Cambridge Yearbook of European Legal Studies, 17 (2015), pp. 3–35
doi:10.1017/cel.2014.1

First published online 3 March 2015

States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination

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Abstract
This article examines how the Euro-crisis and responses to it have affected the horizontal relations of power between the EU Member States. It is argued that, whereas the EU institutional system had been designed since its foundation to strike a balance between state equality and state power, the Euro-crisis and the responses to it have increasingly upset this balance. A dynamic of inter-state domination is evidenced by the intergovernmental modes of governance within the European Council, as well as by the legal reforms in salient areas such as economic assistance, financial stabilisation and banking resolution, which have entrenched asymmetries between the states. In this article, it is argued that this dynamic constitutes a worrying development, given the anti-hegemonic nature of the EU integration project, and shows how intergovernmentalism paradoxically caters for powerful Member States. The article ends by considering options for institutional reforms, cautioning against the proposal to parliamentarise the EU and emphasising the potential of a new separation-of-powers system to restore a proper balance between the Member States.

Keywords: Euro-crisis, equality, power, constitutional balance, institutional design

I. INTRODUCTION

The Euro-crisis and the responses to it have profoundly influenced the constitutional architecture of the European Union (EU). On the one hand, they have affected the vertical relations of power between the Member States and the EU, producing steady centralisation.[1] On the other hand, they have changed the relationship between the political branches and the courts, increasing the involvement of the latter in the

* Earlier versions of this paper were presented at the Conference on 'What Form of Government for the European Union and the Eurozone?' organised at Tilburg Law School on 5–6 June 2014, and at the workshop on 'Constitutions and Financial Crises' held at the World Congress of the International Association of Constitutional Law (IACL) in Oslo on 18 June 2014. I am grateful for comments received at both of these events, and for those of the editors and reviewer of CYELS.

[1] F Fabbrini, 'The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism' (2013) 36 *Boston College International & Comparative Law Review* 1.

economic and fiscal domain.[2] Yet, the Euro-crisis and the legal and political responses to it have also produced relevant constitutional implications for the horizontal relations of power between the Member States. As a Union of states and citizens, the EU has been historically designed to ensure a balance between state equality and state power. Much like other projects of federation building, the process of European integration involved the aggregation of pre-existing states with asymmetrical features, due to profound differences in the size of population, economic conditions and military might. The architects of the EU, therefore, sought to strike a compromise between the demands of the smaller states to be represented *qua* states, and the pressure of the bigger states to see their power adequately reflected into the institutional set-up. Since the foundation of the EU project, this compromise has been mirrored in a complex institutional architecture, in which no state, or group of citizens, could dominate over the others. Notwithstanding subsequent institutional transformations, the existence of a constitutional balance between the Member States has been a crucial factor for the enduring stability and legitimacy of the process of European integration.

The aim of this article is to examine how the Euro-crisis and the political and legal responses to it have undermined the horizontal balance of power between the states, striking at the heart of the anti-hegemonic values on which the EU is founded.[3] The article argues that developments in the practice of the EU institutions, as well as changes in the applicable legal framework – notably in high salience areas of Economic and Monetary Union (EMU) such as economic governance, financial assistance and banking resolution – have upset the horizontal balance of power, and entrenched the domination of some Member States over others. In particular, the increasing intergovernmentalisation of the decision-making process, with the rise of the European Council as the forum for high politics and the growing resort to international agreements outside the legal framework of the EU to implement policy decisions, have diluted the checks and balances which existed in the EU constitutional architecture to ensure a fair relation between the Member States and prevent the problem of domination. In the aftermath of the Euro-crisis, the EU seems characterised by a significant shift of power from smaller and economically weaker Member States toward larger, more prosperous ones – especially Germany.

It is argued here that the constitutional transformations that have been unleashed by the Euro-crisis and the responses to it are paradoxical. The project of European integration was launched after two bloody European civil wars to ensure that no state could impose its will over the others. The euro was created in the 1990s also as a political guarantee that a unified Germany, as the biggest state of the EU, would not

[2] F Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 *Berkeley Journal of International Law* 64.

[3] Note that this article does not examine the changing relationship between states which are part of the Eurozone and states which are outside it. On this point see JC Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press, 2011). Equally, the article does not focus on the inter-state implications of the use of enhanced cooperation. On this issue see F Fabbrini, 'Enhanced Cooperation Under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary' (2013) 40 *Legal Issues of European Integration* 197.

be captured by new hegemonic pulls. Historically, the EU institutional architecture has attempted to ensure a compromise between states' equality and states' power through a combination of supranational and intergovernmental mechanisms.[4] In fact, more than any other federalism-based arrangement world-wide, the EU has given centrality to the idea of state equality, including through intergovernmental features aimed at ensuring to every state an equal seat at the negotiating table. Yet, the Euro-crisis has faulted the idea that an intergovernmental system can be a wall defending the equality of the states, and rather revealed how, on its own, intergovernmentalism opens the door toward the domination of the more powerful states over the others. As a brief comparison with the United States (US) makes clear, a federal system endowed with mechanisms of governance and institutions independent from direct state control is better able to secure states equality and prevent horizontal imbalances. Ultimately, instead, in the world of intergovernmental politics incarnated by the European Council, the larger and richer states will wield more power than the smaller and poorer ones.

Because a balance between the Member States is essential to the legitimacy and stability of the process of European integration, this article criticises the developments that have occurred in recent years and seeks to reflect upon possible options for reform. In this article, it is argued that the emergency triggered by the Euro-crisis has taken the EU institutions and Member States in a problematic institutional direction, and a new constitutional settlement restoring a fair equilibrium between the Member States appears necessary. In this light, this article considers the recent efforts to transform the EU into a parliamentary system of government, but suggests that this development would not overcome the current imbalances between the states. Ironically, in a parliamentary system, the larger Member States would continue to wield disproportionate influence over the policy-making process, at the expense of the needs and claims of smaller Member States. Because of the sheer size of national delegations in the European Parliament, more populous Member States would enjoy an unbalanced majority. As an alternative, therefore, this article points to a new system of separation of powers for the EU, in which the democratic imperative is reconciled with a new mechanism for power and legitimation in the European Council ensuring the independence of its chief from the pressure of the bigger and more powerful Member States.

The article is structured as follows. Section II summarises in historical perspective the EU institutional balance between states' equality and states' power and explains how the Euro-crisis and its aftermath have increasingly undermined it. In particular, here I examine the institutional rise of the European Council, and the consolidation of a *directoire* within it, as evidence of the growing power of some states over others in the EU intergovernmental framework. Section III analyses the legal regime established in the context of economic governance, financial assistance and banking resolution and underlines how, in each of these cases, legal reforms accomplished

[4] S Bunse and K Nicolaïdis, 'Large versus Small States: Anti-Hegemony and the Politics of Shared Leadership' in E Jones et al (eds), *The Oxford Handbook of the European Union* (Oxford University Press, 2012) 249.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

through international agreements outside EU law have entrenched inequalities between the states based on power, size and economic performance, without introducing compensating mechanisms. Section IV critically evaluates these developments and, in light of a brief comparison with the US, argues that – paradoxically – a federal system would have been more protective of states' equality than an intergovernmental one. Section V considers the proposal to parliamentarise the EU but warns that this may have unwanted effect in maintaining an imbalance between the states. Section VI, finally, summarises and concludes by suggesting that only a new system of separated institutions sharing power can offer an alternative to the status quo.

II. THE BALANCE BETWEEN STATE EQUALITY AND STATE POWER: FOUNDATIONS AND TRANSFORMATIONS

State power is a key – albeit not the only – determinant of international relations.[5] Although state power comes in different forms, a general correlation can be detected between the territorial dimension of a country, the size of its population, and its economic, political, and military strength:[6] *ceteris paribus*, larger states are likely to be more powerful than smaller states. As a project of reconciliation between warring nations, the construction of the EU was driven by an anti-hegemonic logic: while the EU acknowledged the role of the larger states, it sought to reassure the smaller states that their voice also counted. Since the foundation of the process of European integration, maintaining a balance between state power and state equality has been regarded as a necessary condition to the stability and the legitimacy of the EU integration project.[7] To achieve this end, the EU political actors developed a practice of governance based on consensus, rather than coercion.[8] Moreover, the EU

[5] RO Keohane, *International Institutions and State Power* (Westview Press, 1989).

[6] The correlation between the size of a Member State's population and its territorial dimension are particularly remarkable in the EU. Hence, eg in the Eurozone, Germany is the first Member State in terms of population size (82 million) and the third Member State in terms of territorial dimension (356,854 km²); France is the second Member State in terms of population size (64.3 million) and the first Member State in terms of territorial dimension (550,000 km²) and Italy is the third Member State in terms of population size (60 million) and the fourth in terms of territorial dimension (301,263 km²). For the data see *EU Member Countries*, available at: http://europa.eu/about-eu/countries/member-countries/ [last accessed 18 January 2015]. In fact, factors about geography and population are also directly connected with the economic size of a Member State: eg, in 2013, Germany had the first highest GDP (equal to 3,635.959 billion USD at current prices), France the second highest (2,807.306 billion USD) and Italy the third highest GDP in the Eurozone (2,071.955 billion USD). For the data see, International Monetary Fund, *World Economic Outlook Database*, available at http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx [last accessed 18 January 2015]. Among the EU Member States who are not part of the Eurozone, the UK stands out as a state with a large population (63.4 million inhabitants), a relatively vast territory (248 527.8 km²) and one of the highest GDP (equal in 2013 to 2,523.216 billion USD at current prices). See generally A Alesina and E Spolaore, *The Size of Nations* (MIT Press, 2003) (discussing optimal size of nations).

[7] W van Gerven, *The European Union: A Polity of States and People* (Hart Publishing, 2005).

[8] A Lijphart, *Patterns of Democracy* (Yale University Press, 1999), p 42 (defining the EU as an example of consociational democracy due to the consensus-based nature of decision-making).

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

institutional architects created a complex institutional system in which the request of the smaller Member States to be represented *qua* states was reconciled with the claim of larger Member States to be represented on the basis of their size – notably, in light of their population.[9] While the EU institutional architecture has been re-adapted over time, the aim to balance state equality with state power has continued to be one of its defining features.

