendment. In France a first attempt to modify the Constitution to insert a ‘golden rule’ failed in March 2011, when the constitutional bill lacked the support of 3/5 majority of both Houses

¹⁵ Kilpatrick, ‘Constitutions and social rights in times of European crisis’, in *Constitutional Change Through Euro-Crisis Law*, EUI Law Working Paper Series, forthcoming.

¹⁶ At least until the election of the new President of the Republic, Sergio Mattarella, on 31 January 2015 that brought to an end the informal agreement between the Democratic Party, the governing party together with Nuove Centro Destra, and Forza Italia, which was fulfilling a strategy of external support to the Executive.

¹⁷ 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 published within the project on *Constitutional Change Through Euro-Crisis Law*, EUI Law Department: <http://eurocrisislaw.eui.eu/>

¹⁸ D. Braun & M. Tausendpfund, ‘The Impact of the Euro Crisis on Citizens’ Support for the European Union’, *Journal of European Integration*, vol. 36, no 3, 2014, p. 231-245 show in their analysis that the support of citizens for the EU integration process has declined substantially during the crisis. Such a decline was detected at the time of the negotiations on the Fiscal Compact. Indeed, one of the reasons why in the version of the Treaty finally agreed the constitutionalization of the balanced budget clause was not made compulsory depended on the fear of the governments in office that constitutional amendments would have been rejected by the People in those Member States, like Denmark, where holding a referendum or new elections in order to enact those amendments is a constitutional requirement. Although the referendum held in Greece on 5 July 2015 did not have to do with the constitutionalization of the balanced budget clause, it was constitutional in its substance and it showed, in a very peculiar and dramatic moment for Greece, a clear decline of the support for the EU and the Eurozone on the part of Greek citizens. On the Greek referendum see the comments published on the Constitutional Change Through Euro-Crisis Law website, <http://eurocrisislaw.eui.eu/news/>

gathered as the Congress. The failure to achieve such a majority in Parliament, which apparently was too broad to reach even for the Euro-national austerity coalition, did not let then President Nicolas Sarkozy desist from the attempt to change the Constitution. He announced he would be using the power within his discretion to submit the constitutional bill to referendum for its approval,¹⁹ after his supposed re-election in 2012, but he was defeated by François Hollande. Even though citizens did not vote for the constitutional amendment, nevertheless they voted against the President who tried to constitutionalize the balanced budget clause; a clear sign of disconnect between the Euro-national austerity coalition and the citizenry. The French Constitutional Council, requested by the new President to judge on the issue, considered the constitutionalization of the balanced budget clause unnecessary and consequently its inclusion in an organic law was deemed to be sufficient (décision n° 2012-653).²⁰ 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), which nevertheless is part of the constitutional block used by the Constitutional Council as a standard of review.

Likewise in Portugal the constitutional amendment did not find enough support in Parliament – two-thirds majority of MPs (Art. 286 Pt. Const.). On this occasion there was a parliamentary reaction by the Left Block (BE-PVC-PE) against a constitutional balanced budget clause perceived as a further confirmation of the austerity policy by the Euro-national coalition. Citizens could not be involved in the constitutional amendment process anyway, as this is designed as a purely parliamentary procedure and referendums on alterations of the Constitution are expressly forbidden (Art. 115 Pt. Const.). Moreover, attempts to call a referendum on the Fiscal Compact – as well as on the European Financial Stability Facility (EFSF) framework agreement and on the amendment to Art. 136 TFEU – were pursued by minority parties by using either the general constitutional clause on referendum ‘on important issues concerning the national interest’ upon which the Parliament and the Government must decide by legislation or international agreement (Art. 115 Pt. Const.); or the special clause that allows for a referendum on the approval of a treaty aimed at the construction and deepening of the European Union of which the Fiscal Compact was considered part (Art. 295 Pt. Const.), although being formally a non-EU Treaty. These minority proposals (BE-PCP-PE) did not obtain the support of the parliamentary majority and the Government, a coalition government (PSD–CDS-PP)²¹ at that time supported also by the socialists (PS).²²

In Italy and in Spain, where the constitutionalization of the balanced budget clause started well before the Fiscal Compact was agreed, citizens were not involved in the constitutional amendment process,

¹⁹ According to Art. 89.3 Fr. Const., the President of the Republic can choose which procedure to use for amending the Constitution, whether the Government Bill to amend the Constitution is submitted to the Parliament convened in Congress and approved only if it is passed by a three-fifths majority of the votes cast; or the Bill is submitted to referendum, the choice initially discarded by President Sarkozy.

²⁰ 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). By contrast, organic laws (also called ‘institutional acts’) are passed by each House by absolute majority in the cases provided by the Constitution and are automatically referred to the Constitutional Council for constitutional review before their promulgation (Art. 46 and 61 Fr. Const.).

²¹ Composed of the Social Democratic Party and the People’s Party.

²² See Rita De Brito Gião Hanek & Daniele Gallo, Report on Portugal, *Constitutional Change Through Euro-Crisis Law Project*, EUI Law Department, February 2015, section IX; Alexandre Afonso, Sotirios Zartaloudis & Yannis Papadopoulos, ‘How party linkages shape austerity politics: clientelism and fiscal adjustment in Greece and Portugal during the eurozone crisis’, *Journal of European Public Policy*, vol. 22, no. 3, 2015, p 315-334.

although the procedures provided in the two Constitutions allow the holding of a referendum under specific conditions.²³ At that time, in 2011, both Spain and Italy were under speculative attack on the financial markets with the spread between Italian and Spanish bonds compared to the German bonds rapidly increasing and thus the Euro-national austerity coalitions, with the fundamental endorsement of the ECB, considered the adoption of a balanced budget clause as a strategic move towards restoring credibility on the financial markets. Aiming to preserve national financial interests, the timing of the constitutional reforms in these two countries was so constrained that parliamentary debates almost did not take place.

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 2011.²⁴ 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 – and all substantial amendments were rejected. The overall majority of the two Chambers agreed on the reform, with the support of the socialist government and of the main opposition party, *Partido Popular*. Only some left-wing parties, like *Izquierda Unida*, showed their discontent but they were not able to reach the quorum of one tenth of MPs to hold a constitutional referendum. However, a *recurso de amparo* was brought before the Spanish *Tribunal constitucional* by some MPs from the political group of *Esquerra Republicana-Izquierda Unida-Iniciativa Per Catalunya Verds* against the constitutional amendments just passed. In particular, the *amparo*, on the one hand, sought the annulment of the parliamentary resolutions and agreements leading to the adoption of the constitutional reform through the urgency procedure and in *lectura única*; on the other, contested the use of the ordinary procedure to revise the Constitution (Article 167 instead of Article 168 Sp. Const.),²⁵ although the constitutional bill was able to impair the protection of fundamental rights and to limit the prerogatives of MPs and citizens. The *amparo* was declared inadmissible as the governing bodies of the Parliament, according to the majority of the judges, rightly applied parliamentary standing orders. The *Tribunal constitucional* simply decided not to engage with the substantive issues at stake in the *amparo*; it did not issue a judgment (*Sentencia*), but just an order of inadmissibility (*Auto*).²⁶ However, the dissenting opinions of Justice Pablo Pérez Tremps and Justice Luis Ignacio Ortega Álvarez pointed to the missed opportunity for the Court to address for the first time ever the issue of constitutionality of constitutional amendments in the Spanish democratic system, an issue of special complexity and institutional significance that would have deserved a much more careful consideration.

Although the timing was slightly more relaxed, by Italian standards the constitutional reform occurred very quickly. 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

²³ In Spain 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.). In Italy, according to Art. 138 It. Const., the condition for presenting a request for a constitutional (confirmatory) referendum by 500,000 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.

²⁴ See F. Balaguer Callejón, 'Presentación', *Revista de derecho constitucional europeo*, n. 16, 2011.

²⁵ The procedure for the total revision of the Constitution and for amending fundamental right provisions, which has never been applied since 1978, is more complex than Art. 167 Sp. Const. procedure. The constitutional revision has to be agreed twice, firstly by the Parliament in office and subsequently by the new Parliament each time by two-thirds majority of the members of each House.

²⁶ See *Auto* 9/2012, BOE no. 36/2012, 11 February 2012, p. 152.

referendum could be requested.²⁷ Indeed the then Government led by Mario Monti, in office since November 2011, was considered as a ‘government of national unity’ sustained by all political groups, from left-wing to right-wing, but for a few MPs from *Lega Nord* and *Italia dei Valori*.

Thus it can be concluded that, in very few member states where the balanced budget rule has been constitutionalized, the Euro-national austerity coalitions encountered almost no opposition in Parliament nor did citizens have the opportunity to participate in the constitutional amendment process. Parliamentary procedures went extremely fast and with little contestation, despite the crucial significance of the reforms passed for the budget and the institutional democratic role of parliaments.

Parliaments vs Governments

EU law stemming from the reform of 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), 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). 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 effectively guaranteed mainly depends on national law.

In most Member States, including 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, on the constitutional prerogatives they already had in EU affairs. Indeed, during the Eurozone crisis in Germany (Art. 23 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 than those on the budgetary process to protect the ‘right’ of the parliament to be informed by the government in the different stages of 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. 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. In other words, this has been treated by parliaments as ‘business as usual’, which in most cases has not prompted 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.

