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THE ASYMMETRIC TURN OF THE NEW EUROPEAN ECONOMIC GOVERNANCE: SOME REMARKS ON THE TREATY ON STABILITY, COORDINATION AND GOVERNANCE IN THE ECONOMIC AND MONETARY UNION

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Abstract

The aim of this paper is to deal with some examples of asymmetries created by the legal frame of the new European economic governance, trying to underline some ambiguities emerging from this scenario. As for structure, this paper is divided into three parts: firstly, the asymmetric dimension in European Union law is explored. Secondly, some relevant provisions present in the Treaty on Stability, Coordination and Governance are analysed. Finally, some general conclusions on the current state of integration are offered.

Keywords: European Union; economic governance; asymmetry; Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG).

EL GIR ASIMÈTRIC DE LA NOVA GOVERNANÇA ECONÒMICA EUROPEA: ALGUNES REFLEXIONS SOBRE EL TRACTAT D'ESTABILITAT, COORDINACIÓ I GOVERNANÇA A LA UNIÓ ECONÒMICA I MONETÀRIA

Resum

L'objectiu d'aquest treball és tractar alguns exemples d'asimetries creades pel marc legal de la nova governança econòmica europea, intentant subratllar algunes ambigüitats que sorgeixen d'aquest escenari. Pel que fa a l'estructura, aquest estudi es divideix en tres parts: en primer lloc s'explora la dimensió asimètrica de la legislació de la Unió Europea. En segon lloc, s'analitzen algunes provisions rellevants del Tractat d'estabilitat, coordinació i governança. Finalment, s'ofereixen algunes conclusions generals sobre l'estat actual d'integració.

Paraules clau: Unió Europea; governança econòmica; asimetria; Tractat d'estabilitat, coordinació i governança a la Unió Econòmica i Monetària (TECG).

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Summary

1 Introduction and aims of the paper

At the beginning of March 2012, 25 European leaders signed the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union—TSCG—which represents just one of the links in a longer chain of measures adopted to confront the EU crisis (I am referring to the creation of the European Financial Stability Facility [EFSF], the European Financial Stabilisation Mechanism [EFSM], the Euro Plus Pact, the amendment of Art. 136 of the TFEU, the European Stability Mechanism [ESM], the so-called six and two packs[1] among others[2]).

With all these measures the EU has intended to deal with very different aspects of the crisis, trying to achieve a new integrated surveillance system for budgetary and economic policies and a new budgetary timeline. It insists on the establishment of clearer rules and of better coordination of national policies. This system has been provided with swifter sanctions.

All these measures run in parallel. Some of them are part of the EU legal order (e.g. six pack, two pack), some of them external to it, some of them are interdependent (in some aspects the six pack and the TSCG), some of them are not (for instance, quite roughly, while the Euro Plus Pact is more about competitiveness, the TSCG is more about austerity). This explains why some Member States participate in some of these actions without necessarily being part of the others.

The contents of all these measures have been extensively analysed by scholars[3] and the aim of this work is not to offer a mere description of them. Rather, I shall explore a common element emerging from this scenario, namely the asymmetrical features of the new European economic governance.

For instance, the TSCG intervenes in a situation already dominated by asymmetry, adding another pattern of differentiation. In fact, besides the already existent asymmetry between Euro and non-Euro members, the latter will be differentiated, from now on, between those who signed the new Treaty and those who did not. This situation will certainly increase the degree of asymmetry of the economic governance of the EU. It remains to be seen whether this will represent an intermediate stage in the road towards integration at the general EU level or, less optimistically, a pattern for disintegration.

The aim of this paper is to deal with some examples of asymmetries created by the new legal frame of European economic governance, trying to underline some ambiguities emerging from this scenario.

As for structure, this paper is divided into three parts: firstly, the asymmetric dimension in EU law is explored. Secondly, some relevant provisions present in the TSCG are analysed. Finally, some general conclusions on the current state of integration are offered.

2 Asymmetry in EU law

There has been frequent experimentation with asymmetry within federalising processes[4], especially in those

1 The so-called six pack is composed of five Regulations (Regulations n. 1173/2011, no. 1174/2011, 1175/2011, 1176/2011 and 1177/2011) and one Directive (Directive no. 2011/85). The two pack is composed of the following Regulations: Regulation no. 472/2013 and 473/2013.