The Treaty of Rome of 1957 designed an original constitutional compromise. On the one hand, the Treaty of Rome weighed the number of votes in the Council of Ministers (in which the executives of the Member States were represented), and the number of seats in the Parliamentary Assembly (in which delegates of national parliaments were assembled) on the basis of the population of the states, albeit along a logic of degressive proportionality. This resulted in the bigger states having more votes (through their ministers) in the Council,[10] and more seats (through their parliamentarians) in the Assembly,[11] than the smaller Member States, although fewer votes and seats than would have been the case on the basis of a purely proportional calculation. On the other hand, however, the Treaty of Rome established the principle that the Council of Ministers would be presided by every Member State for six months on a rotating basis,[12] hence preventing any one state from taking permanent control of this institution. Moreover, it created new independent supranational institutions like the European Commission, or the Court of Justice (ECJ) – in itself an attempt to prevent power-grabs by the larger states – and established that each of them would be composed of at least one national for every Member State.[13] The independence of the European Commission, and its composition, together with the rotating presidency of the Council and the principle of degressive proportionality in the weighing of votes in the Council and apportionment of seats in the Assembly, signalled the commitment of the founding states towards the principle of state equality.

By combining intergovernmental with supranational features into a new system of governance, the compromise struck in the Treaty of Rome is reminiscent of analogous efforts to balance the needs of larger v smaller units of government in other experiments of federation building. As Paul Magnette and Kalypso Nicolaïdis have argued: 'all federal bargains to some extent rest on adopting different principles of representation for different institutions.'[14] In the case of the EU, the need to embed inter-states' relations into an institutional web that would prevent any of them from dominating the others was rooted in the historical awareness of centuries of hegemonic practice. Unsurprisingly, therefore, while the original compromise struck by

[9] See S Fabbrini, *Compound Democracies* (Oxford University Press, 2007) (defining the EU as an example of compound democracy due to the constitutionalisation of a complex institutional architecture for decision-making).

[10] Article 148 EEC.

[11] Article 138 EEC.

[12] Article 146 EEC.

[13] Article 157 EEC.

[14] P Magnette and K Nicolaïdis, *Large and Small Member States in the European Union: Reinventing the Balance* (Notre Europe, 2013), Research Paper No 25, p 30.

the Treaty of Rome was re-adapted over time, the aim to secure a constitutional balance between state power and state equality remained a guiding logic of subsequent EU institutional revisions.[15] During the 1970s, the introduction of direct election to the European Parliament[16] – in which states would be represented on the basis of their population, albeit subject to an apportionment of seats that over-represented the smaller states – was balanced by the institutionalisation of the European Council[17] – in which every state would enjoy a seat, regardless of its size. Similarly, then, the Maastricht Treaty of 1992, in creating the European Central Bank (ECB) in the road towards EMU, devised a new, federal-like compromise between the Member States adopting the euro as their currency.[18]

Given the importance of the ECB – especially in devising responses to the Euro-crisis in the course of the last few years[19] – it is useful to underline how the rules on its composition, and its decision-making process, sought to replicate in the context of EMU the delicate balance between large v small states existing in the governance of the EU. From a structural point of view, although Eurozone Member States contribute to the ECB capital pro-quota, based on a combination of their GDP and population,[20] every state, regardless of its size or economic power, is represented in the Governing Council, the main ECB decision-making body, by the governor of its central bank.[21] At the same time, the Governing Council is complemented by six additional members of the Executive Board, to be selected taking into account a number of factors,[22] and the convention has been that the larger Member States have always had at least one of their nationals among the members of the Executive Board.[23] Nevertheless, as far as decision-making is concerned, the ECB decides by majority voting, with every member of the Governing Council having one vote.[24] Moreover, in anticipation of the expansion of the number of members of the

[15] L van Middelar, *The Passage to Europe* (Yale University Press, 2013).

[16] See Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/EEC: [1976] OJ L 278/5.

[17] See Final Communiqué of the Paris Summit, 9–10 December 1974 (establishing the European Council).

[18] Compare S Martin and C Zilioli, *The Law of the European Central Bank* (Hart Publishing 2001) and S Baroncelli, *La Banca Centrale Europea: Profile Giuridici e Istituzionali: Un Confronto con il Modello Americano della Federal Reserve* (European Press Academy Publishing, 2000).

[19] T Beukers, 'The New ECB and Its Relationship with the Eurozone Member States' (2013) 50 *Common Market Law Review* 1579.

[20] Article 29(1) Statute of the ECB. [2012] OJ C 326/242.

[21] Article 10 Statute of the ECB.

[22] Article 11 Statute of the ECB.

[23] See also 'Lorenzo Bini Smaghi démissionne du directoire de la BCE', *Le Monde* 10 November 2011 (reporting how after the appointment of Mario Draghi, an Italian, to the Presidency of the ECB to replace Jean-Claude Trichet, a Frenchman, the French President Nicolas Sarkozy demanded the resignation of Lorenzo Bini Smaghi, another Italian who was at the time member of the Executive Committee, in order to create space for a new French member to be appointed within the Executive Committee).

[24] Article 10(2) Statute of the ECB.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

Governing Council as a result of the enlargement of the Eurozone, the ECB statute empowered the ECB to enact a rule that, once the governors of the national central banks sitting in the Governing Council would be more than 18, they would temporarily lose their voting rights through a rotation mechanism whereby every month voting rights are suspended for the governor of the central bank of one of the five biggest countries (Germany, France, Italy, Spain and the Netherlands), and for the governors of the central banks of three of the smaller ones.[25] With the accession of Lithuania to the Eurozone from 1 January 2015 this scenario has become the reality, with the result that once every five months, even the governor of the central bank of the largest Eurozone Member State (Germany) will not be able to vote.[26]

The process of enlargement of the EU complicated the effort to maintain an equilibrium between the states.[27] Whereas the founding Community featured three large states (West Germany, France and Italy) with roughly the same population, and three smaller states (the Benelux) with similar economic power, the entrance into the Union of 22 new members has significantly increased the number of small and medium size states, while the reunification of Germany has created a Member State unrivalled in terms of size of its population and economic might.[28] From the late 1990s, this new reality resulted in increasing debate about how to redesign the EU institutional architecture to give due weight to the claims of the smaller Member States to be represented *qua* states and the ever-more assertive demands of the larger states to see their comparatively greater power reflected into the institutional set up.[29] The Amsterdam Treaty of 1997 and the Nice Treaty of 2001 did not introduce any major institutional change, due to inter-state disagreement. In fact, as it has been claimed, 'the rift between small and big states may – in part – be to blame for the ratification crisis of the Constitutional [Treaty in 2005].'[30]

In the end, however, the Lisbon Treaty of 2009 confirmed the EU constitutional compromise.[31] On the one hand, after a long negotiation for the weighing of votes or the apportionment of seats, the Lisbon Treaty continued to allocate the seats in the Parliament along the principle of degressive proportionality, which privileges more populous states, although to a lesser degree than they would be entitled to on purely proportional terms.[32] It also introduced a principle of double-majority in the

[25] Article 10(2) ECB Statute and Decision of the ECB of 19 March 2009 amending the Rules of Procedure of the ECB, ECB/2009/5: [2009] OJ L 100/10.

[26] S Richard, 'L'entrée de la Lituanie dans la zone euro et ses consequences pour la Banque central européenne', Fondation Schuman Policy Paper No 338/2014 (explaining how the new voting mechanisms in the ECB will take off from 1 January 2015).

[27] See note 14 above, p 8.

[28] B Plechanovová, 'The Treaty of Nice and the Distribution of the Votes in the Council – Voting Power Consequences for the EU after the Oncoming Enlargement' (2003) 7 *European Integration Online Papers*.

[29] See note 14 above, p 8 (discussing the so-called 'Lilliput Syndrome' whereby larger EU Member States felt constrained by smaller states).

[30] See note 4 above, p 250.

[31] See also JC Piris, *The Treaty of Lisbon* (Cambridge University Press, 2010) p 237.

[32] Article 14(2) TEU.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

Council, setting as a threshold for the adoption of legal measures a vote by 55% of the states, representing at least 65% of the EU population.[33] On the other hand, the Lisbon Treaty maintained the rotating Presidency of the Council – allowing every state to chair the Council for six months.[34] Further, after the difficulties in the ratification of the Lisbon Treaty faced by Ireland,[35] the European Council decided to maintain the rule that every Member State was entitled to appoint a member of the European Commission – despite questions about the functionality of a college with 27 plus members.[36]

At the same time, the Lisbon Treaty – which rescued most of the institutional innovations included in the Treaty establishing a European Constitution of 2005 – also introduced an important institutional change.[37] The Lisbon Treaty formally recognised for the first time the European Council (the institution grouping the heads of state and government of the EU Member States, plus the President of the Commission) as an institution of the EU – an institution, moreover, now entrusted with the task to 'provide the Union with the necessary impetus for its development and [to] define the general political directions and priorities thereof.'[38] At the same time, the Lisbon Treaty created the post of the permanent President of the European Council.[39] Pursuant to Article 15(5) of the TEU, the President is to be elected by qualified majority by the other members of the European Council for a period of two and a half years, renewable once, and shall not hold simultaneously a national office. During the debates of the Convention on the Future of Europe of 2002–03, the proposal to create a permanent presidency had been one of the most controversial ones. Initially advanced by Convention President Giscard d'Estaing and supported by the largest Member States, the proposal to establish a permanent President of the EU railed opposition from all the smaller states, which saw in this a fundamental challenge to the fragile compromise between state power and state equality crafted since the beginning of the EU integration process.[40]

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[33] Article 16(4) TEU.

[34] Article 16(9) TEU.

[35] D Curtin, 'The Irish 'No' to the Lisbon Treaty: Ireland's Voice and Europe's Exit?' (2009) 7 *Zeitschrift für Staats- und Europawissenschaften* 31 (explaining rejection of the Lisbon Treaty in the first Irish referendum and measures paving the way towards a second, successful, referendum).

[36] Article 17(5) TEU (stating that, from 1 November 2014, the Commission shall consist of a number of members corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides otherwise). But see European Council Decision 2013/272/EU concerning the number of members of the European Commission [2013] OJ L165/98 (deciding, in light of the concern of the Irish people with respect to the Lisbon Treaty reflected in the rejection of the Treaty in a first referendum, that the Commission will continue to include one national for every Member State).

[37] Editorial Comments, 'An Ever Mighty European Council – Some Recent Institutional Developments' (2009) 46 *Common Market Law Review* 1383.

[38] Article 15 TEU.

[39] B Crum, 'Accountability and Personalisation of the European Council Presidency' (2009) 31 *European Integration* 685. See also D Curtin, *Executive Power of the European Union* (Oxford University Press, 2009).

[40] See note 14 above, p 13.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

Ultimately, the institution of the presidency made its way into the Constitutional Treaty, and later the Lisbon Treaty, but with a few correctives. At the request of the smaller states, the President was entitled to head the European Council – and not the EU as such – and was empowered to act more as a chairman of that institution – rather than as an executive leader.[41] As indicated in Article 15(6) of the TEU:

> The President of the European Council: (a) shall chair it and drive forward its work; (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council; (c) shall endeavour to facilitate cohesion and consensus within the European Council; (d) shall present a report to the European Parliament after each of the meetings of the European Council.