This section highlights how domestic law implementing Euro-crisis measures does not represent a way to undermine budgetary powers of parliaments towards the executives *per se*. In some cases, parliamentary powers have even been enhanced compared to the past. Rather, the application of Euro-crisis law in some Eurozone countries has been weakened by the Euro-national political dynamics and

²⁷ Recently an attempt to repeal certain provisions of Law 243/2012, implementing the new constitutional balanced budget clause in Italy, was pursued by an heterogeneous group of politicians and high officials (<http://www.referendumstopausterita.it/>). In order to hold an abrogative referendum on those provisions at least 500,000 signatures have to be collected, an objective that has not been achieved so far. Even if the abrogative referendum were finally held successfully, this would not cancel the constitutional balanced budget clause, which could be removed only through a new constitutional amendment.

by the lack of legal devices fully able to enforce parliamentary prerogatives and to preserve a role for responsible oppositions. The analysis includes the way the confidence relationship is shaped between parliaments and the executive, the loss of powers of national governments individually, the veto powers of parliaments, the duty of the executives to provide information and the scope of parliamentary scrutiny – very different when looking at the ‘unconventional’ Euro-crisis measures and to the European Semester – and the deparliamentarization of political conflicts.

Governments’ loss of powers

As well national parliaments, national governments, in particular those Eurozone countries which received financial support, also suffered from a loss of budgetary autonomy. As long as the rescue operations are underway, they are no longer independent in setting the general and specific directions of their financial and economic policies.

A series of duties falls on national executives; to fix and to comply with medium-term budgetary objectives, to consistently reduce 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 the draft budgetary plans, before they are passed by national Parliaments as the annual budgets for the next fiscal year, the approval of the Commission needs to be sought and, if so requested, the plans 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 accorded to national parliaments. 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 for decades national governments have directed and shaped these procedures (section 1).

During the Eurozone crisis not only parliaments but also many national governments have been keen to accept solutions that either they actively support – in Germany – or passively accept – in France, Italy, Portugal and Spain – to fulfill the proposed objectives of the Euro-national austerity coalitions to which national executives also belong.²⁸ Although the strength of intergovernmental institutions and bodies – European Council, Euro Summit, Euro Group – has certainly increased at supranational level,²⁹ 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 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, although some, like the German and the French governments, depending on their size and role, get some kind of political compensation at EU level. National parliaments are not the only and perhaps not the primary ‘victims’ or ‘losers’ of the Eurozone governance.

²⁸ 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’.

²⁹ See D. Curtin, ‘Challenging Executive Dominance in European Democracy’, *Modern Law Review*, vol. 77, no. 1, 2014, p. 1-32; S. Fabbrini, *Which European Union?: Europe After the Euro Crisis*, Cambridge, Cambridge University Press, 2015, p. 143-150; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford, Oxford University Press, 2015, p. 95-100; F. Fabbrini, ‘From Executive Federalism to Executive Government: Current Problems and Future Prospects in the Governance of EMU’, in F. Fabbrini, E. Hirsch Ballin, H. Somsen (eds.), *What Form of Government for the European Union and the Eurozone?*, Oxford, Hart Publishing, 2015, forthcoming.

Governmental plans overturned by parliaments

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 – with the exception of Cyprus – and to overturn governmental plans.

However, for the sake of political and financial stability during the crisis and of the normal functioning of the form of government the withdrawal of the confidence from the government has been used only as an *extrema ratio*, as a ‘nuclear option’.³⁰ The weak opposition detected in many national parliaments when dealing with Euro-crisis measures has seconded the operation of the austerity coalitions in office. The electoral defeat of a government has not prevented the new government appointed from confirming the austerity dogma of its predecessor, which in turn might remain willing to support the new executive from the outside. The Euro-national austerity coalitions have usually survived the elections.

At the peak of the Eurozone crisis 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 requested for the fulfillment of the European Semester’s obligations, rather than by adopting a proper motion of no confidence.

In Portugal, however, the Euro-national austerity coalitions had been in operation at least since 2009. The socialist minority government managed to pass the Budget Act 2010 and three austerity packages thanks to the passive support of right-wing parties (PSD and CDS-PP).³¹ It was only with the fourth austerity package that PSD withdrew its external support to the minority government, thus preventing the adoption of the Stability Pact 2011 and, given the gridlock, forcing Prime Minister José Sócrates to resign in March 2011. On 6 April 2011 the resigning Prime Minister declared the bailout and the day after he notified the European Commission, the Eurozone countries, and the IMF of the request for financial assistance, which was granted in May. The general elections for the Parliament, held on 5 June 2011, led to the defeat of the socialists (28% of the votes). The center-right Social Democratic Party (PSD) became the first party of the country (39% of the votes) and its leader, Pedro Passos Coelho, was appointed as Prime Minister on 16 June 2011. Nevertheless, the new PSD –CDS-PP coalition government which resulted from the election did not overturn the existent austerity commitment. Rather, aiming to ‘save the country’ the right-wing coalition became even more radical as for the austerity plans than the former socialist government, while the socialist parties passively supported the political economic of the Euro-national coalition until 2013. Since then the political situation has become more unstable with the socialist party not voting for the Budget Acts since 2013³² and challenging the informal alliance with PSD –CDS-PP through a motion of no confidence in March 2013. Several reshuffles took place in the executive; a sign that the Euro-national austerity coalition has gradually lost its momentum and cohesion as soon as the financial and assistance programme is completed and more stable financial conditions are restored.

³⁰ Although no formal withdrawal of confidence occurred, political instability has featured the operation of government even in France, where on 25 August 2014 President Holland asked the Prime Minister, Manuel Valls, to form a new cabinet consistent with the economic directions the President had set for the country. The reshuffle, which took place primarily because of the disagreement between the President and the then Minister of Economy, Arnaud Montebourg, according to French constitutional rules, did not involve a parliamentary vote (Art. 8 Fr. Const.).

³¹ See A. Afonso, S. Zartaloudis & Y. Papadopoulos, cit., p. 9-10.

³² According to E. De Giorgi, C. Moury & J. Pedro Ruivo, ‘Incumbents, Opposition and International Lenders: Governing Portugal in Times of Crisis’, *The Journal of Legislative Studies*, Special Issue, cit., p. 54-74, the withdrawal of the external support to the government on the part of the socialist party derived from the decision of Prime Minister Sócrates to negotiate a package of austerity measures with the Troika without consulting the socialists.

In Italy the resignation of the fourth Berlusconi government in November 2011 was linked to the financial troubles experienced by Italy, although issues of purely internal politics also played a role.³³ 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. It is worth recalling, however, that Italian symmetric bicameral system, in combination with the electoral law and with the progressive changes in the composition of the governmental coalition led the executive, in 2011, to control the majority in the Senate, but not in the Chamber of Deputies. In addition to the risk of a deadlock in the relationship between the Chamber and the Government, the then coalition became extremely divided internally, in particular regarding the direction of the political economy precisely when the spread between Italian BTP and German Bund started rising out of control.

It was in this context that, in the exercise of his prerogatives, the President of the Republic drove the transition from the fourth Berlusconi government to the Monti Government, strongly advocated for at international and European level.³⁴ The Euro-national austerity coalition played a role in the appointment of Mario Monti and in building up a widespread consensus on the need to constitutionalize the balanced budget rule and to reform labour law.³⁵ Starting from July 2011 for a few months Italy benefited from financial support through the Securities Market Programme of the ECB, which in exchange requested the Berlusconi Government – in a secreteexchange of letters, as revealed afterwards³⁶ – to implement a series of structural reforms to restore financial stability. However, the commitment to adopt these reforms was not perceived as reliable by EU institutions, in particular the ECB and the Commission.³⁷ By contrast, Mario Monti, former European Commissioner for the internal market (1995-1999) and on competition (1999-2004), as the prospective head of the new Italian executive, was seen much more aligned to the aim of the Euro-national austerity coalition, which indeed later he ‘religiously’ observed.³⁸

To some extent the sequence of events that took place in Greece at the end of 2014-beginning of 2015 can also be regarded at first glance as an example of the ability of the parliament to force the government to resign. As a matter of fact, however, the inability of the Greek Parliament to elect the new President of the Republic resulted, because of constitutional rules, not only in the resignation of the executive but also in the dissolution of the Parliament itself and a new election on 25 January 2015.³⁹ Moreover, the party obtaining the majority of the seats in the new Parliament, Syriza, was

³³ On the instability of the governmental coalition established in 2008 and on the role of the President of the Republic, see N. Lupo & G. Piccirilli, ‘Le recenti evoluzioni della forma di governo italiana: una conferma della sua natura parlamentare’, *Democrazia e diritto*, no.1-2, 2012, p. 94 ff.

³⁴ See the joint press conference of Angela Merkel and Nicolas Sarkozy on 23 October 2011, the declarations of the then President of the European Council Herman Van Rompuy on 11 November 2011 and of the Director of the IFM, Christine Lagarde on 12 November 2011.

³⁵ See M. Walker, C. Forelle & S. Meichtry, ‘Deepening Crisis Over Euro Pits Leader Against Leader’, *Wall Street Journal*, 30 December 2011, available at: <http://online.wsj.com/articles/SB10001424052970203391104577124480046463576>

³⁶ 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.