2 On this "jungle" of measures see: Bianco, Giuseppe, "The New Financial Stability Mechanisms and Their (Poor) Consistency with EU Law", EUI RSCAS 2012/44 [Florence: European University Institute] (2012) p. 24, [last visited 21 August 2013].

3 See for instance the contributions included in De Witte, Bruno; Heritier, Adrienne; Trechsel, Alexander (eds.), *The Euro crisis and the state of European democracy: contributions from the 2012 EUDO dissemination conference*, Florence: European University Institute, 2013, p. 427. See also the first comments on the Pringle case of the CJEU: (Case C-370/12 Pringle, not yet reported); Craig, Paul, "Pringle: legal reasoning, text, purpose and teleology", *Maastricht Journal of European and Comparative Law*, Vol. 20 [Oxford-Antwerp-Portland: Intersentia] Issue 1 (2013) pp. 3-11; De Witte, Bruno; Beukers, Thomas, "The Court of Justice approves the creation of the European Stability Mechanism: Pringle", *Common Market Law Review*, Vol. 50 [Leiden: Kluwer] Issue 3 (2013) pp. 805–848.

4 Tarlton, Charles D., "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation", *Journal of Politics*, Vol 27 [Cambridge: Cambridge University Press] Issue 4 (1965), pp. 861-874; Fossas, Enric; Requejo, Ferran (eds.), *Asimetría Federal y Estado Plurinacional*, Madrid: Trotta, 2000, p 351; Palermo, Francesco, "Divided We Stand. L'asimmetria negli ordinamenti composti", in Torre, Alessandro; Volpe, Luigi; Cerrina Feroni, Ginevra; Ceccherini, Eleonora; Rinella, Angela; Carducci, Michele; Casonato, Carlo; Frosini, Tommaso Edoardo (eds.), *Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all'Europa)*, Turin: Giappichelli, 2007, pp. 149–170; Watts, Roland L., "A Comparative Perspective on Asymmetry

federal or quasi-federal contexts characterised by the coexistence of different legal and cultural backgrounds (Canada, for instance). One should take this into account before conceiving, for instance, enhanced cooperation as a form of "constitutional evil" conducive to a "disintegrative", multi-speed Europe[5].

Asymmetry might even serve as an instrument of constitutional integration, as comparative law shows. For instance, flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory: "Federal symmetry refers to the uniformity among member states in the pattern of their relationships within a federal system. 'Asymmetry' in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units"[6]. However, asymmetry does not refer to mere differences of geography, demography or resources among the components of the federation or to the variety of laws or public policies present in a given territory[7].

Even in international law, asymmetry is well known. A confirmation of this comes from the experience of the World Trade Organisation (WTO), which allows a member to sign Preferential Trade Agreements (PTAs) with one or more other members[8].

Thus, asymmetry is an institutional solution experienced by many constitutional and even international systems. The EU already knows some forms of asymmetry, and enhanced cooperation[9] is just one of these, together with the opting-out mechanism[10], and the open method of coordination[11].

Scholars have studied the contours acquired by the idea of differentiation in EU law and its main sources, distinguishing several models of differentiation[12]. Others have harshly criticised the asymmetric option, looking at it as something incompatible with an integration process. Finally, a last group of authors has insisted on the positive implications of a multi-speed Europe to overcome the difficulties present in the

in Federations", IIGR, Queen's University [Kingston: IIGR] (2005) p. 7, [last visited 21 August 2013].

5 "Among scholars of EU law, the idea of differentiation has also struck different chords. In general, they have not been very supportive of it. The degree of aversion to differentiation, however, is varied among scholars according to their theoretical visions of the Union. Supporters of the intergovernmental Union have found the pressure for differentiation self-explanatory in light of Member States craving for power and the desire to enhance their positions. The advocates of the supranational Union have, conversely, perceived it as an expression of national selfishness, which presents a regression in the process of integration. By breaking the chain of virtuous spill-over effects, differentiation is also anything but compatible with the neo-functionalist understanding of the Union. At the same time, it does not fit well with the ordo-liberal perspective either, because of its potential to erect new obstacles to trade where there should not be any. Finally, differentiation understandably may not appeal to EU constitutional scholars, who view it as colliding with not only the very telos of integration, but also with the essential character of constitutionalism as a unity-furthering discourse", Avbelj, Matej, "Differentiated Integration—Farewell to the EU-27?", *German Law Journal*, Vol. 14 [Toronto and Lexington: Osgoode Hall Law School and Washington & Lee University School of Law] Issue 1 (2013) pp. 191-212, p. 208.