Moreover, the Treaty enshrined the rule that the European Council would decide by consensus, save when explicitly otherwise provided,[42] with the aim of avoiding the risks associated with centralising too much power into one person. The presidency of the European Council did not affect the system of rotating presidency of the Council of Ministers.[43] In November 2009,[44] plausibly to allay the fear of the smaller Member States,[45] the position of President of the European Council was first attributed to a Belgian, Mr Herman van Rompuy – a former Prime Minister of that country – to whom the mandate was later renewed in March 2012.[46]

The viability of the new institutional architecture designed by the Lisbon Treaty was soon tested by the Euro-crisis, which erupted almost at the time at which the Lisbon Treaty was entering into force. The Euro-crisis profoundly challenged the EU constitutional settlement. In particular, as a growing body of literature in law and political science has underlined, the European Council emerged as the leading institution in managing and coordinating policy responses to the crisis,[47] and a new forum – the Euro Summit – was created to allow heads of state and government of the Eurozone Member States to debate at the highest level EMU matters.[48] As the new centre of EU politics, the European Council became involved in 'regularly deciding concrete policy issues in core domains of EU policymaking such as

[41] P Ponzano, 'Les institutions de l'Union' in G Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant, 2007) 439, p 467 (explaining that the Convention sought to limit the powers of the President).

[42] Article 15(4) TEU.

[43] Article 16(9) TEU.

[44] European Council, press release, 19 November 2009.

[45] See note 4 above, p 265.

[46] European Council, press release, 1 March 2012, EUCO 37/12.

[47] See eg S Fabbrini, 'Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46 *Comparative Political Studies* 1003; D Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 *Modern Law Review* 1.

[48] Article 12 Fiscal Compact.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

economic governance'.[49] Although Article 15(3) of the TEU foresaw that the European Council would meet at least twice a year, in reality the European Council congressed as often as once a month, reflecting how intergovernmental decision-making became in practice 'the predominant strategy in day-to-day crisis management.'[50] The rise of the European Council as the main institutional forum for decision-making in the EU resulted in the weakening of the European Commission, and in the exclusion of the European Parliament.[51] While the European Commission continued to vest important tasks, including in implementing the decisions of the European Council, it lost its role as the EU agenda-setter.[52] At the same time, while the European Parliament was asked to vote – together with the Council – on legislation regarded as necessary to tackle the crisis, it was largely left on the side of the decision-making process as a result of the summitry at the level of the European Council.[53]

The shift in power toward an intergovernmental institution such as the European Council, in the absence of adequate counter-balances inherent in the involvement of supranational institutions such as the Commission and the European Parliament, resulted in a profound redefinition of the relations of power between the Member States. As Jonas Tallberg has explained, bargaining in the European Council is the result of several sources of power: states sources of power, institutional sources of power and personal sources of power.[54] Although, formally speaking, all heads of states or governments enjoy equal status in the European Council – every state having one representative which can authoritatively speak for its country – in reality 'differences between large and small Member States' shape power relations in the European Council.[55] In particular, aggregate states' sources of power play the most fundamental role in explaining negotiation in the European Council, with the result that large Member States can dominate the process, although institutional and individual dimensions of powers can operate to mitigate this trend. Writing before the entry into force of the Lisbon Treaty, Jonas Tallberg thus concluded that 'the European Council offers more limited institutional protection to small and medium-sized Member States. The formal equality of the Member States, as

[49] U Puetter, *The European Council – the New Center of EU Politics* (Swedish Institute for European Policy Studies, 2013), Policy Analysis No 16, p 2.

[50] D Smeets and M Zimmerman, 'Did the EU Summits Succeed in Convincing the Markets during the Recent Crisis?' (2013) 51 *Journal of Common Market Studies* 1158.

[51] For a comprehensive analysis of the relationship between the European Council and the other EU institutions see U Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford University Press, 2014).

[52] European Parliament Research Service, 'European Council Conclusions: A Rolling Check-List of Commitments to Date', study, 7 October 2014, PE 536.359 (reporting lists of actions the European Council required other EU institutions to take).

[53] C Fasone, 'European Economic Governance and Parliamentary Representation: What Place for the European Parliament?' (2014) 20 *European Law Journal* 164.

[54] J Tallberg, 'Bargaining Power in the European Council' (2008) 46 *Journal of Common Market Studies* 685.

[55] Ibid p 687.

expressed in the principle of unanimity [or consensus], is largely a procedural fiction, that helps to legitimise the outcomes of European Council bargaining.'[56]

The experience of the management of the Euro-crisis by the European Council has empirically confirmed this analysis. As underlined both in scholarly research,[57] and public debate,[58] Germany and France, the two biggest states of the EU and the Eurozone, have acquired from 2010 to 2012 a predominant role in the decision-making process, reflected in the practice – proper of a *directoire* – of holding bilateral meetings before the European Council, resulting in decisions that would be later ratified by the European Council as a whole.[59] Since 2012, attempts have been made to expand this exclusive summitry system to include Italy and Spain, the third and fourth biggest economies of the Eurozone.[60] However, the recurrent political instability of Italy and the serious economic difficulties of Spain have hampered this attempt. In fact, because of the increasing economic problems of France too, the original *directoire* between France and Germany has been step-by-step replaced by a new equilibrium, in which Germany – the most populous and most prosperous Member State of the EU and the Eurozone – has taken over as the hegemonic player in the European Council.[61] Despite the existence of a President of the European Council, its weak political legitimation and its lack of significant powers have prevented the emergence of a meaningful counter-balance within the institution itself – and the action of the European Council has largely tracked the German preferences.[62]

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[56] Ibid p 703.

[57] See eg M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-crisis' (2013) 76 *Modern Law Review* 817, and G Maris and P Sklias, 'Intergovernmentalism and the New Framework of EMU Governance', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[58] P Legrain, 'Eurozone Fiscal Colonialism', *The New York Times*, 21 April 2014 (arguing that management of the Euro-crisis has created a 'quasi-colonial relationship' between EU Member States) and S Jeffries, 'Is Germany Too Powerful for Europe?', *The Guardian*, 31 March 2013.

[59] See eg Declaration by France and Germany at Deauville Summit, 18 October 2010 (requiring that budgetary surveillance and economic policy coordination procedures should be strengthened and accelerated) and European Council Conclusions, 28–29 October 2010, EUCO 25/1/10 (endorsing reform to strengthen budgetary constraints and enhance economic governance).

[60] See eg Conference of press by Germany, France, Italy and Spain at Rome Summit, 22 June 2012 (agreeing to adopt measures in favour of growth) and European Council Conclusions, 28–29 June 2012, EUCO 76/12 (endorsing a compact for growth and jobs).

[61] W Paterson, 'The Reluctant Hegemon? Germany Moves Center Stage in the European Union' (2011) 49 *Journal of Common Market Studies* 57.

[62] The promotion of the Fiscal Compact and related policies of fiscal consolidation (ie austerity) as the main strategy to tackle the crisis is the most emblematic example of this. See Editorial, 'The Fiscal Compact and the European Constitutions: "Europe Speaking German"' (2012) 8 *European Constitutional Law Review* 1. Nevertheless, the argument advanced here should not be reversed: not *all* German economic preferences have been incorporated into EU economic policy. For instance, Germany strongly promoted the proposal of 'contractual arrangements', which aimed to bind EU Member States in fragile economic conditions to a detailed program of structural reforms in exchange for financial assistance by wealthier Member States – and the European Commission followed up on it. See Commission Communication, 'The Introduction of Convergence and Competitiveness Instrument',

In conclusion, 'although the tension between large and small countries have always been part of EU politics – a trait shared with all federal experiences'[63] – the developments occurring since the eruption of the Euro-crisis have deeply affected the constitutional balance between the Member States. The institutional system originally designed by the Treaty of Rome, and maintained by subsequent treaty revisions up to the Lisbon Treaty, sought to reconcile the principle of states' equality with the reality of states' size and power. To this end, it created a system of checks and balances in which multiple institutions, each inspired by a different logic of representation, had to share power. Nevertheless, in the aftermath of the Euro-crisis, the European Council – which the Lisbon Treaty had recognised as an official EU institution and endowed with a permanent President – emerged as the ultimate decision-making body in the EU. As Uwe Puetter has explained, the role of the European Council as the new centre of EU politics is not simply a contingent reaction to the emergency caused by the Euro-crisis: rather, it is a development that finds its roots in the design of EMU, with the decision taken at the time of the Maastricht Treaty to integrate new areas of core state sovereignty without delegating new competences to supranational authorities; and, as such, it is a development that it is here to stay.[64] Yet, the rise of the European Council significantly altered the EU institutional equilibrium, challenging the balance between state power and state equality which had characterised the EU constitutional settlement.[65]

In a context of intergovernmental governance, and in the absence of strong, legitimated institutional counter-weights, the European Council unleashed a dynamic of increasing domination by larger states. Notwithstanding the formality of consensus decision-making, the practice of governance since the eruption of the Euro-crisis strikingly revealed how the heads of states and governments of the larger Member States came to play a leading role in setting the agenda and the direction of the EU. Given the reality of the Eurozone, states' size was complemented by economic might as a threshold criterion governing inter-state relations of power within the European Council. In this situation Germany – the largest Member State of the EU, and its economic power house – inevitably became a hegemonic player in the decision making-process within the European Council, to the detriment of the other Member States. In the aftermath of the Euro-crisis, therefore, the trajectory of

(F'note continued)
20 March 2013, COM (2013) 165 final. But opposition by virtually every other EU Member State made the proposal moot. See Government of the Netherlands, press release, 'Contractual Arrangements with EU Member States Not Binding, Says Rutte', 20 December 2013, available at: http://www.government.nl/news/2013/12/20/contractual-arrangements-with-eu-member-states-not-binding-says-rutte.html [last accessed 7 August 2014] (reporting opinion of Dutch Prime Minister Mark Rutte against binding contractual arrangements imposed by the EU).

[63] See note 14 above, p 40.

[64] U Puetter, 'Europe's Deliberative Intergovernmentalism: The Role of the Council and the European Council in EU Economic Governance' (2012) 19 *Journal of European Public Policy* 161.

[65] A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, 2015), ch 6 and H Brunkhorst, 'Collective Bonapartism – Democracy in the European Crisis' (2014) 15 *German Law Journal* 1177.

inter-institutional change epitomised by the aggrandisement of the European Council opened the door to a dynamic of inter-state domination, which undermined the constitutional balance between the Member States historically at the basis of the stability and legitimacy of the process of European integration.