³⁷ Ivi, where the ECB considered Italy's deficit-cutting plan ‘not sufficient’.

³⁸ See M. Manetti, ‘Il governo Monti tra emergenze vere o presunte’, *Democrazia e diritto*, no. 1-2, 2012, p. 41-51.

³⁹ According to art. 32 of the Greek Constitution, the President of Greece has to be elected by the unicameral Parliament summoned in a special sitting by roll call vote by two thirds majority of MPs. If the quorum is not reached, two further ballots are allowed – the second by two thirds majority and the third by three fifth majority – at five days one from the other; after that the Parliament is dissolved and a new Parliament will proceed to the election of the President. On 29 December 2014, at the third attempt the Parliament failed again to support the candidate proposed by the Government and thus the mechanism of the automatic dissolution was triggered.

patently against the austerity policy implemented by the government and the parliament in previous legislative terms.⁴⁰ Hence the parliamentary deadlock in the election of the President brought to a defeat the then (delegitimised) Parliament. To some extent the same can be held true in the exceptional case of the Greek referendum of 5 July 2015. Both the government and parliament of that country preferred not to play their role of representative institutions and rather discharged their responsibility onto the national population by holding what has been described as an “unconstitutional and undemocratic referendum”.⁴¹

By contrast, in Cyprus, the only EU member state where a presidential form of government is in place, although the Parliament does not have the constitutional power to force the government to resign, a crucial Euro-crisis measure to rescue the financial system of the country triggered an important reaction from the Parliament.⁴² Given a serious banking crisis, on 16 March 2013 the Cypriot government obtained from the Eurogroup support for a financial assistance programme of 10 billion euro and from the IMF for a possible loan. Immediately after, the government, without any consultation with the House of Representatives, committed to adopt budgetary measures in order to raise revenues and presented to the House a bill which would have established a one-off stability levy on all bank accounts (insured and uninsured) regardless of the warning by the governor of the Central Bank of Cyprus not to withdraw money from the bank accounts up to 100,000 euro. The bill was rejected by the Parliament on 19 March 2013 and the Government was obliged to re-negotiate the package with the Eurogroup. The new scheme for a financial and assistance programme provided for fiscal downsizing and consolidation of the banking sector, privatization and structural reforms as well as for a lower levy on uninsured deposits. This time the scheme was previously debated in the House of Representatives which eventually approved by a slight majority⁴³ the law ratifying the financial assistance facility agreement and the MoU between the ESM, the Republic of Cyprus and the Central Bank of Cyprus (Art. 169.2 Cypriot Const.).

In contrast with Greece, by far the state most seriously affected by the financial crisis and whose Parliament had been already worn out by five years of strict conditionality, constitutional arrangements in Cyprus, namely the constitutional division of powers between the legislative and the executive branch, allowed the House of Representatives to overturn the deal sealed by the government at European and international level to obtain financial support without any parliamentary consultation.

This notwithstanding and despite the confidence relationship in place in other Eurozone countries, the few attempts to overturn governmental plans reported above, in Portugal and Italy for instance, confirm that Parliaments remain constitutionally entitled to decide about the tenure of the government. The Euro crisis measures do not encroach upon this parliamentary prerogative. The actual use of the threat to overturn governmental plans, however, is dependent on the political context.

⁴⁰ Previous legislative terms were likewise characterised by controversial elections and political instability. Indeed in the election of May 2012 for the first time ever 7 parties won seats in Parliament and this institutions was unable to find a majority to support a new government; as a consequence, one month later, in June 2012 new elections were held this time leading to the formation of a coalition government, subject to reshuffles in June 2013 and 2014.

⁴¹ See X. Contiades & A. Fotiadou, ‘The Greek Referendum: Unconstitutional and Undemocratic’, *Constitutional Change Through Euro-Crisis Law*, 7 July 2015, <http://eurocrisislaw.eui.eu/news/the-greek-referendum-unconstitutional-and-undemocratic-by-xenophon-contiades-and-alkmene-fotiadou/>. According to the first sentence of Art. 44 of the Greek Constitution “The President of the Republic shall by decree proclaim a referendum on crucial national matters following a resolution voted by an absolute majority of the total number of Members of Parliament, taken upon proposal of the Cabinet”.

⁴² See K. Pantazatou, Report on Cyprus, *Constitutional Change Through Euro-Crisis Law Project*, EUI Law Department, February 2014, section X.

⁴³ 29 MPs in favour and 27 against.

Parliamentary powers on ‘unconventional’ Euro-crisis measures

The ‘right’ of the national parliaments to be informed by the governments and to oversee their action in the Eurozone crisis has been affected to a different degree depending on the financial situation of the country and on the Euro-crisis measures at issue. Indeed, while parliaments have been able to adjust rather smoothly to the European Semester by using the existing procedures for their participation in EU affairs, it has been much more difficult for them to scrutinize the action of their government during the negotiation of intergovernmental agreements – the EFSF framework agreement, the Fiscal Compact and the ESM Treaty – and of rescue packages.

Intergovernmental agreements outside EU law

The rule in most Eurozone parliaments has been either fast-track procedures, or the merger in a single debate of the instrument of implementation or ratification of Euro-crisis intergovernmental agreements (outside EU law).⁴⁴ In France, for example, the act approving the amendment of Art. 136 TFEU was authorized at the same time as 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, which had been widely applied during the ‘Sarkozy era’ even before the Euro crisis, 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 convened in the event of a disagreement. Therefore the whole process was very short and the debate extremely limited, with the main opposition party, the socialists, finally abstaining. These time constraints were a response to the urgent political and economic need for France to solidify a new alliance with Germany, the real promoter of the Art. 136 TFEU amendment, and to show France’s willingness to take the lead in the ratification procedure, in contrast with the difficulties experienced in many Member States.

The French Parliament did not even examine the EFSF Framework Agreement when formally authorizing 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.⁴⁵ 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 presented 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 finance in both Chambers had to be duly informed of any loans and funding granted via the EFSF.⁴⁶ Hence the contents of the EFSF, together with the increase of the French contribution to the IMF resources were discussed in Parliament within the framework of the amending Budget Act for 2010 and within the ordinary budgetary procedures.

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.

⁴⁴ Hence although, as it has been argued (for instance, by A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, cit., p. 161-162) ‘these agreements derive their democratic credentials from national democratic process, in that they are negotiated and signed by democratically elected national executives, and are then ratified by national parliaments’, the actual role of national parliaments has been minimal.

⁴⁵ 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 I: activité juridictionnelle et consultative des juridictions administratives*, p. 145.

⁴⁶ 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.

In spite of the wide political support (PSD/CDS-PP plus the socialist party), there was criticism of 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.

In Italy the lack of information 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). As a reaction against the secret intergovernmental negotiations, according to Art. 5.1, law n. 234/2012, 'the Government promptly informs the Chambers about any initiative aimed at the conclusion of agreements with other EU member states on the creation and the strengthening of the rules of fiscal and monetary policy or capable of producing significant effects on the public finance.' Indeed, the signature of the Fiscal Compact bypassing the Parliament, in particular, resulted in a shock for the Italian Chambers.

Even in Germany, where the *Bundestag* has traditionally been protected by means of constitutional case law, the debate in Parliament was definitely subject to time constraints. The bills approving the amendment to Art. 136 TFEU and authorizing the ratification of 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 simultaneously, in June 2012. The only fierce parliamentary opposition was that of *Die Linke* that challenged the validity of these measures by means of an *Organstreit* proceeding – alongside thousands of individual complaints – before the German Constitutional Court. Here the protection of the role of parliamentary minorities fostering the debate on the 'unconventional' Euro-crisis measures, in particular the intergovernmental agreements, derives primarily from the strong role played by the Constitutional Court.

Relying on its past case law of 30 June 2009 on the Treaty of Lisbon, the *Bundesverfassungsgericht* has gradually reinforced the involvement of the *Bundestag* in the Euro-national procedures of implementation of the new economic governance.⁴⁷ 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 irredeemably 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.⁴⁸

In its judgment of 7 September 2011, on the loan agreement for Greece 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*, thus on the constitutional requirement to keep budgetary powers in the hands of the national parliament.

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

⁴⁷ See I. Pernice, 'Domestic Courts, Constitutional Constraints and European Democracy: What Solution for the Crisis?', in M. Adams, F. Fabbrini & P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Oxford, Hart Publishing, 2014, p. 297-318.

⁴⁸ See C. Tomuschat, 'The Defence of National Identity by the German Constitutional Court', in A. Sáiz Arnaiz & C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, p. 205-219.

guarantees for the EFSF led to a violation of the *Bundestag*'s power to make decisions on revenues and expenditures 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 agreement of the *Bundestag* unnecessary in order to issue guarantees. As a consequence of this judgment 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* was also informed about the government's operation on the EFSF in place of the *Bundestag* (Art. 5.7 *StabMechG*). Although the transfer of the right to be informed from the plenary to a minor parliamentary body was not found to be in violation of Art. 38.1 GG, the rights of 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 was required: the right to be informed can only be temporarily suspended for as long as the reasons for keeping the information confidential remain in place. Once they have been overcome, 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). On application for *Organstreit* proceedings brought by a minority group, Alliance 90/The Greens, the Federal Government was found to be in violation of the right of the *Bundestag* to be informed in connection with the ESM and the Euro Plus Pact. In particular, the Court acknowledged 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 but linked to European integration. According to the Court, the Government failed to provide the relevant information to the Parliament although it was the initiator of those pacts, together with France. The *Bundesverfassungsgericht* also set specific standards of quality and quantity for the information to be transmitted to the *Bundestag* so as to enable the Parliament to 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. 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 must be. The duty to inform does not include only governmental acts or documents, but also official materials of the EU institutions, international organizations, and 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 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. There is evidence, provided by the Court itself in the judgment, that the Government had information available well in advance of the closure of the negotiations and which should have been submitted to the *Bundestag*.