6 Watts, Roland L., *Op. cit.*

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

8 Horn, Henrik; Mavroidis, Petros; Sapir, André, "Beyond the WTO? An anatomy of EU and US preferential trade Agreements", Centre for Economic Policy Research Discussion Paper [Brussels: CEPR] (2009) p. 76, [last visited 21 August 2013].

9 See the recent decision in the fields of divorce and unitary patent. On this see: Beneyto, José Maria; Maillo González-Orús, Jerónimo (eds.), "Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation", [Madrid: CEU – S. Pablo] (2009) p. 106, [last visited 21 August 2013] and Cantore, Carlo Maria, "We're one, but we're not the same: Enhanced cooperation and the tension between unity and asymmetry in the EU", *Perspectives on Federalism*, Vol. 3 [Turin: Centre for Studies on Federalism] Issue 3 (2011) pp. E-1-21. See in general, De Búrca, Grainne; Scott, Joanne (eds.), *Constitutional Change in the European Union*, Oxford: Hart Publisher, 2000. From a slightly different perspective, see Baubôck, Rainer, "United in Misunderstanding? Asymmetry in Multinational Federations", ICE Working Paper series, no. 26 [Vienna: Austrian Academy of Sciences] (2001) p. 51, [last visited 21 August 2013].

10 Miles, Lee, "Introduction: Euro outsiders and the politics of asymmetry", *Journal of European Integration*, Vol. 17 [Abingdon: Routledge] Issue 1 (2005) pp. 3-23.

11 Scharpf, Fritz, "The European Social Model: Coping with the challenges of diversity", MPIfG Working Paper 02/8 [Cologne: Max Planck Institute] (2002) p. 21, [last visited 21 August 2013].

12 Avbelj, Matej, *Op. cit.*, pp. 193-195.

enlarged Union[13].

Enhanced cooperation definitely belongs to the universe of the asymmetric options: it aims to ensure, at the same time, unity and diversity. In fact, it allows Member States to experiment with different forms of integration without "shutting the door" to those unwilling to take steps towards deeper integration in specific areas. It can be conceived as a sort of *extrema ratio* to be exploited when the Council realises that the goals of integration cannot be achieved within a reasonable period by the EU as a whole. All these elements serve as constitutional safeguards since they make the asymmetry produced by enhanced cooperation sustainable under EU law[14].

Within the new European economic governance, the asymmetric dimension of the EU has been amplified by two main factors. First of all, some of the measures mentioned at the beginning have been adopted out of the framework of EU law, namely via the conclusion of international agreements. This factor has permitted the creation of a set of rules shared by a group of the EU Member States in the form of a public international law treaty.

The first reaction to this trend may be to interpret it as a return to intergovernmentalism and as a loss in terms of supranationalism. But, as Fabbrini has shown, the use of differentiated agreements among members of a union is known even in federal experiences[15].

As Bruno de Witte has pointed out, this "turn to international treaties" is not new; even in other cases this path has been followed[16].

The second main source of asymmetry in this context is connected to the contents of these measures. I shall thus turn to this subject and deal with some of the provisions included in these acts, with a particular attention paid to the TSCG.

3 An introduction to the TSCG

The TSCG was the solution chosen to challenge the crisis after having evaluated a list of alternatives, first of all the revision of the EU Treaties, i.e., the Treaty on the Functioning of the EU (TFEU) and the Treaty on the European Union (TEU). Another option considered was the use of enhanced cooperation as regulated under the EU Treaties.

Other alternatives were theoretically available; authors like Beukers[17], for instance, identified a more complex scenario. But these two options (treaty revision and enhanced cooperation) are still topical, partly at least, as

13 Piris, Jean Claude, "It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members", Jean Monnet Working Paper 5/2011 [New York: New York School of Law] (2011) p. 60, [last visited 21 August 2013].

14 On these elements see, among others, Fabbrini, Federico, "The enhanced cooperation procedure: a study in multispeed integration", Centre for Studies on Federalism Research Paper [Turin: Centre for Studies on Federalism] (2012) p. 20, [last visited 21 August 2013].

