DIMITRIS-TSATSOS-INSTITUT
FÜR EUROPÄISCHE
VERFASSUNGSWISSENSCHAFTEN

CONSTITUTIONAL ASPECTS OF EUROPEAN ECONOMIC GOVERNANCE

Threat or opportunity for the European 'sympoliteia'?

Prof. Dr. Peter Schiffauer
Honorarprofessor der Rechtswissenschaftlichen
Fakultät der FernUniversität in Hagen

DTIEV-Online Nr. 2/2014

FernUniversität in Hagen

DTIEV-Online
Hagener Online-Beiträge zu den
Europäischen Verfassungswissenschaften

ISSN: 2192-4228

FernUniversität in Hagen
Dimitris-Tsatsos-Institut für Europäische Verfassungswissenschaften
58084 Hagen
Tel.: 02331 987-2912
e-mail: DTIEV@Fernuni-Hagen.de
http://www.fernuni-hagen.de/dtiev

Constitutional aspects of European economic governance[1]

Threat or opportunity for the European 'sympoliteia'?

Peter Schiffauer[*]

1. Subject of the investigation

This essay is not examining particular options available for the macro-economic governance at the level of the European Union. No political consensus exists on such options and this author possesses no particular insight which enables him to advance any particular scientific argument in favour of one over the other. Rather, the focus of attention shall be directed towards answering the following question: How are those options which are supported by the majority of member states incorporated into and connected with the constitutional structure of the European Union? The result will show how the measures taken with considerable or great political difficulty at the level of the European Union to overcome the current economic and financial crisis can be reconciled with the principles of European integration. It will ask if the criticism made by Jürgen Habermas is justified, who recently[2] characterised these developments as undemocratic and a return to national state thinking. This analysis will not solely be confined to the legal dimension. It will also include the political dimension in order to examine where and by whom political power is exercised. Since the acceptance of political decisions is largely determined normatively through their constitutional-democratic legitimacy, but also factually through the manner in how that political power is distributed. An examination of the media and its focus on

---

[*] The author is the head of the Secretariat of the Committee on Constitutional Affairs of the European Parliament and Honorary Professor of the Law Faculty at the University of Hagen. His comments reflect his personal views and cannot be attributed as the views of the institution to which he is an official.

[1] This essay will be published in German under the title: „Konstitutionelle Aspekte der Europäischen Wirtschaftsregierung - Gefahr oder Chance für die europäische Sympoliteia?“ in the volume „Verfassung – Parteien – Unionsgrundordnung, Gedenksymposion für Dimitris Tsatsos“ (in 2011) of the publication series of the Dimitris-Tsatsos-Institut für Europäische Verfassungswissenschaften, published by Berliner Wissenschafts-Verlag (forthcoming 2014). The essay was finalized in autumn 2011. A few updates have been added in January 2014.

[2] *Jürgen Habermas*, a pact for or against Europe? Presentation for discussion on April 6, 2011 'Europe and the rediscovery of the German nation-state', European Council on Foreign Relations and Stiftung Mercator, published in Süddeutsche Zeitung, April 7, 2011 Page 11.

power-oriented reporting clearly demonstrates this point. Before entering into this investigation proper, it is necessary to provide a brief overview on the current state of affairs on the constitutional framework of economic governance of the European Union.

2. European economic government from Maastricht to Lisbon

The establishment of the European Union by the Treaty of Maastricht supplemented the economic provisions of the European Economic Community providing for a new title on an economic and monetary union. The rules contained within this title were transformed largely[3] unchanged in Articles 119 to 144 of the Treaty on the Functioning of the European Union. Authorities such as the former President of the Commission Jacques Delors[4] as well as the Commission's proposals for the creation of the Economic and Monetary Union[5] demanded from the outset that the responsibilities and powers of the Union in the field of European monetary policy should find a corresponding equivalent in the area of economic policy. This demand for a „European economic government“ has been the subject of intense debate over the years and often marred in controversy due to opposing and often conflicting ideological positions.