As a consequence of these decisions, the Act on Financial Participation in the European Stability Mechanism (*ESMFinG*) and the Law on the Pact of 2 March 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 regards the information duty of the government towards the *Bundestag*.

The subsequent decision of the Court of 12 September 2012 expressly linked the right to information to the performance of the overall budgetary responsibility by the *Bundestag*. The latter is dependent upon the former (para 215).

‘The German Bundestag cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions 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.’

On the basis of the German example and of the path traced by the German Constitutional Court since the decisions of 7 September 2011 and of 28 February 2012, which was treated as a benchmark in France, Italy, Portugal and Spain, a parliamentary assent, usually in the form of a law and in particular through the annual Budget Act, is also requested for the payment of the installments for the ESM. 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; secondly the potential veto of these parliaments of their governments, as it was discussed especially in the case of the Spanish Parliament, is unable to block the functioning of the ESM under the emergency voting procedure, given the decision-making role 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, where the decisions that would “threaten to a significant extent the economic and financial sustainability of the euro area” are not taken by unanimity but rather by qualified majority of 85% of the votes cast.⁴⁹ 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. The weakness or the strength of a Parliament in controlling the operation of the ESM relies on purely economic grounds and in particular on the share capital that each Member State has in the Fund, this being proportionate to its decision-making powers.

Rescue packages

The secrecy of the procedures and the lack of parliamentary involvement also featured in the adoption of the crucial measures of financial assistance and support. For example, the inclusion of Italy in the Securities Market Programme of the ECB was officially disclosed by the Italian Government only in late 2011. Furthermore, it was never debated by the Parliament, although, as said above (section 4.2.), it certainly affected the change of the government in 2011 and the subsequent adoption of structural reforms.⁵⁰ By the same token, only one year ago, former Prime Minister of Spain José Zapatero

⁴⁹ See C. Fasone, ‘Eurozone, non-Eurozone and “troubled asymmetries” among national parliaments in the EU. Why and to what extent this is of concern’, in *Perspectives on Federalism*, Special Issue on “The Never-Ending Reform of the EU: Another Chain in the Semi Permanent Treaty Revision Process?”, edited by Roberto Castaldi and Giuseppe Martinico, vol. 6, no. 3, 2014, p. 1-41 and A. Maatsch, ‘Asymmetries of anti-crisis measures’ approvals by national parliaments’, forthcoming in *Parliaments and parliamentary elections in Europe*, EUI Working Paper, edited by C. Fasone, D. Fromage and Z. Lefkofridi, 2015.

⁵⁰ See L. Pierdominici, ‘Legal manifestations of the emergency in national Euro-crisis law: Italy’, in *Constitutional Change Through Euro-Crisis Law*, EUI Law Working Paper series, cit., Law 2015/14, p. 7.

disclosed to the public the letter received by the ECB in August 2011 directly before the constitutional reform was adopted and whose existence he had always refused to admit to.⁵¹

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 were they involved during the negotiations. In Portugal this happened despite the fact that according to the text of the Constitution, in theory the position of the Portuguese Parliament is secured in both the budgetary process and in relation to EU affairs. For example, parliamentary authorization is requested 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 was particularly relevant in the context of the Portuguese bailout. Moreover, in theory the Portuguese Parliament is protected by the Constitution as regards its participation in EU decision-making processes and the Government must inform the Parliament ‘in good time’ about any developments in the EU integration process (Arts. 163.f and 197.i Pt. Const.). Due to the political crisis and elections in 2011, the Portuguese Assembly could not debate the Memorandum of Understanding and the Financial and Economic Assistance Programme immediately, but it did so only one year after their adoption, when the measures agreed with the Troika were included in the annual Budget Act.

Furthermore, although the Portuguese Constitutional Court has the power to review *ex ante* the compliance of international agreements with the Constitution, thus acting as a potential constraint on the conditions imposed by the austerity coalition and to protect parliamentary prerogatives, this review was deliberately avoided by the Government (Art. 278 Pt. Const.) by considering the Memorandum of Understanding (MoU) with the Troika as a political agreement formally devoid of binding effects.⁵²

By the same token, although in Spain the MoU was treated as an international treaty, the government chose to consider it as an agreement not subject to parliamentary approval before the ratification (Art. 94.2 Sp. Const.). The Spanish Parliament has only been able to debate and pass legislation implementing the measures agreed through the MoU, mainly by means of decree-laws issued by the executive and converted into law, without amendments, by the *Cortes Generales* (Art. 86 Sp. Const.).⁵³

Finally, given the extraordinary situation of the bailout from 2011 to 2014, in the Portuguese Parliament the attempt to strengthen the oversight on the implementation of the rescue package led to the use of measures that are usually not connected with 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 economic governance.⁵⁴ According to Art. 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 2011. This Committee,

⁵¹ 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.

⁵² See F. Pereira Coutinho, ‘A natureza jurídica dos memorandos da “Troika”’, *Themis*, no. 24/25, 2013, p. 147-179 and C. Kilpatrick, ‘Constitutions and social rights in times of European crisis’, ‘Legal manifestations of emergency in Spanish Euro-crisis law’, in M. Cremona & C. Kilpatrick (eds.), *Constitutional Change Through Euro-Crisis Law*, forthcoming.

⁵³ See L. Díez-Sánchez, *Legal Manifestations of the Emergency in National Euro Crisis Law: Spain*, in *Constitutional Change Through Euro-Crisis Law*, cit., Law 2015/14, p. 10-14.

⁵⁴ *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 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.*

composed of MPs from all political parties, controlled the compliance of the national measures with the Memorandum of Understanding and the correct implementation of the Memorandum by the Government. Moreover it regularly met *in camera* with the Troika's representatives during the review missions.

Parliamentary powers within the European Semester

The lack of judicial protection comparable to the one assured by the German Constitutional Court to the *Bundestag* limited the ability of some Eurozone parliaments, and particularly those of the bailout countries, to control the negotiation, ratification/application and implementation of the 'unconventional' Euro-crisis law measures as atypical sources of law that they do not usually manage⁵⁵ and whose adoption was *una tantum* or whose force is expected to exist for a limited period of time.

By way of contrast, the participation of parliaments in the European Semester, as provided by the six-pack and the two-pack, has now become routine and sees parliaments actively involved in budgetary procedures. For 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 sources of law, amendable by a special majority and integrating the standards of review by Constitutional Courts.⁵⁶ In other words, a double standard of protection of parliamentary prerogatives can be detected. As regards 'unconventional' Euro-crisis law – intergovernmental agreements and rescue packages – justified in the name of the extraordinary circumstances threatening the collapse of the Euro area, parliaments were largely bypassed and enjoyed only a limited influence during the negotiations and the initial implementation, except where a Court effectively played a counter-majoritarian role; within the European Semester, instead, parliamentary powers have been enhanced compared to the pre-crisis regime, although their actual use might be impaired when the possibility of a judicial enforcement of these powers against the government is lacking.

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).⁵⁷ By the same token, given the coordination of the budgetary 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 subjects in the two chambers in due time so as to make the transmission of information to the parliament useful and to allow the Parliament to orient the government's action (Art. 10). To this end, the procedures for parliamentary participation in EU affairs to hear Ministers before and after European meetings and parliamentary questions are also often used.

The Italian Parliament has also 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, as

⁵⁵ On the confusion created by the MoU as for their legal nature and force, for example in Greece, see A. Marketou, *Legal Manifestations of the Emergency in National Euro Crisis Law: Greece*, in *Constitutional Change Through Euro-Crisis Law*, cit., Law 2015/14, p. 3.

⁵⁶ In Italy, also at constitutional level. 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.

⁵⁷ 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.

amended, contains an *ad hoc* section on parliamentary scrutiny. Art. 4.2 promotes forms of bicameral cooperation on scrutiny of public finances and Art. 4.1. allows the chambers to orient the government in the preparation of the budgetary documents. The Italian side of the Euro-national budgetary process starts with 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 for 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 in both chambers by resolution. The Minister of Economics is heard before the relevant committees immediately after the European Council and provides the policy orientations and a debate takes place on the subsequent drafting of the stability and the national reform programmes. In practice these two programmes are examined by the Parliament before their transmission to the European Commission even though 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).⁵⁸

In Portugal, law 37/2013 – substantially modifying the *Ley de Enquadramento Orçamental* and implementing Directive 2011/85EU – has reinforced the right to information of the Parliament in the budgetary process.⁵⁹ The principle of transparency has been introduced and 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 a list of information relevant to oversee the execution of the budget (Art. 59.3 and 4) in a timely manner, every month or every three months, depending on the document, including the flow of monies 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 by the Parliament, with the Government bound to comply with this additional request for information (Art. 59.6). Moreover the Government must transmit to the Assembly any other domestic document 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). However, one of the problems that might occur, in Portugal as well as in Italy, is that there is no mechanism for ensuring the compliance of the government with its duty of information,⁶⁰ unless there are effective tools for challenging the constitutional validity of the Government's omission and the duty of information is entrenched in the Constitution.⁶¹

Similarly in Spain 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: drawing on the case law of the German Constitutional Court, if due to the lack of information available MPs are unable to perform their representative function, then the right of citizens to participate in public life is also 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 in the Constitution in favour of the *Cortes Generales* (unlike Art. 23.2 German Basic Law) nor organic law 2/2012 (*de Estabilidad Presupuestaria y Sostenibilidad Financiera*) acknowledges the right to information in favour of the Parliament. It is only Law n. 22/2013, the annual Budget Act for 2014 (*de*

⁵⁸ 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.