15 "As the comparative analysis makes clear, the US Constitution is also endowed with an instrument – the 'compact clause' – which allows states to pursue flexible and differentiated action within the American Union. Yet, the comparison reveals that this instrument is not subject to a specific finality and has consequently been utilized in the US for a wide variety of purposes having to do generally with interstate adjustments", Fabbrini, Federico, *Op. cit.*

16 "And yet, what happened then, and what happened later when the ESM Treaty and the Fiscal Compact were concluded by groups of Member States, seems less shocking when seen within a broader evolutionary perspective of European law. In fact, there are numerous earlier examples of international treaties concluded between groups of Member States of the EU. They have concluded, ever since the 1950s, agreements in areas such as tax law, environmental protection, defence, culture and education. The most prominent example of an inter se agreement (that is: an agreement between some but not all the EU Member States) was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. The Schengen instruments were expressly designed as interim arrangements in preparation of a final regime at the level of the European Community, rather than as a rival co-operation regime. The same was true for the Social Policy Agreement concluded, as a separate part of the Maastricht Final Act, between 11 of the then 12 Member States; and for the Prüm Convention later on. In the course of the evolution of European integration, the importance of international agreements between the EU Member States has declined", De Witte, Bruno, "Using International Law in the Euro Crisis: Causes and Consequences", ARENA Working Paper, 4/2013 [Oslo: ARENA Centre for European Studies] (2013) p. 23, [last visited 21 August 2013].

17 Beukers, Thomas, "The Eurozone Crisis and the Legitimacy of differentiated Integration", in De Witte, Bruno; Heritier, Adrienne; Trechsel, Alexander (eds.), *The Euro crisis and the state of European democracy: contributions from the 2012 EUDO dissemination conference,* Florence: European University Institute, 2013, pp. 7-30.

the final provisions of the TSCG seems to confirm.

The first option (reform of the EU Treaties) would be very risky: it would imply another round of constitutional politics and seem to be unworkable now due to the UK veto.

However, the possibility of reforming the EU Treaties should not be underestimated. In fact, the EU institutions might have an interest in bringing the discipline of Euro-governance fully into the Treaties in the near future, and there are several think-tanks that are currently proposing something along these lines[18].

The advantages of enhanced cooperation are obvious: it could avoid a time-consuming reform of the Treaties. It could also demonstrate the maturity of the current constitutional architecture of the Treaties, since it is an instrument governed by the charter of the EU, without the necessity of finding a solution to the European debt crisis outside the present system.

Finally, enhanced cooperation would not lead to an irreducible "rupture" with the UK or with other Member States, which could decide to join the enterprise at a later date. Such a reunion would instead be much more complicated in the case of a "pure" international agreement[19].

This path was suggested by some leading scholars as the way to overcome many of the EU's difficulties[20]. Still today, if one takes a closer look at the draft of the TSCG it is possible to see that the use of enhanced cooperation techniques is repeatedly advocated therein. Enhanced cooperation still remains a valid option, yet its use is encouraged in a text which is formally out of the EU Treaties' armoury.

As has been said, this is not the first time in which instruments of international law have been employed to face a supranational issue, even in the field of European economic governance[21]. However, scholars do not see a common strategy behind this trend; rather, this path was allegedly chosen because of the flexibility it can offer[22].

As to its contents, the TSCG is divided into six parts: Purpose and Scope (Art. 1), Consistency and Relationship with Law of the Union (Art. 2), Fiscal Compact (Art. 3-8), Economic Policy Coordination and Convergence (Art. 9-11), Governance of the Euro Area (Art. 12-13), General and Final Provisions (Art. 14-16).

From a constitutional law viewpoint, the most important clauses are represented by Art. 1 (devoted to the aim of the Treaty, namely "to strengthen the economic pillar of the economic and monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion"), Art. 2—concerning the relationship with EU law and reaffirming the precedence of EU law over the Treaty, a point which is present in many other parts of the Treaty[23]—Art. 3.2—providing for the necessity for the

18 For instance see the "Appeal to European Leaders for the Euro and European stability and development" launched by the Centre for Studies on Federalism based in Turin [Turin: Centre for Studies on Federalism] (2011) [last visited 21 August 2013].

19 It is interesting to note the content of Art. 15 TSCG: "This Treaty shall be open to accession by Member States of the European Union other than the Contracting Parties. Accession shall be effective upon the deposit of the instruments of accession with the Depositary, who shall notify the other Contracting Parties thereof". Such openness differs from the model followed within the frame of an enhanced cooperation since it follows a pure public international law logic. On this difference see Cantore, Carlo Maria, *Op.cit*.