III. INSTITUTIONAL IMPLICATIONS WITHIN EMU

While changes in the institutional processes, with the rise of the European Council and the shift towards intergovernmental modes of governance, have upset the constitutional balance between the Member States and opened the door towards dynamics of domination of the bigger states over the others, changes in the law have ratified the increasing inequality between the Member States. The analysis of legal measures adopted in the field of economic governance, financial assistance and banking resolution shed light on this trend.[66] As I have argued elsewhere, largely as a result of the intergovernmental mode of decision-making centred on the European Council, during the Euro-crisis Member States have increasingly felt free to step outside the legal framework of the EU, and reform the architecture of EMU through international agreements.[67] As it were, these agreements negotiated under the rules of international law have crystallised the reality of power asymmetries between the Member States. This has emerged in two directions. On the one hand, a first set of legal measures has increased the powers that supranational authorities enjoy vis-à-vis *several* states only, while leaving untouched the powers retained by other states. On the other hand, a second set of legal measures has introduced for the first time in the text of the law the explicit recognition that larger, more prosperous states enjoy more power and rights than smaller, poorer ones.

The establishment of a new framework of economic adjustment for Member States in fiscal distress provides the most emblematic evidence of the first trend – namely the emergence of a difference in the way in which supranational authorities treat the Member States, based on factors such as fiscal performance and size of the economy. The Euro-crisis and the responses to it have produced an unprecedented centralization of power, shifting authority in the economic and budgetary field from the Member States to the EU institutions.[68] However, the process of centralisation has been uneven: five Member States – Greece, Ireland, Portugal, Spain and Cyprus – facing peculiar challenges in the fiscal or banking domain, entered into special programmes of economic adjustment with the EU institutions. These programmes, which were agreed upon through Memoranda of Understanding (MoU) – technically an international agreement between the Member State and the European Commission, on behalf of the pool of international lenders[69] – provided for the award of financial

[66] See generally K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), ch 4 and KA Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 *European Law Review* 601.

[67] See note 2 above.

[68] See note 1 above.

[69] P Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in F Fabbrini et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing, 2014) pp 28–9 (speaking about the shift from legislation to contract).

assistance on the condition that the concerned country implemented a set of economic reforms finalised to restore the health of the economy. Hence, the signature of a MoU empowered supranational institutions – and notably the so-called Troika: the European Commission, the ECB, and the International Monetary Fund (IMF) – to dictate economic policies in the countries under adjustment programme, in a way which they were not entitled to do vis-à-vis the other Member States.[70]

As Lina Papadopoulou emphasised with regard to Greece, the MoU contained 'measures concerning fiscal, tax, social and social security policies, such as reform of the pension schemes including pension and salary cuts, bold tax increases, including housing taxes, loosening of labour law protections, as well as deep structural reforms towards a more competitive economy and fiscal sustainability with the aim of regaining the confidence of the markets.'[71] For all practical purposes, this resulted in a complete take-over by the Troika of the economic and budgetary policy of that country – in a way which did not find correspondence with the powers exercised by supranational institutions vis-à-vis any other Member State.[72] It is questionable whether the size of Greece, besides its peculiar economic challenges, played any role in the elaboration of such a pervasive MoU. Yet, as a comparison of the MoU signed by Greece[73] and that signed by Spain[74] makes clear, the latter Member State, albeit facing a major banking crisis and skyrocketing percentages of unemployment, was able to get away with a much lighter set of supranational oversight – arguably also because Spain is, after all, the fourth biggest Member State of the Eurozone and a much more prominent player in the European Council.[75]

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[70] See also European Parliament resolution of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, P7_TA(2014)0239 (criticising the invasive role of the Troika in the EU Member States subject to an economic adjustment programme).

[71] L Papadopoulou, 'Can Constitutional Rules, even if 'Golden', Tame Greek Public Debt?' in F Fabbrini et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing, 2014) 223, p 230.

[72] See generally also D Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 667 (emphasizing capacity of the EU institutions to dictate to Member States policy reforms in a broad range of fields) and K Bush et al, 'Euro Crisis, Austerity Policy and the European Social Model: How Crisis in Southern Europe Threatens the EU's Social Dimension', Friederich Ebert Stiftung International Policy Analysis 2013 (discussing the threat that austerity policies produce on the welfare state).

[73] Greece – Memorandum of Understanding on Specific Economic Policy Conditionality, 3 May 2010, available at: http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/a8/52/57/a85257bc11624aa0a2f89a6bebea2219687ce5f0/application/pdf/EU%2BBundle2.pdf [last accessed 1 June 2014].

[74] Spain – Memorandum of Understanding on Financial-Sector Policy Conditionality, 20 July 2012, available at: http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf [last accessed 1 June 2014].

[75] See note 57 above, p 839. See also International Monetary Fund, World Economic Outlook Database, available at http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx [last accessed 7 November 2014] (reporting that in 2012 Spain had a GDP at current prices of 1,029.279 billion euro, while Greece had one of 193.347 billion euro).

The second trend – namely the recognition of explicit differences in the power enjoyed by states under new institutions designed to tackle the Euro-crisis – is instead epitomised by the Treaty establishing the European Stability Mechanism (ESM). Adopted by the Eurozone Member States in March 2012 to endow the EMU with a permanent stability mechanism to assist those countries facing fiscal difficulties, the ESM replaced previous rescue funds and established a financial firewall with a capital stock of 700 billion euros.[76] Eurozone Member States contribute to the capital of the ESM pro-quota, on the basis of the subscription by their national central banks to the capital of the ECB. Because of the ways in which the ESM is designed – with state contributions being the source of ESM funding – bigger and richer Member States transfer more money to the ESM capital.[77] As a result, states such as Germany, France and Italy, contribute a larger share of the ESM capital. As indicated in Annex I to the ESM Treaty, in fact, the contributions of Germany, France and Italy to the ESM capital amounts to respectively 27%, 20% and 17% – while, say, the contributions of tiny Member States like Malta, Estonia and Luxembourg corresponds to only 0.07%, 0.18% and 0.25% of the ESM capital. However, the ESM Treaty matches the asymmetry in financial contribution with an asymmetry in power – granting to the larger and more prosperous Member States more power of decision-making vis-à-vis the smaller and less rich ones.[78]

To begin with, Article 48 of the ESM Treaty codified the rule that the Treaty 'shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions set forth in Annex II.' This provision effectively granted to the four largest Member States of the Eurozone – Germany, France, Italy and Spain – a veto right on the ability of the ESM to start operating, since each of them hold a quota in the ESM capital of more than 10%. The idea to overcome the requirement of the unanimous consent of all the signatory parties as a condition for the entry into force of an EU-related treaty is in itself a major departure from the principle of state equality. As Carlos Closa has explained with regard to the Treaty on the Stability, Coordination, and Governance of the EMU, the so-called Fiscal Compact,[79] which also introduced a requirement of the approval by a majority of Eurozone Member States to enter into force,[80] the abandonment of unanimity breaks the possibility for outlier states to hold-out reforms for idiosyncratic reasons.[81] Yet, it is clear that in the context of the ESM, the requirement that entry into force be

[76] Article 8 ESM.

[77] Annex I ESM.

[78] See also G Napolitano, 'Il Meccanismo Europeo di Stabilità e la nuova frontiera costituzionale dell'Unione' (2012) 5 *Giornale di Diritto Amministrativo* 461.

[79] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, available at http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf [last accessed 10 May 2014].

[80] Article 14 Fiscal Compact.

[81] C Closa, *Moving Away from Unanimity: Ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* (RECON, 2011), Working Paper No 38, p 11.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

conditional on the ratification of states representing at least 90% of the ESM capital stock de facto rendered insignificant the ratification of the other then 13 smaller Member States of the Eurozone, whose aggregate contribution to the ESM capital stock amounted, in any case, to less than 10%.

Yet, while the rules on the entry into force of the ESM Treaty already entrenched the disproportionate power of the larger states, it is the governance system of the ESM that underlines more clearly how the delicate balance between states' equality and citizens' equality existing in the EU institutional system has been abandoned here in favour of bigger states' domination.[82] While the default rule is that decisions within the ESM must be adopted by unanimity, the most important decision-making procedure designed by the Treaty – the decision whether to grant financial assistance to countries facing an emergency financial shortfall[83] – grants a special power to the larger Member States. Pursuant to Article 4(3) of the ESM Treaty decisions by the Board of Governors of the ESM (the body grouping the Minister of Finances of the ESM parties) and the Board of Directors (the body grouping representatives of the ESM parties at a non-ministerial level) shall be adopted by unanimity. However:

> By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance […] would threaten the economic and financial sustainability of the euro area. The adoption of a decision […] under that emergency procedure requires a qualified majority of 85% of the votes cast.[84]

But votes are equal to the number of shares allocated in the authorised capital stock.[85] So, as a result, decisions may be adopted even without the agreement of all the Member States: yet, Germany, France, and Italy are endowed with a veto right, since no emergency decision can be taken against their will (each of them has a share of more than 15% of the ESM capital).[86]

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[82] See also F Fabbrini, 'From Fiscal Constraints to Fiscal Capacity: The Future of EMU and its Challenges', in F Fabbrini et al (eds), *The Constitutionalization of European Budgetory Constraints* (Hart Publishing, 2014), p 406.

[83] This is the most important decision-making procedure because it is the one to be adopted whenever a Member State is facing financial shortfalls which risk undermining the stability of the Eurozone. Preventing this scenario is precisely the statutory aim of the ESM. See also C Calliess, 'From Fiscal Compact to Fiscal Union? New Rules for the Eurozone' (2012) 14 *Cambridge Yearbook of European Legal Studies* 101, p 115 (stating that 'there is a danger that the emergency voting, which should rather be an exception, turns into the standard procedure'.)

[84] Article 4(4) ESM.

[85] Article 4(7) ESM.