At the European Convention, the issue of economic government was examined in a separate working group – with a degree of hesitancy. This fact can be recognised when comparing the French term „gouvernance économique“ to the term used by the German working group members who preferred to use a term which represents „economic ordinance“. There was a consensus within the group to incorporate the economic and social objectives of the Union into the constitutional treaty. However, only a minority supported the idea that in addition to the exclusive competence of the Union in monetary policy for the euro area, the Union should have shared competence

3 By the Treaty of Lisbon were particularly striking out the obsolete transitional arrangements, have been newly created 133 TFEU with a legal basis for the adoption of measures for the use of the euro as the single currency, Article 136.

4 Speech to the College of Europe in Bruges dated 17.10.1989.

5 Communication from the Commission on 21.8.1990, the Economic and Monetary Union, Office for Official Publications, Luxembourg, 1990.

in macro-economic policy. A majority of the group expressed a preference for keeping responsibility for economic policy solely in the hands of the Member States, while regarding it as a matter of common interest. The group, therefore, argued in favour of strengthening economic policy coordination through the open method of coordination, as well as modest strengthening of the role of the Commission in the implementation of the Stability and Growth Pact. In addition, a majority of the group endorsed the possibility of qualified majority voting as the decision making rule in the Council on issues such as the approximation of tax rates, setting of minimum standards and the creation of a common tax base in the calculation of indirect and corporate taxation. In relation to the regulation of financial markets, the group adopted a wait and see approach until the publication of the results of an assessment on the then applicable regulation before formulating an opinion on the issue.

The Treaty of Lisbon did not result in any significant changes to the existing treaty provisions pertaining to the economic governance of the Union. The modesty of the reforms reflected to some extent the degree of sensitivity attached to these issues by member states. The decision making process of the Council on the excessive deficit procedure was facilitated through the requirement of a qualified majority in Article 126 TFEU instead of the previous 2/3 voting majority while the voting decision of the Member State subject to the procedure would not be taken into account. In addition, obsolete transitional provisions of the ECT were deleted and replaced by Article 139 TFEU which outlines the provisions which do not apply to Member States that have adopted the euro. Article 133 TFEU provided the legal base for the adoption of measures concerning the euro as the single currency through a form of an institutionalised enhanced cooperation on the basis of the Protocol (No. 14) on the Euro Group between the Member States who adopted the euro; Article 136 TFEU provided the legal basis to adopt measures within this framework and to coordinate and monitor fiscal discipline by member states with the goal to develop common basic principles on economic policy.

3. The economic and financial crisis after the entry into force of the Treaty of Lisbon

The arduous struggle for the enactment of the substantive outcome of the European Convention lasted seven years. It prepared the ground for the wide-ranging consensus „that the Treaty of Lisbon will provide a stable framework that allows future development of the Union".[6] At that time, the potential for new treaty changes in the short to medium term appeared unlikely but was viewed as possible or even desirable in the longer term, particularly in the field of macro-economic governance[7]. By the end of summer 2008, there was an acute awareness of the need to take action when the European banking system came under the threat of bankruptcy following the financial collapse of the investment bank Lehman Brothers. Throughout the course of 2010 the crisis spread to some of the peripheral members of the euro zone. Initially it was Greece, followed by Ireland and then Portugal which experienced a sovereign debt crisis. By this stage, the need for solidarity and support at the EU level was unavoidable in order to ensure the stability and future existence of the single currency. The subsequent rescue packages designed to stabilise the troubled banks implemented before the entry into force of the Treaty of Lisbon, were adopted primarily at the national level with little policy coordination among the member states. Indeed, the coordination of these rescue measures were carried out only in hindsight[8] in consultation with the European Commission to ensure their compatibility and adherence with competition and state aid rules. The Council of Ministers and the European Council needed to concentrate increasingly on these new challenges arising from the economic and financial crisis. In June 2009, the European Council[9] identified the need to build a new system of European financial supervision. It advocated the creation of a committee on systemic risks to assess the potential risks to the financial stability of the European banking system and the creation of three supra-national financial supervisory authorities to increase the level of supervision over

6 Section 8 of the European Parliament Resolution of 20 February 2008 on the Treaty of Lisbon, P6_TA (2008) 0055, Corbett / Mendez de Vigo, the Committee on Constitutional Affairs (A6 0013/2008).