⁵⁹ 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.).

⁶⁰ See European Parliament, Directorate-General for Internal Policies, Economic Governance Support Unit, *Involvement of the National Parliaments in SCP and NRP – 2013 and 2014*, PE 497.743, Brussels, 1 October 2014.

⁶¹ The Portuguese Constitution acknowledges the unconstitutionality by omission, to be declared by the Constitutional Court (Art. 283 Pt. Const.), but it is the omission of legislative measures by the Parliament or by one of the regional legislative assemblies that can be challenged rather than the inability of Government to fulfill its duties.

Presupuestos Generales del Estado para el año 2014), that contains a series of provisions about the duty of information of the Government with regard to the budgetary cycle.⁶² According to organic law 2/2012, the Spanish Parliament is able to influence and to control the Government closely throughout the European Semester. The *Cortes Generales* adopt the medium term objective as well as the stability and the national reform programmes (Art. 23) and defines the stability objectives that orient the executive in drafting the budget (Art. 15). Like in France, the Spanish Parliament can use ‘classical’ instruments of scrutiny, like hearings and questions, when it deals with budgetary issues.⁶³ However, even scrutiny procedures are strongly dominated by the majority party, *Partido Popular*, which controls an overwhelming majority of the seats in both Chambers,⁶⁴ in particular through the bodies governing the plenary and the committees (*Mesas*) which decide when and how to convene meetings.

The strong party discipline and the limited procedural rights of minority groups undermine the ability of the Spanish Parliament as a whole to scrutinize the Government.⁶⁵ Also while the *Tribunal constitucional* has built upon Art. 23 Sp. Const. and the *recurso de amparo* the conditions for an effective protection of the *individual* rights of MPs, especially parliamentary immunities,⁶⁶ there is no equivalent protection of opposition and minority rights in the framework of parliamentary scrutiny and oversight.⁶⁷ Moreover the *saisine parlementaire* by a minority of fifty MPs or senators only concerns legislative acts and thus cannot be used in this framework (art. 161.1.a), Sp. Const.).

Parliaments also enjoy veto powers on their governments under national law in specific procedures provided for within the European Semester, like the power to veto the temporary deviation from the MTO in exceptional circumstances. 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 – so 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.⁶⁸

Where the absolute majority is requested for the parliamentary authorization to deviate, reaching this quorum is not a problem for legislatures where the majority party or coalition is stable and can count on a number of MPs equal to or above the absolute majority. However, it might become a problem if a minority government is in office or if the ruling coalition is not particularly cohesive, like in Italy and in Portugal. However, given the consensual spirit which has inspired the Parliaments so far in the

⁶² 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.

⁶³ See D. Fromage, *Parlement et Gouvernement espagnols: quelles relations après le Traité de Lisbonne?*, forthcoming, 2015.

⁶⁴ Out of 350 seats in the *Congreso*, there are 185 MPs from the *Partido Popular*, plus those of the *Grupo Parlamentario Mixto* (18) and of the *Grupo Parlamentario Catalán* (16), who usually vote in favour of governmental bills. In the Senate out of 266 seats, 160 senators are from the *Partido Popular*, 13 from the *Grupo Parlamentario Catalán* and 15 from the *Grupo Parlamentario Mixto*.

⁶⁵ S. Piedrafita, ‘The Spanish Parliament and EU Affairs in the Post Lisbon Treaty Era: All Change?’, *The Journal of Legislative Studies*, no. 4, 2014, p. 7.

⁶⁶ See J. García Roca, *Cargos públicos representativos. Un estudio del art. 23.2 CE*, Aranzadi, Pamplona, 1999.

⁶⁷ See I. Torres Muro, ‘Actos internos de las Cámaras y recursos de amparo’, *Revista española de derecho constitucional*, no. 12, 1984, p. 153-167.

⁶⁸ In France the occurrence of the exceptional circumstances under which a deviation from the MTO is justified is declared by the newly established independent fiscal institution – the *Haut Conseil des finances publiques* – upon governmental request. The opinion of the High Council then is transmitted to the Parliament and in the framework of the correction mechanism the Government has to propose corrective measures and to explain before the Parliament the reasons for the deviation.

implementation of the reform of the economic governance in the five countries and the serious threat posed by one of the exceptional circumstances invoked, it is unlikely that a Parliament would reject the proposal of the Government to resort to this instrument.

The rejection is also unlikely to happen because of the way these procedures are sometimes managed, with the aim to avoid or delay the parliamentary involvement in the issue. In Italy, for instance, Finance Minister Pier Carlo Padoan sent a letter to the European Commission announcing the deviation from the MTO on 16 April 2014, before seeking parliamentary authorization on the decision, as it is requested by Art. 6 Law 243/2012.⁶⁹ The Government interpreted Art. 6 as implying seeking the consent of the European Commission on the deviation first and subsequently receive a retroactive and formal authorization by the Parliament, which is deprived of a real power to endorse or veto this deviation. Against this interpretation there is little to do as, for example, the Italian Constitutional Court could hardly be asked to judge on a Government's omission, given the way proceedings are designed before the Court (Art. 134 It. Const.).

Thus it can be concluded that despite the strengthening of parliamentary prerogatives in the budgetary cycle under national law as a consequence of the setting up of the European Semester, the actual enforcement of these powers might rely on the existence of a judge, like a Constitutional Court, by whom cases of violation of parliamentary prerogative by the government can be addressed.

The (unexploited) potential of fiscal councils

In the framework of the European Semester the setting up at national level of fiscal councils can represent a positive development for national parliaments. These new institutions were designed by Directive 2011/05/EU, by the Fiscal Compact (Art. 3.2), and by the two-pack, in order to provide independent macroeconomic forecasts for the budget, to monitor fiscal performance and/or to advise the government and the parliament on fiscal policy matters.⁷⁰ Fiscal councils can become sources of independent information for parliaments to narrow the information gap between legislative and executive branches on budgetary issues. In other words, these new independent institutions could re-balance the inter-institutional relationship in favour of parliaments in a field, like that of the budgetary procedures between the national and the supranational level, where information is traditionally administered by governments with a high degree of autonomy.

However, the potential of fiscal councils has not yet been properly exploited. In Member States, like Portugal and Germany, where the fiscal councils are established within the executive branch, parliaments do not receive any direct benefit from their setting up. The Portuguese Council of Public Finance and the German Council of Economic Experts and Stability are not only devoid of a direct relationship with the parliament but they cannot be considered as truly independent institutions from the executive, under the conditions set by EU law.⁷¹

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

⁶⁹ 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

⁷⁰ 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.

⁷¹ See 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. The list of institutions that Member States report as being fiscal councils is available on the website of the European Commission: http://ec.europa.eu/economy_finance/db_indicators/fiscal_governance/independent_institutions/index_en.htm. According to this database of fiscal councils, Germany has four different fiscal independent institutions in operation, but none of them is established within the Parliament.

presided over by the first President of the Court of Auditors and four 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 economic expertise. 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.⁷² 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).⁷³

In a judgment of 2012 the French *Conseil Constitutionnel*, deciding on the *Loi organique relative à la programmation et à la gouvernance des finances publiques* that also set up the *Haut Conseil*, clearly established a connection between the enforcement of the principle of sincerity of the budget, recognised in French constitutional case law for years, and the new fiscal council:

*‘Considérant que l'article 6 de la loi organique énonce le principe de sincérité des lois de programmation des finances publiques, en précisant : « Sa sincérité s'apprécie compte tenu des informations disponibles et des prévisions qui peuvent raisonnablement en découler » ; qu'il est notamment prévu à l'article 13 que le Haut Conseil des finances publiques rend un avis sur les prévisions macroéconomiques sur lesquelles repose le projet de loi de programmation des finances publiques; que la sincérité de la loi de programmation devra être appréciée notamment en prenant en compte cet avis. [emphasis added]*⁷⁴

Since then, according to Art. 61 Fr. Const., a series of cases were brought before the *Conseil Constitutionnel* by parliamentary minorities also on these grounds, although they have never succeeded.⁷⁵ For instance, in a *saisine parlementaire* against the Social Security Financing Act for 2014, law n° 2013-1203, a minority of senators and of MPs challenged the constitutionality of that law taking into account that, according to the opinion of the *Haut Conseil*, the macroeconomic forecasts on which the Social Security Financing Act was based were not sufficiently reliable and, hence, the principle of sincerity had been violated.⁷⁶ This case could have been an opportunity for the Parliament, through its parliamentary minorities, to use independent information to scrutinize closely the 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 Social Security Financing Act would have impaired the achievement of the national objective on the expenditure for the health care insurance and the government during the legislative process tabled an amendment – which was adopted – aimed at reducing the negative impact on public expenditures. In stating this, the Constitutional Council provided a narrow reading of the *Haut Conseil*'s powers on the decisions of the government and of the impact of the fiscal council's opinions as a standard for the constitutional review of budget and financing acts.