[86] Significantly, in authorising the ratification of the ESM Treaty by the German Parliament, the German Constitutional Court was explicit in requiring that Germany takes step to ensure that its veto power be maintained in case new Member States access the ESM, and thus that the German percentage of control over the system does not decrease. See BVerfG, Case No 2 BvR 1390/12 et al, judgment (final) of 18 March 2014, para 193 (stating that 'Germany's veto position, which is required under constitutional law, will also be maintained under changing circumstances. Pursuant to Article 44 ESM Treaty, accession to the European Stability Mechanism requires a unanimous decision by the Board of

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Moreover, Article 5(7) of the ESM Treaty provides that a qualified majority of 80% of the votes/shares in the ESM capital is enough for the Board of Governors to adopt decision as far reaching as the appointment of the ESM Managing Director and the termination of its office, the adoption of by-laws for the ESM, the approval of the annual account of the ESM and the resolution of a dispute on the interpretation of the Treaty[87] – rendering Germany and France hegemonic parties in the management of the permanent stability fund for the Eurozone. Commenting on the functioning of the ESM from the perspective of a small Member States such as Estonia,[88] Carri Ginter and Raul Naritis noticed the 'evident redistribution in the balance of power within the Member States to the detriment of the smaller Member States'[89] and, while rejecting the view that each Member State ought to have a right to veto as impractical, and inconsistent with the experience of EU integration, they underlined how alternative options could have been considered for the ESM. In fact, as they argued: 'within the decision-making mechanisms of the ESM, small Member States have not just lost their 'right of veto' but, also, have relinquished a significant portion of the weight of their votes compared to those existing within the EU. In turn, the significance of the vote of the large Member States has increased. […] The current decision-making mechanisms of the EU vividly demonstrate that there are valid alternatives that allow a much gentler infringement.'[90] The example of the ECB, which was discussed above, comes to mind here.[91]

As it were, the same logic underpinning the ESM has now made its way into the legal framework of the Banking Union – a major legislative overhaul of the rules governing the supervision, resolution and deposit insurance of systemic banks across the EU.[92] In particular, the second pillar of the Banking Union devoted to the resolution of failing banks has resulted in rules akin to those applying in the context of the ESM.[93] As a starter, although the establishment of a Single Resolution

(F'note continued)

Governors […]. This enables, and if necessary requires, the Federal Government to make its approval of an application for membership contingent on an amendment of [the voting rights system within the ESM] in order to safeguard the *Bundestag*'s overall budgetary responsibility.') On this decision see also note 2 above.

[87] Article 5(7)(m) *juncto* Article 37(2) ESM Treaty.

[88] The ESM Treaty provisions which rendered Estonia's participation to the ESM effectively irrelevant were challenged before the Estonian Supreme Court. See Supreme Court of Estonia, Case 3-4-1-6-12, judgment *en banc* of 12 July 2012. In its decision, however, the Court rejected the challenge upholding the constitutionality of the ESM Treaty. On this decision see also note 2 above.

[89] C Ginter and R Naritis, 'The Perspective of a Small State to the Democratic Deficiency of the ESM' (2013) 38 *Review of Central & East European Law* 54, p 63.

[90] Ibid p 65.

[91] See text above accompanying nn 18–24.

[92] G Lo Schiavo, 'The Single Supervisory Mechanism: The New Top-Down Cooperative Supervisory Governance', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[93] F Fabbrini, 'On Banks, Courts and International Law. The Intergovernmental Agreement on the Single Resolution Fund in Context' (2014) 21 *Maastricht Journal of European & Comparative Law* 444.

Mechanism (SRM) was designed through an EU regulation,[94] the Member States of the Eurozone decided to conclude an international agreement regulating the transfer and mutualisation of contributions to the Single Resolution Fund (SRF) outside EU law.[95] In fact, even though there was no need from a legal point of view to adopt an international agreement to regulate the SRF, the German government strongly pushed for it and had it its way.[96] In its final version of May 2014, the agreement codified an ESM-style rule on the entry into force, requiring approval '[b]y signatories participating in the Single Supervisory Mechanism and in the Single Resolution Mechanism that represent no less than 90% of the aggregate of the weighted votes of all Member States participating in the Single Supervisory Mechanism and in the Single Resolution Mechanism, as determined by Protocol (No 36) on transitional provisions annexed to the TEU and the TFEU.'[97] Whereas the ESM Treaty weighted the Member States' votes in light of their financial contributions, the SRF agreement refers to the Protocol No 36 provisions on the weighing of votes in the Council, which is broadly based on Member States' population (corrected by the principle of degressive proportionality). Nevertheless, the effect of the rule is, once again, to codify a privileged position for larger states as opposed to smaller ones. As a simple mathematical calculation shows, in fact, by requiring 90% of the weighted votes of the Eurozone Member States in Council, the SRF rule grants to the four larger Eurozone Member States – Germany, France, Italy and Spain – a veto on the decision whether the SRF can enter into force.[98]

Moreover, in the functioning of the SRF, the agreement foresaw that national contributions to the SRF – which the Member States would collect as levies from the banking sector – would constitute separate national compartments of the SRF, to be mutualised only through a step-by-step process.[99] As a result of this, funding for the resolution of credit institutions must initially be derived from the national compartment of the Member State in which the resolution is taking place.[100] Those Member States

[94] 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, [2014] OJ L 225/1.

[95] See Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 21 May 2014 (hereinafter SRF Agreement) available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT [last accessed 25 May 2014].

[96] See note 93 above.

[97] Article 11(2) SRF Agreement.

[98] Article 3 Protocol No 36 (provisionally attributing to every Member State a number of weighed votes in the Council of Ministers). Because the Member States participating in the SRM are the Member States of the Eurozone, the total number of weighed votes of these 19 countries (as of 1 January 2015) is 224, meaning that at least 202 votes must be cast in favour of the SRF for it to enter into force. With 29 votes each, Germany, France and Italy, and with 27 votes Spain, are therefore necessary to reach the critical threshold.

[99] Article 4 SRF Agreement.

[100] Article 5 SRF Agreement.

which do not enjoy sufficient resources to wind down a failing bank may ask for assistance and draw on the compartments of other Member States which have not yet been mutualised.[101] Yet, when this is the case, Article 7(4) of the international agreement has introduced the power for those states to object to the transfer if:

> (a) it might require the financial means from the national compartment that corresponds to it to finance a resolution operation in the near term or if the temporary transfer would jeopardise the conduct of an ongoing resolution action within its territory; (b) the temporary transfer would take more than the 25% of its part […]; (c) it considers that the Contracting Party whose compartment benefits from the temporary transfer is not providing guarantees of refunding from national sources […].

This rule effectively vests in the wealthier states – and ultimately in Germany, as the most prosperous one in financial terms – the real decision-making power relating to the SRF.

In conclusion, the inequality between the Member States emerged in the intergovernmental practice of the European Council has spilled over into the international agreements reforming the EMU architecture, which have legally entrenched differences between the states. On the one hand, the measures adopted in the framework of programmes of economic adjustment for states under financial assistance have deepened the cleavage between states enjoying full status vis-à-vis the EU authorities, and states subject to a more invasive supranational oversight. At its height, in the case of the MoU, five Eurozone Member States have been required to surrender, albeit to different degree, their economic, budgetary, financial and arguably social policies to supranational control – while the other states have maintained more autonomy in these fields. On the other hand, international agreements adopted in the area of financial assistance and banking regulation have introduced a direct discrimination between the Member States, by codifying differences in power between larger states and smaller ones – supplemented by considerations of economic strength. Hence, the ESM and the SRM explicitly endow larger and more prosperous Member States, and especially Germany, with veto rights on the use of the funds, replacing the traditional balance between states existing in the EU institutional system with a new equilibrium in which financial might sets the rules.

While as a result of these EMU reforms the EU is today engaged in more extensive practices of inter-state redistribution than a decade before, the ways and means through which this has been achieved have challenged the anti-hegemonic logic which had underpinned the process of European integration for over half a century. Even if the EU constitutional balance had been subject to subsequent re-adaptations, the EU institutional system had always sought to secure a compromise between state equality and state power as a condition for the stability and legitimacy of the EU integration project. EMU reforms, instead, gave away with this concern. In the public debate it has often been said that this was an inevitable, and wholly justified, development. After all, say, if Germany contributes more than the other Member

[101] Article 7 SRF Agreement.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

States to the ESM fund, should it not also have more powers than the others in deciding how to use it? But this is a false problem. There was no inevitable choice in the design of a new mechanism of financial assistance through intergovernmental treaties, outside the framework of EU law. There were alternatives to entrenching the asymmetries of power between the states existing in the European Council, without foreseeing forms of checks and balances and compensating mechanisms. Other options were available – witness the compromise used in the institutional design of the ECB.[102] Yet, they were not considered. At a high price for the cohesion of the EU.

IV. THE PARADOX OF DOMINATION

The developments taking place in institutional practice, and the legal changes to the architecture of EMU, have profoundly affected the horizontal relations of power between the EU Member States. The Euro-crisis and the responses to it upset the compromise struck in the original EU constitutional bargain, and maintained through subsequent treaty revisions, between the interest of the larger states to be represented in light of their power, and those of the smaller states to be represented *qua* states. In fact, as explained above, the Euro-crisis and the responses to it produced important inter-institutional changes in the EU, epitomised by the rise of intergovernmental bodies such as the European Council. In the absence of adequate institutional counter-weights, intergovernmentalism in the EU unleashed a dynamic in which the more populous, more prosperous Member States have come to dominate over the others, as evidenced by the design of mechanisms of financial assistance and banking resolution outside EU law. As I would like to suggest, this dynamic of domination is to some extent paradoxical. Concerns over state domination informed by the tragedies of history played a major role at any turn of the process of European integration – from the 1950s in which defeated Germany and Italy were invited to join the Community of the Six on the same grounds as the others states, to the 1990s, when German reunification was consented to in exchange for the creation of the EMU, binding the destiny of Germany to that of the other states.[103]

As explained in Section II, the EU institutional architecture mirrored the anti-hegemonic nature of the European integration project. The EU never embraced the traditional international law concept of the sovereign equality of states, attributing to the larger Member States greater representation within several institutions such as the Council and the Parliament.[104] Of course, as it is well known, despite the formal international law claim of the equality of states, in the reality of international relations power heavily influences the horizontal interactions between the states,[105] and several international organisations established in the aftermath of World War II

[102] See text above accompanying nn 18–24.

[103] M Gilbert, *Surpassing Realism: The Politics of European Integration* (Rowman & Littlefield, 2003).

[104] P Eleftheriadis, 'The Standing of States in the European Union' in N Tsagourias (ed), *Transnational Constitutionalism* (Cambridge University Press, 2010).

[105] See S Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999).

have even constitutionalised the inequality between their members:[106] the United Nations (UN), for instance, gives a privileged status to five states by making them permanent members of the UN Security Council based on military power;[107] and the IMF sets up a voting system in which states count on the basis of their financial contribution to the fund.[108] Yet, as a project to restore peace on the European continent, the EU carefully avoided recognising any special status for any of its Member States. At the same time, contrary to what is the case in a purely nation-state context, the EU recognised that Member States do matter, and therefore established appropriate fora in which the representation of states *qua* state could still be secured.