7 In this sense at least, the author has argued in an internal seminar during the summer of 2009.

8 A coordinated action plan for the countries of the euro area was only approved on 12 October 2008 (Council document 14239/08) and the European Council welcomed it on 15/16. October (see Presidency Conclusions of the meeting from 15 / October 16, 2008 par. 3.

9 Presidency Conclusions of the meeting on 18 / 19 June 2009 par. 15-24.

activities in the national bond and financial markets, banks and insurance companies. To achieve this end, the European Commission proposed three regulations and one directive, the content of which were agreed by the European Parliament and Council in the autumn of 2010 at the first stage of reading.

After the entry into force of the Treaty of Lisbon and the election of Herman Van Rompuy as President of the European Council, there was a noticeable intensification of its deliberations on these issues. In his first four months, President Van Rompuy convened four meetings of the European Council, furthermore a meeting of the Euro-group at the level of Heads of State and Government was held. The focus of attention of these meetings was to deal with the economic and financial crisis. At its meeting of 25/26 March 2010, the European Council[10] launched under the title of „Europe 2020" a new European strategy for employment and growth. The Council instructed its President to set up a working group consisting of representatives from the Member States, the European Commission and the European Central Bank with the objective to draw up proposals for an improved framework in crisis management and compliance with budgetary discipline within the EU. The European Council clearly expressed its desire to maintain a close working relationship with the European Parliament and other EU institutions on the issue, but nonetheless assumed leadership and initiative in these areas. The conclusions of the Brussels European Council of 17 June 2010[11] for the first time made explicit reference to the goal of „strengthening of economic governance". Its central focus was to strengthen the Stability and Growth Pact through a review of national stability and growth programmes/policies carried out by the European Commission as part of the „European semester". It also outlined a legislative programme for the regulation of financial services, which had been drafted by the European Commission, and which received a considerable degree of political support. At its meetings of 28-29 October[12] and 16-17 December 2010[13], the European Council decided to trigger on the basis of the report of the above mentioned Working Group, the procedure for amending Article 136 TFEU. This amendment allows to create a permanent stability mechanism in the way of an international

10 Presidency Conclusions of the meeting on 25/26. March 2010 par. 1-10.
11 Presidency Conclusions of the meeting on 17 June 2010 par. 9-11.
12 Presidency Conclusions of the meeting of 28-29. October 2010 par. 1-3.
13 Presidency Conclusions of the meeting of 16-17. December 2010 par. 1-8.

agreement among the states of the euro area.[14] The European Council set a deadline until the end of June 2011 for the legislative bodies, to adopt a package of six legislative acts proposed by the Commission. The aim of these legislative measures is to avoid macro-economic imbalances and reform the Stability and Growth Pact through strengthening of sanctions in order to improve financial discipline by member states. At its meeting on 25 March 2011[15], the European Council endorsed its priorities for fiscal consolidation and structural reform. It was hoped that all Member States would transform these priorities into concrete measures in their national reform programmes for stability and/or convergence. An additional commitment made by the government leaders of the euro area in the euro-plus pact including six other Member States was welcomed as a „new quality of economic policy coordination“[16]. Furthermore, the European Council in accordance with the simplified Treaty revision procedure pursuant to Article 48(6) TEU, decided at that meeting on the amendment of Article 136 TFEU[17] which since then was ratified and entered into force on 1 May 2013.

In the meantime, other tangible results could be achieved. The „Six-Pack“ of legislative acts seeking to avoid macro-economic imbalances was adopted by Parliament and Council on 8 November 2011 and entered into force on 13 December 2011[18].

On 2 February 2012, the 17 Member States of the euro area signed the Treaty establishing the European Stability Mechanism and on 2 March 2012 25 Member States signed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (so-called Fiscal Compact). Both Treaties are now ratified and entered into force on 27 September 2012 and 1 January 2013 respectively. They contain a noteworthy particular arrangement according to which the entry into force

14 The legal issues of this Treaty amendment are examined more in depth by *Izabela Jedrzejowska*, A reshaped Economic and Monetary Union – still attractive, but hardly legitimate, Scientific Journal of Wroclaw School of Banking, 2014 (forthcoming).