20 Piris, Jean Claude, *Op. cit.*

21 For instance the Treaty Establishing the European Stability Mechanism was signed by the Member States of the Eurozone to create the European Stability Mechanism (ESM), [last visited 21 August 2013].

22 "Separate international agreements, which do not involve an amendment of the TEU and TFEU, can define alternative requirements for their entry into force. Not only can such agreements be concluded between less than all the EU states, but they can also provide for their entry into force even if not all the signatories are able to ratify. The Fiscal Compact offers a spectacular example of this flexibility in that it provided that the treaty would enter into force if ratified by merely 12 of the 25 signatory states, provided that those 12 are all part of the euro area. The fact that the authors of the Fiscal Compact moved decidedly away from the condition of universal ratification for its entry into force has created a 'ratification game' which is very different from that applying to amendment of the European treaties, where the rule of unanimous ratification gives a strong veto position to each individual country". De Witte, Bruno, *Op. cit.*

23 For instance, Art. 3 reads that the fiscal compact is to be applied "Without prejudice to the obligations derived from European Union law"*;* Art. 7, concerning sanctions for states in excessive deficit procedure, is applicable "while fully respecting the procedural requirements of the European Union Treaties". A similar reference to EU law contained in Art. 10 on enhanced cooperation applies "In accordance with the requirements of the European Union Treaties". In this respect one should take into account also Art. 5.2 TEU

States to codify the budget rule in national law "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to". It is debatable whether this last provision (Art. 3.2) is inconsistent with Art. 4.2 of the TEU stating the necessity to respect the national identity and constitutional structure of the EU Member States[24].

Probably, thanks to this provision, many of the EU economic issues will be "internalised" and a significant role might be played by national judges, even by constitutional courts, in order to ensure the enforceability of these clauses[25].

Another problematic provision is Art. 8, which gives the CJEU the jurisdiction to rule on the parties' compliance with the requirements of Art. 3.2 of the Treaty. Is this provision compatible with the TFEU? The Preamble of the international agreement refers to Art. 273 TFEU and Art. 260 TFEU, but Art. 273 TFEU seems to be very clear in anchoring the jurisdiction of the CJEU to the subject matter of the EU Treaties[26]. As the Court said, the extension of the competences of the Court is possible always provided that the core of the Treaties[27] is respected. This point, again, led commentators to take into account the very finality of this new international agreement in order to assess its compatibility with the EU Treaties.

As is clear from its contents, the TSCG aims at achieving a certain degree of obligation, which was missing in the previous instruments of European economic governance, representing a real turning point in this ambit and this explains why this Treaty has attracted the attention of many constitutional lawyers, especially in light of the domestic amendments required by its Art. 3.

Having recalled the structure and the main problematic points of this Treaty it is time to move to the analysis of the elements of asymmetry introduced by its provisions.

4 The asymmetric dimension of the new European economic governance: some problematic remarks

As said at the beginning, the TSCG is peculiar for many reasons, the most evident being the fact that the TSCG intervenes in a situation already dominated by asymmetry, making the picture more fragmented. Building on Rossi's work[28], it is possible to argue that the TSCG has created a system characterised by various concentric circles:

1. A first circle is represented by those EU Member States of the Eurozone that have ratified the TSCG (at least "twelve Contracting Parties whose currency is the euro" according to Art. 14 TSCG[29]).

"the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" and Art. 13.2 TEU: "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them".

24 Things are even more complex in countries whose fundamental laws are written in more than one document (see Sweden, for instance). There are also countries (the Netherlands for instance) that do not have a document officially called "constitution".

25 On this issue see: Delledonne, Giacomo, "Financial Constitutions in the EU: From the Political to the Legal Constitution?", Sant'Anna Legal Studies (STALS) Research Paper, n. 5/2012, [Pisa: Scuola Superiore Sant'Anna] (2012) p. 29, [last visited 21 August 2013].

26 "Professor Craig, for instance, agreed that Article 273 was sufficient to give the Court jurisdiction, but that Article 8 of the proposed treaty caused difficulties because even though the Commission would not bring a case in name, the provisions meant that it might do so in effect, and there is no provision under the EU treaties for the Commission to bring such a case", House of Lords, "The euro area crisis - European Union Committee", London: House of Lords, 2012, [last visited 21 August 2013] .