From this point of view, the effort to design in the EU a complex institutional architecture able to embed concerns for states' power into a system respecting states' equality, recalls efforts in other experiences of federation building. The case of the US – the paradigmatic example of a federal system[109] – offers a good illustration. In the US, the opposition between, and the need to reconcile the interests of, the large states and small states was the most difficult problem in the constitution-making process, and was resolved in the Philadelphia Constitutional Convention of 1787 only through a grand compromise in which state equality and citizens' equality would be balanced through three different institutions of government.[110] First, the US Constitution created a Senate based on the equal representation of the states – every state having two seats, regardless of size.[111] Second, it established a House of Representatives based on degressive proportional representation of citizens – every state having a number of representatives proportional to its population, yet with every state having at least one representative regardless of size.[112] Third, it invented the Electoral College to elect the President in which every state would enjoy as many votes as the sum of its senators and representatives[113] – thus ensuring that no state could hijack the nomination process of the federal executive due to its size or power.

However, possibly because the process of European integration never wore a purely federal cloth, consistent with the hybrid nature of the EU as an in-between national and international law,[114] the push in favour of the protection of states'

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[106] E Posner and O Sykes, *Voting Rules in International Organizations* (University of Chicago Law School, 2014), Public Law and Legal Theory Working Paper No 458.

[107] Article 23 Charter of the United Nations (recognising status of permanent members of the UN Security Council to the US, the UK, France, China and the Soviet Union, now the Russian Federation).

[108] Article 12(5) Agreement of the International Monetary Fund (granting votes pro-quota).

[109] See D Halberstam, 'Federalism: Theory, Policy, Law' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).

[110] See G Wood, *The Creation of the American Republic* (Norton 1993) and J Rakove, 'The Great Compromise: Ideas, Interests and the Politics of Constitution Making' (1987) 44 *William and Mary Quarterly* 424 (discussing the grand bargain struck by the US Constitutional Convention at Philadelphia).

[111] US Constitution, Article 1, Section 3, Clause 1.

[112] US Constitution, Article 1, Section 2, Clause 3.

[113] US Constitution, Article 2, Section 1, Clause 2.

[114] R Schütze, 'On 'Federal' Ground: The European Union as an (Inter)national Phenomenon' (2009) 46 *Common Market Law Review* 1069.

equality played a larger role in the design and evolution of the EU institutional arrangement. This resulted in the creation, within the EU's system of governance, of intergovernmental bodies typical of an international organisation, rather than of a federal regime – the European Council being a particular example.[115] From a legalistic perspective, intergovernmental institutions provide the best assurance of formal states' equality. In each of these bodies, every country has a chair at the negotiating table and can consider itself on a par with the others. Nevertheless, intergovernmental institutions can be double-edged swords: in the context of quasi-diplomatic negotiations between states, power matters, and larger and more resourceful states can more easily have it their way.[116] For this reason, smaller EU Member States traditionally defended the so-called 'Community method'[117] – the default process by which law-making is accomplished in the EU, which involves the power of the Commission to propose legislation, of the Council and (in most cases) the Parliament to approve it, and (if needed) the ECJ to review it – as most protective of the horizontal balance between the states.[118]

In the aftermath of the constitutional crisis of 2005, however, national governments, including in small and medium size EU Member States, increasingly embraced the intergovernmental logic.[119] Member States agreed to formally recognise in the Lisbon Treaty the role of the European Council and accepted the creation of a permanent presidency, to be exercised separately from any other institutional mandate at the national level.[120] Because of a fear that the European Council presidency could be cannibalised by larger, more powerful states, the smaller EU Member States sought and obtained in the final version of the Lisbon

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[115] U Puetter, 'New Intergovernmentalism: The European Council and its President', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[116] This dynamic has emerged also in another intergovernmental context: that of the Eurogroup – which brings together the finance ministers of the Eurozone Member States, under the chairmanship of a semi-permanent presidency. The former President of the Eurogroup, Mr Jean-Claude Juncker, famously decided to step down from the job complaining that it was impossible for him to make decisions because of the way Germany and France were running the show. See B Parkin, 'Juncker Says Ceding Euro Job Due to Franco-German Interference', *Bloomberg News*, 30 April 2012 (reporting Mr Juncker as stating that Germany and France acted in the Eurogroup 'as if they are the only members of the group').

[117] R Dehousse, 'The Community Method at Sixty' in R Dehousse (ed), *The Community Method* (Palgrave Macmillan, 2011).

[118] See eg Prise de position des Premiers Ministres et des Ministres des Affaires étrangères du Benelux à la Convention, 21 January 2003 (affirming opposition of the Benelux countries against the Franco-German proposal of a permanent President of the European Council) cited in note 14 above, p 19.

[119] R Dehousse, '"We the States": Why the Anti-Federalists Won' in N Jabko and C Parsons (eds), *With US or Against US? European Trends in American Perspective* (Oxford University Press, 2005).

[120] See also P Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility' in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone* (Hart Publishing, 2015) (emphasising responsibility of the Member States for the current EU institutional set-up).

Treaty a number of amendments – largely reducing the powers of the President of the European Council to those of a chairman and re-affirming the principle that the European Council would operate on a consensual basis.[121] The irony of things, however, is that these innovations played *against* the interests of the smaller Member States, rather than in their favour. Ultimately, in the absence of a powerful and strongly legitimated President of the European Council, no counter-balance was available within that institution to check the power of the larger Member States. In the negotiating room of Justus Lipsius, the more populous and more prosperous Member States emerged as the dominating forces, disrupting the delicate equilibrium between the states that had been created over more than a half a century of European integration.

Which leads me to the paradox I would like to emphasise. Although inter-governmentalism has been partially justified also as an institutional arrangement which guarantees the equality of the Member States – since every state has a seat at the negotiating table – in fact this mode of governance is instead opening the door for the domination of the larger states over the others. As in the international arena, intergovernmental politics in the EU has allowed the mighty states to stake their claims. On the contrary, federal compacts that embed the corporate representation of the states in a broader institutional framework can provide a better defence against the self-aggrandisement of the larger states, even in cases where the asymmetry between the states (in power, size and population) is extreme. Hence, going back to the previous example, although the US sees the coexistence of a state such as California, with 38 million inhabitants, and a GDP that would make it the seventh world economic power,[122] together with Wyoming, of just 350,000 people and a tiny economy,[123] the former has never been able to dominate the US policy-making process at the expense of the latter, or seen its strength directly codified in greater constitutional power. As Allan Erbsen put it, in the US federal system 'state/state interactions are between entities on an equal plane of constitutional status, and are thus "horizontal"'.[124]

Needless to say, US history is ripe with inter-state confrontations – not least a Civil War – and over the course of its continuous transformations the US constitutional system has at times authorised differences in treatment between the states. Yet, these have only been tolerated on a temporary basis. Notably, the post-Civil War amendments empowered the federal Congress to enforce due process, equal

[121] See text above accompanying nn 37–46.

[122] See Center for the Continuing Study of California Economy, *California Poised to Move Up in World Economy Ranking 2013*, July 2013, available at http://www.ccsce.com/PDF/Numbers-July-2013-CA-Economy-Rankings-2012.pdf [last accessed 1 June 2014] (reporting ranking of California in global perspective).

[123] For the data see US Census Bureau, *Apportionment Population* (2010), available at http://www.census.gov/population/apportionment/files/Apportionment%20Population%202010.pdf [last accessed 1 June 2014] and US Department of Commerce Bureau of Economic Analysis, *Gross Domestic Product by States* (2013), available at http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm [last accessed 1 June 2013].

[124] A Erbsen, 'Horizontal Federalism' (2009) 93 *Minnesota Law Review* 493, p 501.

protection and voting rights principles in the de-segregated South[125] – and during the Second Reconstruction the US Congress introduced special rules that subjected states with a history of racial discrimination to enhanced federal oversight, for instance by requiring them to obtain federal approval before enacting their electoral laws.[126] In June 2013, however, in a controversial decision called *Shelby County v Holder*,[127] the US Supreme Court struck down this requirement – authorised in the 2006 renewal of the 1965 Voting Rights Act[128] – holding that the application of these rules only vis-à-vis some states, and not others, constituted a 'dramatic departure from the principle that all States enjoy equal sovereignty.'[129] In other words, the US Supreme Court found that the oversight powers that the federal government enjoyed vis-à-vis several (Southern) states were incompatible with the principle of states' equality. Whereas this decision can be faulted for failing to grasp the seriousness of the threat of disenfranchisement today (and the consequential importance of federal oversight in this field),[130] its defence of the principle of states' equality appears striking when compared with the reality of domination increasingly underpinning the EMU – from the MoU to the ESM.[131]

In conclusion, the intergovernmental turn impressed by the Euro-crisis generated a paradox of domination in the EU, in which the more populous and more prosperous Member States took on a hegemonic role.[132] Such a dynamic however has opened a deep wound in the fabric of the EU. It is certainly true that the action by the European Council, and many of the reforms adopted since 2009, have pushed the process of European integration forward, especially in the area of EMU. Yet, the erosion of the constitutional balance between the Member States has also contributed to shake at its roots the legitimacy and the stability of the EU – as evidenced by the rise of extreme, anti-system parties at the latest national and European elections.[133] By disregarding the problem of a balance between state power and state equality, the legal and institutional constellations that emerged in the aftermath of the Euro-crisis weakened one of the most essential conditions for the sustainability of the EU.[134]

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[125] W Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Harvard University Press, 1988) and S Calabresi and N Stabile, 'On Section 5 of the Fourteenth Amendment' (2009) *Pennsylvania Journal of Constitutional Law* 1431.

[126] R Valelly, *The Two Reconstructions* (Chicago University Press, 2004) and B Ackerman, *We the People: Volume 3. The Civil Rights Revolution* (Harvard University Press, 2014).

[127] *Shelby County v Holder*, 570 U.S. __ (2013).

[128] Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No 109–246.

[129] *Shelby County,* at 1 [slip opinion].

[130] F Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford University Press, 2014), p 262. See also critically, JP Stevens, 'The Court and the Right to Vote: A Dissent', 60 *New York Review of Books*, 15 August 2013, 37, p 38.

[131] See text above accompanying nn 66–102.

[132] See note 61 above.

[133] N Scicluna, 'Politicization without Democratization: How the Eurozone Crisis is Transforming EU Law and Politics' (2014) 12 *International Journal of Constitutional Law* 545 and B Crum, 'Saving the Euro at the Cost of Democracy?' (2013) 51 *Journal of Common Market Studies* 614.

[134] See note 57 above.