15 Presidency Conclusions of the meeting on 25 March 2011 par. 1-17.

16 This formulation is independent of whether it’s in the case agrees or not, at any rate more accurately than by the President of the Central Bank Jean-Claude Trichet used metaphor of a „quantum leap“ in the economic governance in the EU and the euro area, given the infinitesimally small distance to overcome the quantum jumps in a timely manner.

17 OJ L 91 of 6.4.2011.

18 OJ L 306 of 23.11.2011.

was not delayed where a single Member State was not in a position to (timely) ratify the Treaty (for the ESM Treaty only when its financial contribution is not very significant). The Fiscal Compact was indeed ratified after its entry into force by Hungary, Luxembourg, Malta, the Netherlands and Poland.[19]

On 30 May 2013 two complementary regulations with the aim of reinforcing economic governance in the euro area („Two-Pack")[20] entered into force following their adoption by the European Parliament and the Council. In October two regulations[21] concerning the financial supervision of systemic relevant banks by a European Banking Authority were adopted and a draft regulation[22] concerning a single resolution mechanism for banks is under consideration[23].

4. Classification of the development under constitutional aspects

Since the beginning of the global economic and financial crisis, the number of decisions taken at the level of the European Union with the objective of improving the management and governance of economic policy has significantly increased. The Union seems to make proof of its capability to act, however in a different manner from the one which the advocates of a European economic government originally intended. Only a limited part of the response has been adopted through European legislation, the traditional form of action as a legal community as constituted by a Union of States and the citizens of Europe[24]. The use of legislation proved to be a useful instrument when it came to rules concerning the actors in the financial markets and monitoring macro-economic imbalances. However, reform programmes to overcome the debt crisis or promote competitiveness were adopted outside this

19 A general overview on Ratification requirements and present situation in the Member States concerning Article 136 TFEU, ESM, Fiscal Stability Treaty is given in a Research Note by European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs, edition 12 December 2013, PE 462.455.

20 Regulations (EU) No 472/2013 and No 473/2013, OJ L 140 of 27.5.2013, p. 1ss, 11ss.

21 Regulations (EU) No 1022/2013 and No 2014/2013, OJ L 287 of 29.10.2013, p. 5ss, 63ss.

22 COM (2013) 0520.

23 The recent developments are presented more in depth by *Izabela Jedrzejowska*, Multi-tier governance in the EU: a dynamic and efficient response to the economic crisis, Scientific Journal of Wroclaw School of Banking, 2014 (forthcoming).

24 Cf to this characterisation of European integration. D. Tsatsos (eds.) The European Union's constitutional structure, Getting a Constitution for Europe, Berlin 2010, pp. 1 see Introduction.

framework through coordinating decisions and intergovernmental agreements on the level of Heads of State and Government of the Union or of the 17-country euro area.

With regard to the constitutional aspects of the European integration process these developments raise important questions:
Are the chosen forms of action the most efficient means to achieve the desired objectives?
Do these developments signal a revival of nationalism and distrust for traditional forms of integration?
What impact do these different types of action have on the separation of and balance of powers within the Union?
Is the democratic legitimacy of these procedures adequately secured?
What long-term implications do these measures present for the future process of European integration?

4.1. Are the chosen forms of action the most efficient means to achieve the desired objectives?

The experience of European integration has shown that legislation taken at the EU level[25] is the most efficient instrument for action. Since the Union does not possess its own means of power, the law which applies equally and uniformly across all parts of the Union is the most powerful means to achieve its common objectives. If authorities choose to pursue common goals through other forms of action it can arouse a suspicion of weakness[26].

This weakness could be purely political in nature, such as in the following scenario: an efficient plan of action is identified, the institutional capacity to act is a given but the political conditions for its adoption can not be secured. In many cases it would be too easy to criticise the Union for a weakness of this sort especially in the field of economic governance. On the one hand, the discussion on and adoption of the legislative package providing for measures to avoid macro-economic imbalances and

25 Until the entry into force of the Treaty of Lisbon on the community level.
26 *J. Habermas*, supra; (Fn.2) makes this observation.

to strengthen the Stability and Growth Pact demonstrate that the classical form of legally binding legislation of the Union remains the main instrument. However, not every politically desirable action can be achieved using secondary European Union legislation. This issue appeared in the discussions on the legislation to monitor the financial markets, which considered whether to grant these newly created regulatory bodies full autonomy in their duties similar to the independence enjoyed by the European Central Bank. Such an idea could hardly have been implemented by means of secondary legislation, even if a large majority were in support of it, because of legal constraints which to that end would have required a modification of the existing treaties. As set out in the Treaty of Lisbon, there are only a limited number of bodies that have been conferred with autonomous powers subject to oversight through political accountability. Thus the powers of the newly created supervisory authorities of the financial markets could not be established as autonomous ones but as powers to prepare decisions that need to be formally taken and politically accounted by an institution of the European Union.