27 On the involvement of EU's institutions outside the scope of EU law see Case C-316/91 EP v Council and C-181/91, ECR 1994 pp. I-625. On the possibility of giving the CJEU a jurisdiction not referred to in the Treaties see Opinion 1/00 [2002] ECR I-3493. (On this see Peers, Steve, "Written Evidence", in House of Lords, *Select Committee on the European Union, The euro area crisis. Oral and written evidence*, London: House of Lords, 2012, pp. 80-85, [last visited 21 August 2013].

28 Rossi, Lucia Serena, "Fiscal Compact e conseguenze dell'integrazione differenziata nell'Ue", in Bonvicini, Gianni; Brugnoli, Flavio (eds), *Il Fiscal Compact*, Roma: Edizioni Nuova Cultura, 2012, pp. 29-34.

29 Art. 14, p. 2: "This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier". The ratification process can be followed here.

2. A second group comprises those States that do not belong to the Eurozone but that have ratified the TSCG[30].

3. A third circle includes those States that do not participate in the Euro Plus Pact but that have ratified the TSCG[31].

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

As we saw above, asymmetry was the price to pay in order to ward off a dangerous impasse, avoiding "going through the cumbersome and lengthy procedures of EU legislation"[32]. Yet, at the same time it opened a potential wound in the EU. However, the fact that not all Member States are involved in the TSCG does not represent the only cause of asymmetry generated by such an international Treaty.

Indeed, another source of asymmetry in the new European economic governance is represented by the provisions included in the TSCG and devoted to the enhanced cooperation mechanism, namely Art. 10 TSCG. Elsewhere[33] I tried to emphasise the ambiguous drafting of this provision and the particular nature of this kind of enhanced cooperation governed by the TSCG. It is apposite to have a closer look at Art. 10, which reads: "in accordance with the requirements of the European Union Treaties, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro as provided for in Art. 136 of the Treaty on the Functioning of the European Union and of enhanced cooperation as provided by Art. 20 of the Treaty on European Union and Art. 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the smooth functioning of the euro area, without undermining the internal market".

My argument is a literal one: the idea is that the TSCG might have introduced a sort of inconsistency or at least an evident textual contradiction between the concept of enhanced cooperation in EU law (Art. 20 TEU describes enhanced cooperation as a "last resort"[34]) and enhanced cooperation outside EU Treaties where—as we saw—this mechanism may be used when "necessary and appropriate", in spite of the *renvoi* to Art. 20 TEU made in Art. 10 TSCG.

These formulas employed by the TSCG seem to introduce an element of discretion which is very far away from the idea of *extrema ratio* and this might open the door to a greater leeway to the States in the use of this mechanism. What about the consequences of this inconsistency? Is it possible to solve the antinomy by means of interpretation? Difficult to say but, in my view, the systematic reading of these two provisions might lead to a relativisation of the very idea of last resort, which is already—*per se*—an ambiguous concept. This could induce a distortion of the *ratio* of enhanced cooperation even in EU law.[35] The wording of Art.

30 For instance Poland.

31 For instance Hungary.

32 De Witte, Bruno, *Op. cit*.

33 Cantore, Carlo Maria; Martinico, Giuseppe, "Asymmetry or Dis-integration? A few considerations on the new 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union'", *European Public Law*, Vol. 19 [the Hague: Kluwer] Issue 3 (2013) pp. 463–480.

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

35 An example of this ambiguity is given by the reading given to this concept in the recent opinion on the case concerning the enhanced cooperation scheme in the field of a unitary patent given by AG Bot. On that occasion, AG Bot emphasised the ambiguity of the idea of "last resort" and concluded by saying that: "(…) [C]ooperation must come into play as a last resort, when it is established that the objectives pursued by that cooperation cannot be attained within a reasonable period by the Union as a whole". As has been said, AG Bot reads this safeguard mainly as an issue of time. The opinion of Advocate General Bot, joined cases C-274/11 and C-295/11, Kingdom of Spain and Italian Republic v Council of the European Union, 11 December 2012 (especially see par. 108). I indeed agree with Fabbrini when he argues that: "enhanced cooperation can be used only when EU member states disagree on whether to act jointly at the EU level. On the contrary, the procedure cannot be used when member states agree on the opportunity of expanding integration into a new legal field but disagree on how to act at the EU level. While it will be argued that this interpretation restricts the possible room for resort to enhanced cooperation, the paper explains that this construction has several advantages, including preserving the integrity of the EU constitutional order, preventing circumvention of Treaty rules and providing the EU judiciary with a manageable standard to review action by the EU political branches", Fabbrini, Federico, *Op. cit.*