In a union of states and citizens like the EU, even smaller and poorer Member States (and their citizens) must feel they have a voice in the decision-making process. When some states or groups of citizens have the perception that they cannot influence the decision-making process – that is, when they feel their voice does not count – then exit becomes a realistic scenario.[135]

The unravelling of a balance between state equality and state power in the aftermath of the Euro-crisis constitutes in my view one of the greatest challenges to the future of the EU. Because of the tragic history of Europe no Member State of the EU, no matter how populous, how prosperous and how righteous, can afford to play a hegemonic role today. In a union of states and citizens, the existence of a horizontal balance between the Member States is a condition for endurance. As Paul Magnette and Kalypso Nicolaïdis put it, in the EU 'legitimacy largely depends on the trust of all constitutive parts: if some states felt that they are considered as minor elements by the larger states, their confidence would be low and the overall level of legitimacy of the EU would be undermined.'[136] In fact, although the EU institutional system has been subject to re-adaptations over time, for over 50 years securing a balance between state power and state equality has been the basis for the stability and the legitimacy of the EU integration process. The paradox of domination therefore strikes at the heart of the anti-hegemonic nature of the EU and urgently calls for institutional solutions which are able to restore a sound equilibrium between state equality and state power in the EU system of governance.

V. LOOKING AHEAD: THE PARLIAMENTARISATION OF THE EU AND ITS PROBLEMS

While the Euro-crisis has had profound implications on the EU constitutional order, another recent constitutional development in the EU which requires particular attention is the attempt to transform the EU institutional system into a form of parliamentary government. As it is well-known, in view of the May 2014 European Parliament elections, EU political groups decided to bring forward lead candidates for the post of President of the European Commission, with a commitment that the candidate of the party winning a parliamentary majority would be elected President of the Commission.[137] In making this gamble, the EU political groups were relying on the new Article 17(7) of the TEU – a provision not yet in force at the time of the 2009 elections – according to which:

> Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority,

[135] AO Hirschman, *Exit, Voice and Loyalty* (Harvard University Press, 1970) (developing a framework to explain behaviours in firms, organisations and states based on notions of exit, voice and loyalty).

[136] See note 14 above, p 31.

[137] See European Parliament Resolution, 'On the Elections to the European Parliament in 2014', 22 November 2012, P7_TA(2012)0462, §1.

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> shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members.

Following this procedure, and notwithstanding many resistances,[138] Mr Jean-Claude Juncker, the top candidate of the European People's Party (EPP) – which came in as the party with a relative majority of 29.4% of seats in the European Parliament after the May 2014 elections[139] – was eventually nominated European Commission President by the European Council in June 2014,[140] and confirmed by a vote of the Parliament's plenary in July 2014.[141]

The idea to politicise the elections of the European Parliament by linking them to the selection of the President of the European Commission had long been hailed in European circles as a way to mobilise political participation in the European public space. From this perspective, granting to EU voters the possibility to influence (indirectly) the choice of the President of the European Commission would increase EU citizens' interest in EU affairs, and contribute to overcome the democratic deficit of the EU.[142] At the same time, the efforts to link the elections of the European Parliament to the selection of the European Commission have been explained with a view to transform the EU into a fully-fledged parliamentary regime, in which the relationship between the Parliament and the Commission would constitute the fulcrum of the EU system of government.[143] As it has been suggested, the attribution to the President of the European Commission of a clear electoral mandate, and the creation of a political relationship of power and accountability between the Commission and the European Parliament, would endow the Commission with the institutional capital needed to function as the government of the EU.[144] By making the relationship between the Parliament and the Commission the centre of the EU system of governance, the process would reverse the intergovernmental slide that emerged during the Euro-crisis, and shift power back from the European Council to the Community institutions.[145]

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[138] See also D Kelemen and A Menon, 'Fight Club: When the EU's Campaign Season Ends, the Real Political Battle Will Begin', *Foreign Affairs*, 18 May 2014.

[139] European Parliament, *Result of the 2014 European Elections*, available at: http://www.results-elections2014.eu/en/election-results-2014.html [last accessed 7 August 2014].

[140] European Council Conclusions, 27 June 2014, EUCO 79/14, §25 (proposing the election of Jean-Claude Juncker with 26 heads of states and government in favour, and 2 against).

[141] European Parliament, press release, *Parliament Elects Jean-Claude Juncker as Commission President*, 15 July 2014 (reporting vote to elect Jean-Claude Juncker as Commission President with 422 votes in favour, 250 against and 47 abstained).

[142] JHH Weiler, 'European Parliament Elections 2014: Europe's Fateful Choices' (2014) 24 *European Journal of International Law* 747.

[143] S Hix, *What's Wrong with the European Union and How to Fix it?* (Polity, 2008), p 162.

[144] M Maduro, 'A New Governance for the European Union and the Euro: Democracy & Justice' report commissioned by the Constitutional Affairs Committee of the European Parliament PE 462.484 (2012).

[145] M Kumm, *What Kind of a Constitutional Crisis is Europe in and What Should be Done About It?* (WZB, 2013), Discussion Paper SP IV 2013–801, p 19.

Much debate has occurred on the efforts to parliamentarise the EU. While some have questioned the opportunity of politicising the selection of the European Commission,[146] or even challenged its legality,[147] others have raised concerns about how the process effectively unfolded in the aftermath of the May 2014 European Parliament elections, but raised hope that the process may improve over time.[148] In fact, it is not even certain whether the process followed after the May 2014 elections will be replicated in the future[149] – although it would seem difficult for the European Council to revert it.[150] In this article, I am not interested in taking a position on the question whether the politicisation of the European Commission via the elections of the Parliament can fill the democratic disconnect afflicting the EU today. Rather, I would like to advance a skeptical view of the efforts to transform the EU into a parliamentary form of government *from the perspective of the balance of power between the EU Member States*. Is the attempt to transform the EU into a parliamentary regime a positive development in restoring an equilibrium between states' equality and states' power in the EU? In my view, the answer to this question must be in the negative. Regardless of the impact of the politicisation of the Commission on EU democracy, the evolution toward a parliamentary regime is unable to restore a meaningful balance between the Member States and address the problem of domination. In fact, a parliamentary regime along the lines advocated above is liable to *deepen* the cleavage between larger and smaller states, entrenching, albeit in a different form, the asymmetry that characterises the EU Member States.

To appreciate this point one must recall the significant differences in size which exist between the EU Member States. At one extreme, Germany and France total respectively 80 and 64.3 million inhabitants, while at the opposite, Malta and Luxembourg have populations of just 419,000 and 542,000.[151] As I explained in Section II, the apportionment of the seats between the Member States in the European Parliament reflects these profound differences in states' size, by attributing to the larger Member States more seats than to the smaller Member States, albeit subject to the principle of degressive proportionality which over-represents the

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[146] A Somek, 'What is Political Union?' (2013) 14 *German Law Journal* 561.

[147] A Kocharov, 'In the Image of State: Constitutional Complexities of Engineering a European Democracy', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[148] C Antpöhler, 'Enhancing European Democracy in Times of Crisis? The Proposal to Politicize the Election of the European Commission's President', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[149] European Council Conclusions, 27 June 2014, EUCO 79/14, §27 (stating that to address the concerns of the UK 'the European Council will consider the process for the appointment of the President of the European Commission for the future, respecting the European Treaties.').

[150] D Kelemen, 'Towards a New Constitutional Architecture in the EU?', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[151] For the data see Eurostat, *European Population by Countries* (2013), available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001&plugin=1 [last accessed 1 June 2014].

smaller states. Pursuant to Article 14(2) of the TEU no Member State can have more than 96 seats in the 751-seat European Parliament, and no Member State can have fewer than six. In its well-known decision on the constitutionality of the Lisbon Treaty the German *Bundesverfassungsgericht* criticised this apportionment of seats between the Member States as inconsistent with the democratic principle of 'one head one vote', since a member of the European Parliament elected in Germany would represent roughly 12 times more citizens than a EU parliamentarian elected in Malta.[152] However, besides the fact that the decision was criticised for showing a poor understanding of how electoral representation works in non-centralised systems of government, including in Germany,[153] the German Constitutional Court essentially failed to acknowledge a simple mathematical fact: 96 is more than 6.

Taking this simple fact into account is crucial when discussing the prospect of parliamentarisation of the EU. In a parliamentary system of government – even one corrected in light of the principle of degressive proportionality – larger states count more than smaller states. While small states may still be overrepresented, their weight is too little to influence the political dynamics of a parliamentary regime. In fact, 56% of the Members of the European Parliament (MEPs) are elected in just six states: Germany, France, the United Kingdom (UK), Italy, Poland and Spain.[154] Hence, in the abstract, a majority of 376 seats in the European Parliament could be comfortably achieved just with the seats of these six biggest Member States – their seats exceeding the number of seats apportioned to the other 22 Member States all together. Of course, Article 10 of the TEU states that the European Parliament represents EU citizens, and no longer 'the peoples of the States brought together in the Community.'[155] For many years, the Parliament has endeavoured to structure itself along party-lines, rather than national-lines.[156] One of the aspirations and expectations behind the call for parliamentarisation is that state differences will become irrelevant and that European citizens will only cast their vote in light of political affiliations – recreating at the EU level a distinction between the Left and the Right.[157]

Nevertheless, differences between states still play a major role in the European Parliament. Legally speaking, MEPs are elected in state constituencies, and voters

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[152] BVerfG 123, 267 (2009) §§284–285.

[153] C Schönberger, 'Lisbon in Karlsrhue: Maastricht's Epigones at Sea' (2009) 10 *German Law Journal* 1201 (holding that the standard of democratic legitimacy set by the court 'is unable to account for federal states, including Germany'.)

[154] Calculations are based on the data on the apportionment of seats for the European Parliament elections of May 2014 available at: http://www.europarl.europa.eu/news/en/news-room/content/20130308STO06280/html/How-many-MEPs-will-each-country-get-after-European-Parliament-elections-in-2014 [last accessed 17 April 2014].

[155] Article 189 TEC.

[156] See eg S Hix and B Højland, *The Political System of the European Union*, 3rd ed (Palgrave Macmillan, 2011).