In Spain and in Italy, in theory, fiscal councils have a 'special' relationship with parliaments. The budget office of the Spanish *Cortes General* – *Oficina Presupuestaria de las Cortes Generales* – is

⁷² The *Haut Conseil* also issues opinion on the national stability programme and on the deviation from the medium term-objective.

⁷³ See, in detail, D. Fromage, 'Le Haut Conseil des Finances Publiques: Quelles conséquences deux ans après sa création ?', forthcoming in *Revue de droit public*, 2015.

⁷⁴ *Conseil Constitutionnel*, Décision no. 2012-658 DC du 13 décembre 2012, para 19.

⁷⁵ See *Conseil Constitutionnel*, Décision no. 2013-682 DC, due 19 décembre 2013; Décisions no. 2014-698 DC and 2014-699 DC du 06 août 2014; and Décision no. 2014-707 DC du 29 décembre 2014.

⁷⁶ *Conseil Constitutionnel*, Décision no. 2013-682 DC, 19 December 2013, in particular paras 2-7.

regulated by law 37/2010 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 that is needed and in this it is at the complete disposal of the *Cortes*. According to law 37/2010 and law 22/2013 it is primarily by means of this parliamentary budget office that governmental information reaches the Chambers and is elaborated upon, 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 Ministry of Economy, the *Autoridad Independiente de Responsabilidad Fiscal* (AIRF). This authority is appointed with the consent of the Spanish Congress and provides studies, 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 and assesses the economic and fiscal programmes of the regions.

Likewise the Italian fiscal council, the parliamentary budget office established in May 2014, is closely connected with parliamentary activity. This is so on account 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 compliance with the Euro-national fiscal rules, of the trend in the public finances, 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.

In spite of the long list of competences these Italian and Spanish fiscal councils have, the lack of binding powers and of coordination with other institutions performing similar tasks, like Courts of auditors, diminish their potential to strengthen parliaments. Although the independent information flow towards parliaments has certainly grown, the effect of a deviation from fiscal councils' position is still not clear. In Spain if the recommendations issued by AIRF are disregarded by the administration to which they are addressed, the administration must give reasons for its conduct. Similarly, in case of 'significant divergence' between the Italian parliamentary budget office's assessment and that of the Government, one third of the member of the Committee on budget can 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. The uncertainty about the value of fiscal councils' opinions, like in France, or the coexistence of several fiscal councils in the same country, like in Germany, can undermine their role and authority.

At present the main effects of these provisions appear to be the creation of new avenues to hold the Government accountable on budgetary decisions, although it can take time before these fiscal councils build up a solid reputation, when they are brand new institutions, and to establish more effective and cooperative relationships with other constitutional bodies, primarily the Parliaments.

The deparliamentarization of political conflicts

As said above (section 2), the mainstream idea according to which national parliaments have been marginalized in the new economic governance stems primarily from the attitude shown by legislatures when dealing with Euro-crisis measures, first of all 'unconventional' Euro-crisis measures. Euro-crisis intergovernmental agreements and rescue packages, where their ratification was authorized by parliaments and their national measures of implementation were frequently passed by overwhelming

majorities. Indeed, the main (responsible) opposition party either supported the majority or abstained and thus became directly or indirectly part of the austerity coalitions.⁷⁷

Such wide parliamentary consensus,⁷⁸ strongly promoted by the EU institutions, on the one hand, was a sign of responsibility from the legislatures, given the seriousness of the financial crisis, to fulfil the European and international obligations taken by their governments and to please financial markets against 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.

This debate between austerity supporters and the others – with very different positions, from those advocating for Keynesian counter-cyclical policies to those claiming to withdraw from the Eurozone – was thus deparliamentarized. Dissensus arising from the implementation of Euro-crisis measures was addressed outside representative institutions, and in particular parliaments, the traditional place where political conflicts are addressed in constitutional democracies.⁷⁹ The opposition was voiced through elections, by means of new Eurosceptic and anti-system – initially also extra-parliamentary – parties/movements, and through Courts.

The parliamentary majorities in office at the beginning of the Eurozone crisis were defeated almost everywhere in the first elections – Portugal and Spain in 2011, France in 2012, Italy in 2013, with the partial exception of Germany.⁸⁰ Yet the new Governments usually have not changed the existing path towards austerity reforms, regardless of mass protests and demonstrations.⁸¹ It has been argued, for example in the Portuguese case, that the reforms of the new ruling coalition were even more radical than those of the past minority government and compared to the conditions posed by the Troika in exchange for financial assistance.⁸²

New movements and parties have grown in this context, at the opposite sides of the political spectrum, from extreme right to extreme left, and it is difficult to consider them as a unitary phenomenon. Sometimes their rise originated from purely domestic reasons. Most of these parties, however, do have some features in common, like the populist rhetoric, the attempt to overturn the role of representative institutions, and above all the contestation of austerity measures ‘imposed’ by the EU. Also, so far these movements and parties have been able to turn existent dissensus into a source for their public consensus, given the stagnation in parliaments and governments. Everywhere, from the Spanish movement of the *Indignados*, now turned into a party, *Podemos*, the French *Front National*, the Italian

⁷⁷ E. De Giorgi & C. Moury, ‘Conclusions: Great Recession, Great Cooperation?’, cit., p. 115-120.

⁷⁸ E. De Giorgi, C. Moury & J. Pedro Ruivo, ‘Incumbents, Opposition and International Lenders: Governing Portugal in Times of Crisis’, cit., p. 71 clearly highlight the different attitudes of opposition parties in Portugal: whereas traditional pro-European parties, like PSD and PS, showed a more cooperative attitude towards the executive at least until 2013, if compared to the pre-crisis period; more radical and Eurosceptic parties, like PCP and PEV, put in place a strong opposition against the governments, much more adversarial and fierce than in normal times.

⁷⁹ On the persistent inability of national parliaments and existing parties – also after the Treaty of Lisbon – to represent the ‘will of the People’ in the EU-decision making process and in the Eurozone crisis, see R. Bellamy & S. Kröger, ‘Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU’s System of Governance’, *Parliamentary Affairs*, vol. 67, no 2, 2014, p. 437-457.

⁸⁰ 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.

⁸¹ Protests against austerity measures took place in France, Greece, Italy, Portugal and Spain starting in particular from 2011. See P. Statham & H.-J. Trezz, ‘Understanding the mechanisms of EU politicization’, cit., p. 1-20. Even where the new Government, like the Greek Government led by Alexis Tsipras, claimed to overturn the austerity mainstream it could not do so fully because of the lending conditions.

⁸² See A. Afonso, S. Zartaloudis & Y. Papadopoulos, ‘How party linkages shape austerity politics’, cit., p. 10-11 and section 4.2. above.

Five Star Movement (M5S), *Alternative für Deutschland* (AfD), not to mention the Greek Syriza and even Golden Dawn⁸³ have gained increasing support when they have run for local, national or European elections.⁸⁴ They have also been given ‘merit’ to politicize, through their contestation, the EU and Euro-crisis issues at national level, something that had never taken place before.⁸⁵

Although successful, these anti-system movements and parties have not managed to bring their claims inside national parliaments in France, Germany, Portugal and Spain and thus they lead the debate in public opinion against austerity but outside domestic legislatures. The electoral systems in place, in particular the double ballot majority system and ‘corrected proportional’ electoral system, like in Germany and in Spain, so far have prevented this outcome.

Parliaments and Constitutional Courts

The dissensus against the austerity reforms and the passivity of parliaments to the ‘diktat’ of the Euro-national austerity coalitions has also been channelled, sometimes successfully, by means of constitutional complaints and challenges before courts. 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. They have also set substantial and procedural limits on the implementation of Euro-crisis measures that have affected parliamentary powers, with the effect of either strengthening or undermining these prerogatives. Indeed, depending on the case, Constitutional Courts can rule in favour of parliamentary prerogatives or the opposite; can impair parliamentary autonomy and budgetary powers.⁸⁶ However, whether the protection of parliaments really is the ultimate objective of these courts remains to be seen.

The German Constitutional Court stood as a protector of the budgetary powers of the German *Bundestag* in a series of cases since 2010 where the democratic principle has been connected to the overall budgetary responsibility of parliament.⁸⁷ This Constitutional Court, however, has taken a rather paternalistic stance towards the Parliament, even protecting the *Bundestag* against itself and its passivity, as confirmed in the latest decisions of the ‘saga’. For example, in the OMT referral of the

⁸³ On Spain, see A. M. Palau, L. Muñoz Márquez & L. Chaqués-Bonafont, ‘Government-Opposition Dynamics in Spain under the Pressure of Economic Collapse and the Debt Crisis’, *The Journal of Legislative Studies*, Special Issue, cit., p. 75-95; on Italy, see F. Bordignon & L. Ceccarini, ‘Protest and project, leader and party: normalization of the Five Star Movement’, *Contemporary Italian Politics - Special Issue: The Five-star Movement: A new political actor on the web, in the streets and on stage*, vol. 6, no. 1, 2014, p. 54-72 and F. Marangoni & L. Verzichelli, ‘From a Technocratic Solution to a Fragile Grand Coalition: The Impact of the Economic Crisis on Parliamentary Government in Italy’, *The Journal of Legislative Studies*, Special Issue, cit., p. 35-53; on Greece, see K. Gemenis & R. Nezi, ‘Government-Opposition Dynamics During the Economic Crisis in Greece’, *The Journal of Legislative Studies*, Special Issue, cit., p. 14-34.