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

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

There is another reason for which the text of Art. 10 is at odds with its correspondent provisions included in the fundamental EU Treaties: Art. 10 TSCG only states that enhanced cooperation might not undermine internal markets, but internal market is just one of the elements included in Art. 326 TFEU.[36]

One could say that Art. 10 in any case refers to all the relevant norms regulating the phenomenon in EU law and this is true, but why recall in an explicit manner just one of these elements? I see two possible interpretations here: the last lines of Art. 10 could be either pleonastic (by expressing just one of the elements recalled by the relevant EU Treaties provisions) or maybe "selective", willing to give a particular value to just one of the elements recalled by the EU Treaties and thus creating something different. This problematic picture is made even more complicated by the uncertain mandate of the CJEU (as we saw, it is not clear from Art. 8 TSCG whether the task of the Court concerns the content of Art. 3 only or all the contents of the TSCG and this of course matters)[37], i.e., one of the most important actors in the process of EU integration, the guardian of those constitutional safeguards that inspire the life of the Union.

5 Final remarks

Like some complex systems in natural sciences, the European legal order is adaptive[38], i.e., it reflects "an ability to adapt through the emergent characteristic of self-organization, which comes from the inter-dependency of their individuals or agents, a.k.a. sub-systems"[39]. In order to evolve, adaptive systems need flexibility. Asymmetry can give an added value to the life of the Union, which is a political entity characterised by the coexistence of different cultures and laws. Yet, this differentiation must be accompanied by the respect of a set of untouchable values.

This paper has offered a reflection on the asymmetric implications of the new European economic governance, paying particular attention to the TSCG. After having recalled that asymmetry is already part of many EU law arrangements, I first introduced the TSCG and then devoted the second part of this work to some provisions included in the text of this international agreement.

As has been said, my argument is that asymmetry is not a "bad thing" in itself. On the contrary, it might have an integrational function (as happens in many federal or quasi-federal contexts): this is for instance the case of enhanced cooperation under EU Treaties. I have tried to show some of the ambiguities present in the TSCG and speculate about their possible consequences. Of course, it is too early to foresee the application of these provisions and the impact of this new set of legal sources, and maybe the considerations made here will be overcome by their concrete application.

Traditionally, it has been argued that the need to resolve financial crisis favours the centralisation of powers. Supporters of this view frequently recall the New Deal, a regulatory scheme often defined as a turning

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

37 On this see: Ferreres Comella, Victor, "Amending the National Constitutions to Save the Euro: Is This the Right Strategy?", *Texas International Law Journal*, Vol. 43 [Austin: the University of Texas School of Law] Issue 2 (2013) pp. 223-240, p. 236.

38 Martinico, Giuseppe, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, Abingdon: Routledge, 2012, p. 194.

39 Schneider, Marguerite; Somers, Mark, "Organizations as complex adaptive systems: Implications of Complexity Theory for leadership research" *The Leadership Quarterly*, Vol. 17 [Philadelphia PA: Elsevier] Issue 4 (2006) pp. 351–365, 355.

point in the history of American federalism[40]. More recently, Loubert stressed the impact of the American sovereign debt crisis of 1780 on the state of the Union[41].

Against this background, the crisis presents two main risks. On the one hand, too much asymmetry might lead to the disintegration of the Union; on the other hand excessive rigidity might jeopardise that delicate compromise which inspires the EU. Indeed, the impression one gains from the current scenario is that of an EU which is currently struggling with its own constitutional limits, putting pressure on national institutions and actors (the Greek and Italian cases are emblematic from this point of view[42]). This is not consistent with those celebrated theories (constitutional pluralism[43] for example) that recognise a constitutional function for the EU developed in accordance and in synergy with the national level.

According to this scheme, the existence of an EU constitutionalism does not imply incompatibility with, and the death of, national constitutionalism, since both contribute to that steady attempt to protect some constitutional goods deemed as fundamental by all these levels, like that of intergenerational fairness for instance[44].

As comparative law shows, crises have always played a key role in reshaping the relationship between the centre and the periphery in regional, federal or quasi-federal contexts: if this is true in this case as well, the current crisis is at the same time a chance for, and a threat to, the constitutional mission of the EU. A crisis (from Greek *κρίσις*, judgment, decision, election, choice) in the deepest etymological sense of the word, as it implies an important moment of reflection over the very nature of the whole integration process.

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