[157] See also note 148 above.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

cast their ballots on the basis of national party lists.[158] Politically speaking, despite the existence of European political parties, national considerations still influence MEPs voting behaviour within the European Parliament.[159] MEPs regularly coordinate their actions with fellow national ministers in the Council through state ambassadors in Brussels.[160] Similarly, national considerations still determine European Parliament elections, as candidates run on national platforms – and voters conceive themselves as voting for national parties.[161] In fact, notwithstanding the efforts by European political parties to overcome the national electoral focus and create a transnational political competition by advancing lead candidates for the position of Commission President, this has remained true even in the May 2014 elections. The most striking evidence of this was offered by the lead candidate for the position of President of the European Commission of the European Socialist Party (S&D): while being one of the strongest promoters of the initiative to have main European party candidates compete across the EU, Mr Martin Schultz did not hesitate to campaign in Germany by explicitly playing the card of his nationality with voters.[162]

In a union of states and citizens like the EU, in other words, the state dimension matters even in an institution such as the European Parliament.[163] Unsurprisingly, the strongest endorsements to transform the EU in a parliamentary system have come from the larger states, not from the smallest ones.[164] It is quite significant that the candidates for the post of President of the European Commission brought forward by the main political parties competing in the 2014 European elections came mostly from large Member States. As mentioned, the S&D advanced as a candidate a German, Mr Martin Schultz; the European Green Party proposed a ticket including a German and a Frenchman, Mrs Ska Keller and Mr Michel Bové; and, while it is true that the candidate of the EPP, Mr Jean-Claude Juncker, comes from (tiny) Luxembourg, it did not go unnoticed to observers that he was chosen mainly because of his ability to speak German (and French) and thus campaign directly in the largest Member States.[165] In fact, the whole process of promoting a competition between

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[158] Council Decision of 25 June and 23 September 2002, amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, 2002/772/EC, Euratom [2002] OJ L 283/1.

[159] S Piattoni, 'Is the EU a Representative Democracy? The Normative Debate and the Impact of the Euro-Crisis', in F Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015).

[160] S Novak, 'Les grand retour des Etats' (2014) 149 *Pouvoirs* 19, p 23.

[161] A Gratteri, 'Parlamento e Commissione: Il difficile equilibrio fra rappresentanza e governabilità nell'Unione Europea' (2014) *La Comunità Internazionale* 237.

[162] Martin Schultz promoted his campaign in Germany with electoral posters stating 'Nur wenn Sie Martin Schultz und die SPD whälen, kann ein Deutscher Präsident der EU-Kommission werden' [Only if you vote for Martin Schultz and the SPD can you have a German President of the EU Commission].

[163] See also S Bartolini, *Restructuring Europe* (Oxford University Press, 2005).

[164] See also note 145 above.

[165] B Romano, 'E' Juncker il candidato PPE alla Commissione Europea', *Il Sole 24 Ore*, 8 March 2014.

lead candidates for the position of President of the Commission was largely a German initiative: as it has been emphasised, '[s]omewhat tellingly, and indicating a certain unwillingness to embrace the concept in other Member States, the candidates have become known under their German name *Sptizenkandidaten* throughout the EU.'[166]

Equally, it will not be surprising to know that, following the May 2014 European Parliament elections, the chairmanships of 19 out of 22 committees that compose the European Parliament have been assigned to parliamentarians elected in the six largest Member States. As the European Parliament reported, five chairmanships of parliamentary committees have been attributed to MEPs elected in Germany, four to MEPs elected in Poland, three to MEPs elected in Italy, three to MEPs elected in the UK, two to MEPs elected in France and two to MEPs elected in Spain – while the three remaining committees will be chaired by an MEP elected in Bulgaria, an MEP elected in Sweden and an MEP elected in the Czech Republic.[167] Moreover, the whips of the three largest parliamentary groups come from three large states. Mr Manfred Weber, who is the whip of EPP, is German; Mr Gianni Pittella, who leads the S&D is Italian, and Mr Syed Kamall, of the European Conservative and Reformists, is British. In the end, in light of the preoccupation raised by the German *Bundesverfassungsgericht* that the principle of degressive proportionality may undermine Germany's representation within the European Parliament, it is worth emphasising that the President of the European Parliament, Mr Martin Schultz, is German – as is the Secretary General of the European Parliament, Mr Klaus Welle.

Let me be very clear on this point: in itself there is nothing wrong in the fact that many Germans (or for that matter, Italians or Poles) play important roles in the European Parliament. This is a normal consequence of population size. In the US, for instance, it is fairly common that in the House of Representatives delegates elected in California or Texas – the two largest states – occupy many leadership positions.[168] But precisely the example of the US helps make the point. In the US system of government, the House of Representatives is *just one* of the institutions governing the nation. While in the House of Representatives it is fairly normal that (representatives from) larger states have a greater say than smaller ones, this advantage is counter-balanced by the existence of the Senate (in which states have equal representation) and of the President (who must be elected through a process in which the support of smaller states is also necessary). This is what makes the proposal to make the European Parliament the centre of the EU institutional system problematic from the point of view of the balance between the EU

[166] Editorial Comments, 'After the European Elections: Parliamentary Games and Gambles' (2014) 51 *Common Market Law Review* 1047, p 1048.

[167] European Parliament, press release, *Members Elect Chairs and Vice-chairs of Parliamentary Committees*, 8 July 2014.

[168] D Willis, 'In New Congress, House Committees Will Carry a Strong Texas Accent', *The New York Times*, 26 December 2014 (reporting how, in the 114th Congress from 2015–16, representatives elected in Texas, which is the second largest US state, will assume the leadership of six out of 21 Committees in the House of Representatives and indicating that, among others, representatives from California, the largest US state, held five committees, and the speakership, in the 111th Congress, from 2009–10).

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Member States. The asymmetry in population between the EU Member States – and therefore the different degree of influence they can exercise within the European Parliament – raise serious concerns about the suitability of a parliamentary system of government to provide an acceptable constitutional framework on which to ground the functioning of the EU. Certainly, in a parliamentary regime, states would count on the basis of their population, rather than of their economic might, which is certainly more acceptable in democratic terms.[169] But, to put it bluntly: what would be the interest for smaller Member States to be part of a union in which decisions are taken via a game they cannot influence?

Section IV emphasised how the success of a federal bargain lies in its capacity to balance the demands of the smaller states to be represented *qua* states and the requests of the larger states to see their power reflected into the institutional set-up. Contrary to the traditional international law claim of the sovereign equality of states, the EU must confer a particular weight on larger states. Yet, contrary to a unitary nation state, the EU must also secure that in some form all Member States have the same status. Hence, the complex institutional system designed since the Treaty of Rome, in which multiple checks and balances made sure that no group of states, or citizens, could systematically dominate over the others in the decision-making process. It is from this concept of institutional design that any new effort to revise the architecture of EU, and restore a healthy horizontal balance between the Member States in the aftermath of the Euro-crisis, must start. Whereas a transition toward a parliamentary regime would vest governmental function in a single institution, in which the power of size ultimately prevails, a union of states and citizens characterised by significant asymmetries such as the EU can only prosper in an institutional regime in which separated institutions, each reflecting different logics of representation, share the power.[170] Only a system of separation of powers can make sure that the interests of all parties to the federal compact are taken into account, through the requirement of multiple majorities.

While the rise of the European Council produced a dynamic of inter-state domination – because in an intergovernmental setting larger states have been able to exploit their relative power to the detriment of smaller ones – a transition to a parliamentary system would entrench the domination of larger states over smaller ones, although for very different reasons. Given the profound asymmetries that characterise the Member States, the EU cannot afford to be governed by a single institution – be it a congress of heads of state or government, or a parliamentary assembly giving its confidence to the executive. If the EU is to live up to the anti-hegemonic logic which inspired its foundation, and guided its transformations through several rounds of institutional reforms, its system of government must be constituted on multiple institutions, each reflecting a different logic of representation, sharing power. Although the European Parliament ought to have a crucial

[169] See text above accompanying nn 66–102.

[170] See also S Fabbrini, *Which European Union? Europe after the Euro Crisis* (Cambridge University Press, 2015) (making the case in favour of a new constitutional settlement in the EU based on separation of powers).

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press

role in checking and balancing the European Council, the resolution of the inter-state imbalances that emerged in the aftermath of the Euro-crisis will not come through a parliamentarisation of the EU. During the European Constitutional Convention, ideas were advanced to strengthen the authority and legitimacy of the President of the European Council as a way to tame the power of the bigger Member States within that institution.[171] I have discussed these proposals further elsewhere, as well as the challenges that arise along that road.[172]

VI. CONCLUSION

This article has analysed the constitutional implications of the Euro-crisis, and of the responses to it, for the horizontal balance of powers between the Member States. As I have explained, the EU institutional system had been characterised since the founding by the attempt to strike a balance between state power and state equality. Subsequent treaty revisions, up to the Lisbon Treaty, had updated but maintained this balance through a complex institutional architecture. However, since the beginning of the Euro-crisis the European Council has emerged as the leading institution in devising the strategy to reform the EMU, outside any checks and balances from other bodies. Yet, within the European Council, the bigger Member States – and especially Germany – have found limited restraints on the exercise of their political and economic power – and have been able to take over the decision-making process in a way which has upset the original balance between large and small Member States. The institutional implications of the domination by larger states have been reflected in the legal measures adopted in the area of economic adjustment, financial stabilisation, and banking resolution. For the first time, supranational rules have introduced into the field of EMU different treatments for the EU Member States, and entrenched different powers for them, mainly on the basis of their economic might.

As I have argued in the light of a brief comparison with the US federal system, the developments occurring in the EU constitutional system are paradoxical. Not only was the EU established as an anti-hegemonic project, but its institutional system traditionally gave more weight to states' equality than a fully-fledged federal system. Yet, in the US, despite the strong asymmetries in economic might and size of the population between the states, a balance has been maintained between the states through a complex system of separated institutions sharing power. In contrast, in the EU, the rise of intergovernmental modes of decision-making premised on the idea of 'one-state-one-vote' have opened the door towards the domination of larger, richer states over their smaller, economically weaker sisters. As I have suggested, the

[171] See eg G Papandreou, Foreign Minister of Greece, contribution to the debate of the European Convention, amendment No 43 (suggesting the direct election of the President of the European Council and explaining that this would 'contribute to the substantial equality of the Member States.') in Convention Secretariat, Summary sheet of proposals for amendments, 9 May 2003, CONV 709/03.

[172] F Fabbrini, 'Austerity, the European Council and the Institutional Future of the EU: A Proposal to Strengthen the Presidency of the European Council' (in press) 22 *Indiana Journal of Global Legal Studies*.

paradox of domination constitutes a serious problem for the stability and legitimacy of the EU. Yet, the proposal to solve this situation by pushing the EU toward a parliamentary system of government would be unable to restore a horizontal balance of power between the Member States. The challenge for constitution-amenders in the EU is to design a new institutional settlement which is able to prevent in the future the worrisome picture depicted by Thucydides, according to whom 'the strong do what they can and the weak suffer what they must.'[173]

[173] Thucydides, *The Peloponnesian War* (TE Wick ed, Modern Library, 1982), p 351.

https://doi.org/10.1017/cel.2014.1 Published online by Cambridge University Press