⁸⁴ On *Podemos*, which has recently got excellent results at the local elections in May 2015, see the survey published on *El Mundo*, ‘Podemos, primera fuerza’, by Marisa Cruz, 24 November 2014; the French *Front National* obtained a good result in 2012 presidential election, managed to elect two MPs at the 2012 legislative election and at the 2014 European elections it scored as the first party in France (see P. Haski, ‘The Front National's victory reflects a failure of France's elite’, *The Guardian*, 28 May 2014); the Italian M5S, after the success in regional elections, e.g. in Sicily, in February 2013 became the second party represented in the Chamber of Deputies and the third party at the Senate; finally *Alternative für Deutschland* at the national election of 2013 scored little below the threshold of 5%, in 2014 won 7 of the 96 Germany's seats at the European Parliament, and for the first time in 2014 won seats in regional elections in Saxony, Brandenburg and Thuringia.

⁸⁵ See L. Hooghe & G. Marks, ‘A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’, *British Journal of Political Science*, vol. 39, no 1, 2009, p. 8 ff.

⁸⁶ 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’, cit., and M. Wendel, ‘Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference’, *EuConst*, vol. 10, 2014, p. 264.

⁸⁷ See, in detail, section 4.3.1.

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) towards the OMT decision of the ECB that could threaten a violation of the complainants' constitutional rights as well as the position of the German *Bundestag* invoked by the applicant in the *Organstreit* proceedings.⁸⁸ However, the judgment was not unanimous and was seen as an attempt by the Court to overstep its role. In contrast with the majority view, the dissenting opinion of Justice Lübke-Wolff claimed that to ascertain whether the federal inaction on the OMT violated the prerogatives of the *Bundestag* amounted to a violation 'of judicial competence under the principles of democracy and separation of powers'.⁸⁹

In the judgment of 18 March 2014 (BVerfG, 2 BvR 1390/12), although the Court upheld the constitutionality of the EU 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 self-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 (para 161).'⁹⁰

From this decision and even more so from the OMT reference it has become clear that the German Constitutional Court does not safeguard the budgetary powers of the *Bundestag* for the sake of protecting the Parliament as an institution, but just because it is the instrument for the exercise of the democratic powers by citizens. The *Bundesverfassungsgericht* has always considered the democratic principle and the effective representation of citizens through the *Bundestag* as a non-negotiable value embedded in the Basic Law. 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. Also, much more than the Parliament itself the German Constitutional Court has been able to address the discontent created by the Euro-crisis measures 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 Portuguese Constitutional Court.⁹¹ The Court was accused of judicial activism as it declared unconstitutional several provisions of the annual Budget Acts of 2012, which implemented the content of the Memorandum of Understanding and the Financial and Assistance

⁸⁸ See BVerfG, 2 BvR 2728/13, the first question referred for a Preliminary Ruling, §33.

⁸⁹ On this point, see in detail M. Wendel, 'Exceeding Judicial Competence, cit., p. 281.

⁹⁰ 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 (para 163).'

⁹¹ 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 n.º 353/2012 do Tribunal Constitucional*, in *Direito & política* 2012, p. 108 ff.; A. Dos Santos, C. Celorico Palma, *O Acórdão do Tribunal Constitucional n.º 353/2012 de 5 de julho: a prevalência da razão jurídica 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*, vol. 3, 2013, p. 527-544, and M. Nogueira de Brito, 'Medida e Intensidade do Controlo de Igualdade na Jurisprudência da Crise do Tribunal Constitucional', in *O Tribunal Constitucional e a Crise*, Almedina, 2014, p. 107 ff.

Programme, in particular through public wage and pension cuts. As a consequence, especially after judgment 187/2013, the Government was forced to renegotiate the terms under which the rescue package had been agreed. The Court itself was divided in the judgments on Euro-crisis measures. The most controversial decisions were taken by a 7-to-6 majority and often every judge was in the minority on one of the issues under review while at the same time being part of the majority on 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,⁹² but just for the sake of limiting 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.⁹³ 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-on-year permanent cutting of 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 stamping the decision taken by the Troika ‘in agreement’ with the national government, notwithstanding that the Government was 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 ‘the majority’ was 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 judgments of the Court were the result of a broad alliance of bodies and institutions that filed many constitutional challenges against the same Act; a sign that there was a widespread discontent with the Budget Acts. For example, judgment 187/2013 decided jointly four constitutional challenges brought before the Court by a variety of actors, the President of the Republic, parliamentary minorities, and 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.

In Italy and in Spain, by contrast, in the adjudication of the Euro-crisis law Constitutional Courts have usually maintained a deferential approach towards parliaments – and thus towards the Euro-national austerity coalitions – while at the same time they have never explicitly 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 2/2012.⁹⁴ Even in the few cases where the Spanish Constitutional Court decided on the merits, the constitutionality of the national legislation has usually been upheld and the constitutional challenge has been dismissed based on an interpretation in conformity with the Constitution.⁹⁵ When

⁹² See Portuguese Constitutional Court, judgment no 468/2014.

⁹³ 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.

⁹⁴ 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.

⁹⁵ 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*). Indeed, in judgment no 119/2014 the Constitutional Court confirmed its

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 being based on too-optimistic forecasts and thus being arbitrary was rejected by the Court (judgment 206/2013). According to the Court, 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.⁹⁶

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 declared legislation affecting pensioner and worker rights unconstitutional, for example because of its retroactive nature and its potential to negatively impact on intergenerational justice (decision 264/2012). 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, also by making reference to the political discretion which the parliament enjoys in this field.⁹⁷

Finally, in France the decisions of the Constitutional Council on Euro-crisis measures appear much more oriented towards preserving the autonomy and the political discretion of the government, regardless of their pro or anti austerity orientation, than to protect parliamentary budgetary powers. An outcome that is consistent with the French form of government and with the system of constitutional review of legislation.⁹⁸ Thus the options for the non-constitutionalization of the balanced budget clause (décision n° 2012-653), for the inclusion of the medium-term objective in ordinary legislation, specifically in the Programming Act (décisions n° 2012-658), and for the non-binding effects of the *Haut Conseil des finances publiques* (décisions n° 2013-682 and n° 2014-699), are all signals of the will to leave a wide margin of manoeuvre to the government when it comes to economic governance. Moreover, the French Constitutional Council in its decision on the organic law on the Programming and Governance of Public Finances,⁹⁹ for the implementation of the Fiscal Compact, clearly stated that the new law did not encroach upon parliamentary prerogatives in budgetary matters.¹⁰⁰

It follows that only the German and the Portuguese Constitutional Courts, for different reasons, defined limits in the implementation of Euro-crisis measures at national level and thus constrain the

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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.

⁹⁶ Spanish Constitutional Court, judgment 206/2013, para 7.

⁹⁷ See, for instance, Italian Constitutional Court, decision 10/2015. The Italian Court annulled in a few but very contested cases legislative provisions aiming to redistribute resources. It 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 as well as public workers, like judges, whose independence – the Court said – is deeply affected by the amount of allowances they get. In fact, 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 additional allowances to other social purposes. More recently, the Italian Constitutional Court has been again at the centre of the political debate for its judgment 70/2015, which considered unconstitutional the block of the pension adjustment to the inflation rate, according to decree-law 201/2011; a decision that, however, left unresolved the problem of how to cover the lump sum to return to pensioners through the public budget as a consequence of the declared unconstitutionality. See G. Monti, ‘Judgment 70/2015 of the Italian Constitutional Court: Pension Cuts’, *Constitutional Change Through Europe-Crisis Law website*, 6 May 2015.

⁹⁸ As A. Stone Sweet, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective*, OUP, 1992, p. 140-191, points out, only in a few – though significant occasions – the Constitutional Council ruled against legislation implementing governmental programmes, for instance when a new party took the power, like the socialist party under the leadership of President François Mitterand in 1981.

⁹⁹ *Loi organique n° 2012-1403 du 17 décembre 2012 relative à la programmation et à la gouvernance des finances publiques*.

¹⁰⁰ Conseil Constitutionnel, Décision n° 2012-658 DC, 13 Décembre 2012, para 12.

Euro-national austerity coalitions. While the German Court did it in the name of the democratic principle and of the budgetary responsibility of the *Bundestag*; the Portuguese Court followed a different line of reasoning, based mainly on the principle of proportional equality and of legitimate expectations without paying much attention to ‘passive virtues’ and parliamentary prerogatives.¹⁰¹

Conclusions

In the discourse surrounding the Eurozone crisis the reform of economic governance has been accused of severely undermining the budgetary autonomy of national parliaments. They have been described as the main institutional victims of the Euro-crisis law. However, this assessment neglects first of all that parliaments had already been marginalized as budgetary authorities in the EU member states well before this financial crisis, at least since the second half of the twentieth century, so that the limits to parliamentary prerogatives have not suddenly materialized solely on account of the Euro-crisis measures. Secondly, the present situation, following the reform of European economic governance, is much more variegated and nuanced than one would expect.

Is the ‘state of emergency’, triggered by the crisis and affecting parliamentary powers, leading to a (permanent) mutation of national constitutional systems whereby legislatures will be systematically undermined in their prerogatives? Only some measures adopted in the aftermath of the crisis have prompted a clear limitation of the budgetary powers of parliaments, which appears to be temporary in nature –except for the few cases of constitutionalization of the balanced budget clause – and unable to endure in the long term. Indeed, national parliaments have felt particularly uncomfortable in coping with the ‘unconventional’ sources of the Euro-crisis law, such as the Memoranda of Understanding, ESM Treaty and the Fiscal Compact. With few exceptions, parliaments were not informed about ongoing negotiations and, where involved in their approval or ratification, were forced to act under tight time constraints. Once strict conditionality has come to an end and the implementation of intergovernmental agreements has become routine at national level and translated into domestic legislation, the role of national parliaments has been gradually redeemed. As it was before the crisis in their relationship with the executive, the actual protection of parliamentary prerogatives depends a lot on the constitutional and institutional devices and procedures available for them in each Member State.

By contrast, national 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 of EU affairs. Moreover, after the six-pack and the two-pack domestic legislation has significantly strengthened the duty of information of the executive in favour of parliaments. The scrutiny and the oversight powers of parliaments have also been enhanced by legislative reforms so as to guarantee the control of the position of the government before and after its engagement at European level. Parliaments can veto some decisions, although politically this is unlikely to happen or it is used as *extrema ratio*. Moreover, in the overall assessment of parliament-government relationships, although the role of the executives collectively, through intergovernmental institutions, has been strengthened, the individual position of many national governments frequently has not been, especially in debtor countries.

Nevertheless it is the political contingency of the Euro-crisis that has often impaired the exercise of old and new parliamentary prerogatives and has instead prompted to parliamentary passivity. The rising of Euro-national austerity coalitions, composed of EU institutions and national governments, but supported also by traditional responsible oppositions, in an effort to restore credibility and stability on the financial markets and to promptly fulfill the new obligations, has secured the parliamentary

¹⁰¹ According to A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed., Binghamton-NY, Vail-Ballou Press, 1986, p. 111 ff., the ‘passive virtues’ of a Court refer to its use of legal techniques aiming to avoid the exercise of constitutional review of legislation.

approval of intergovernmental agreements and reforms by overwhelming majorities with little or no dissent. The lack of opposition and confrontation in Parliament, which is a vital element in any democratic legislature, led to a deparliamentarization of the political debate. Since anti-austerity sentiments had been raised and were widespread in the civil society they were channeled outside parliaments. The disconnect between parliaments (and governments) and people, confirmed at almost any election, favoured the creation of Eurosceptic anti-system movements and parties together with the increase of political and redistributive conflicts before Courts.

Depending on national constitutional arrangements, parliamentary passivity and the deparliamentarization of political conflicts can be limited and prevented. For example, where, like in Germany, parliamentary opposition and minorities enjoy a set of constitutional and legal prerogatives, where these minorities or individuals can access the Constitutional Court and where the electoral system avoids the representation of anti-system parties in Parliament, the powers of the Parliament as a whole are also protected.

Likewise, the role of Constitutional Courts in protecting parliaments during the crisis can make a 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 prior parliamentary consent. On the other hand, Courts can trigger a parliamentary reaction. As shown by the latest development in the German Constitutional Court's judgments, the *Bundestag* being viewed only as an instrument to safeguard the democratic principle, its passivity against illegitimate decisions of supranational institutions can be considered unconstitutional. By the same token, the case law of the Portuguese Constitutional Court, accused of judicial activism, while striking down provisions of annual Budget Acts has indirectly warned the Parliament of its disconnect with the people.

How to move beyond the current impasse? Partly, by means of national institutional reforms, usually mirroring the German model in protecting parliaments; partly the situation will evolve of itself – and there are already signals in this direction –, from an economic point of view, as the more severe stage of the bailout and of strict conditionality is over – except for Greece, whose future remains uncertain at the moment of writing – and thus a normalization of parliamentary procedure becomes feasible. Moreover, also from a political point of view, something appears to have changed and the Euro-national austerity coalitions are very gradually losing their coherence. The declarations of France and Italy aiming to adopt policies in favour of investments and growth,¹⁰² even if this implies a violation of the Stability and Growth Pact, as well as the more accommodating position towards the Greek government which they have taken during the ongoing Greek crisis, as well as the commitment of the new President of the European Commission, Jean-Claude Juncker, to ‘mobilise up to € 300 billion in additional public and private investment’ seem to confirm this trend.¹⁰³ Such a move can undermine the appeal Eurosceptic anti-system parties have had so far and can restore a more normal dialectic between majority and responsible opposition in most Eurozone countries, according to traditional right-wing and left-wing cleavages.¹⁰⁴

¹⁰² See, for instance, M. Renzi, Programme of Activities of the Italian Presidency presented before the European Parliament, 2 July 2014. [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140702+ITEMS+DOC+XML+V0//EN&language=EN#creitem13)

[//EP//TEXT+CRE+20140702+ITEMS+DOC+XML+V0//EN&language=EN#creitem13](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140702+ITEMS+DOC+XML+V0//EN&language=EN#creitem13) and, more recently, *Completing and Strengthening the EMU. Italian contribution*, May 2015, p. 4-5. On this point, see P. Lindseth, ‘Reconciling Europe and National Parliaments’, cit., p. 3-5.

¹⁰³ See J.-C. Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, Political Guidelines for the next European Commission and Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014, p. 4, http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf

¹⁰⁴ An interesting example, as for the normalization of parliamentary debates along traditional cleavages, is provided by the approval of the so-called ‘Macron Law’ in France (still pending at the moment of writing). The Law on Growth,

During the debt crisis and because of the origins of this crisis parliamentary passivity has also been triggered by the ‘assault of the supranational technocracy’ on public accounts. This technocracy forms part of the Euro-national austerity coalitions and is perceived as possessing a clear strategy to exit the crisis. The separation between lawmaking by political institutions and implementation by non-majoritarian independent institutions has been overturned at some stages of the Eurozone crisis. At present however, even if the problem of the control and accountability of the ECB has not yet been properly addressed, the regained fiscal sovereignty by most Eurozone countries has certainly limited the risk of ‘assault’ on the part of the ECB and the Troika, leading to a re-expansion of the political domain. Moreover, the potential of new fiscal councils established or reformed in the last three years, aiming to supply parliaments with independent information for a more autonomous assessment of governments’ performance, have not yet been exploited.¹⁰⁵ However, fiscal councils can potentially enhance parliamentary scrutiny and oversight and can increase the accountability of the executive by forcing it to explain publicly why it departs from the estimates and forecasts provided by the independent institution as a benchmark. The effective operation of fiscal councils, however, takes time, in order to build up a solid reputation and to establish cooperative relationships with other institutions.

All in all, after a first phase of the Euro-crisis corresponding to the adoption of intergovernmental agreements and the first rescue packages, when parliaments were sidelined in the response to the crisis, national legislatures have not seen their budgetary powers overturned compared to the pre-crisis period. Most of them have been able to move beyond parliamentary passivity triggered by the political situation and the emergency, and are gradually regaining their role. Also when looking at the implementation of the six-pack and the two-pack, national parliaments have been even granted new prerogatives in terms of scrutiny and oversight, although they have gradually started to exercise these powers whose actual protection depends primarily on domestic constitutional arrangements and national reforms. This is why, despite common trends that have been detected, after the Eurozone crisis the positions on national parliaments are definitely asymmetric, depending on Member States’ constitutional systems.

(Contd.)

Economic Activity, and Economic Equal Opportunities, which has been labeled with the name of the Minister of Economy, Emmanuel Macron, and that aimed to implement structural reforms agreed with EU institutions during the European Semester, has raised a harsh debate in Parliament with many MPs from the socialist majority complaining that the law was too libertarian. In order to let the bill passed in the National Assembly against over 3000 amendments presented, Prime Minister Manuel Valls successfully used a controversial tool which has been very rarely applied in recent times, art. 49-3 Const. procedure: the bill is considered approved unless a motion of no confidence is passed. The Senate has subsequently heavily amended the bill with a view of making it even more ‘liberal’. As a consequence a joint committee of senators and MPs from the National Assembly is now summoned to agree on the text. On this case, see in detail, R. Gabled, ‘Brussels, French Politics and the ‘Macron Law’’, post available on the *Constitutional Change Through Euro-Crisis Law website*, 31 March 2015.

¹⁰⁵ On the importance given to fiscal councils, although the Greek situation can be considered exceptional at this stage, see the Euro Summit Statement of 12 July 2015, available at <http://www.consilium.europa.eu/en/press/press-releases/2015/07/12-euro-summit-statement-greece/>, where the making of the fiscal council operational has been listed among the set of first measures to be implemented by the Greek government by 15 July 2015 before a MoU is finalised.