The system of competences under Article 5 of the EU Treaty requires the EU to comply with the principle of conferral. This principle is opposed to a Treaty amendment that would create an unlimited global legal basis for adopting measures of economic governance. As long as this principle applies in the European treaties, the extent to which the Union Treaties can confer the power to adopt legislation depends on whether the required political action can be formulated in sufficiently concrete legal terms. In addition, the Union is obliged to respect the national identities of the Member States. Macro-economic governance at EU level implies a very substantial impact on the design of national budgets, their respective national systems of education, professional training and social security and taxation. Any possible proposal to confer to the Union the power to take decisions that would impact upon these areas in the form of legally binding norms would have to defend against the argument that this would reduce the political room for maneuver and the domestic autonomy of the Member States to a negligible residual.

The choice of non-legally binding guidelines as the dominant instrument of action to implement European Council decisions, such as the Euro-Plus Pact should not necessarily be viewed as a sign of weakness. One should not consider it as a sign of

weakness for as long as under the pressure of the crisis the required consensus between the leaders can be actually achieved and provided that the latter are all willing to defend the decisions taken jointly in the course of the domestic political disputes and to implement them. In the current political environment within Europe, the leaders of government are the only institutional actors which possess the necessary power to convince the competent bodies at the national level to take decisions in line with guidelines agreed at the EU level[27]. They may not shift the accountability for taking such decisions onto the institutions of the Union „in Brussels," but rather have to defend them domestically within their national context, with the weight and support of their parliamentary majority. At the same time, this approach allows sufficient flexibility to be adapted year to year to changing circumstances and regional differences.

Therefore there are plausible reasons why the European Council has taken the leading role in the macro-economic management of the European Union. Under pressure from the crisis, the European Council has occupied a political vacuum which the European Commission under the prevailing political conditions could not fill. Should this be interpreted as a sign that the political integration process of Europe has diminished?

4.2. Are these developments a signal of a revival in nationalism and distrust of the traditional methods of integration?

In accordance with the principle formulated in Article 17 of the EU, the Commission shall defend the general interests of the Union, and has been conferred full independence to fulfill that role. However, the obligation to pursue the general interest of the Union does not make it illegitimate that individual actors can articulate their national interests at the level of the Union, as long as in the discursive process of decision making, they are balanced against other national interests and a synthesis is found which overcomes particular interest lines. The institutional practice does not always correspond to the described theoretical model. There may have been periods in the European integration process, where actors coming from Germany, perhaps under

[27] This consideration, I owe to the suggestion by Klaus Hänsch.

the shock of the collective responsibility for the last world war, did show only a low profile in the expression of national interests. There may be other periods, such as after the unification of Germany, where partners from other countries may have noted with surprise that German actors began to defend their national positions with far less fear than before. This could be considered a path to normality in a continuously changing historical process.

But then there is, as often is the case in spontaneous developments, a tendency and danger to over-react. On the one hand, such exaggeration can manifest in the formation of national extremism. In the work of the European institutions such exaggeration may become visible through a rigidity which fails to keep appropriate distances, and formulates national interests in negotiating procedures no longer as contribution to the discourse, but as an end in itself. And if negotiators fall victim to such excesses, it can be easy for mistrust towards the institutions of the European Union, in particular the European Commission to emerge. Perhaps in the Economic Community of six Member States, the decisions of the Commission (with two of nine members coming from Germany) from the perspective of the German capital were more predictable than in the European Union of the present where one from twenty-eight members of the Commission comes from Germany. Perhaps there is a need for meaningful reform in the operation of the European Commission in order to address any concerns that the political level of Commissioners might become disconnected from transnational synthesis elaborated in its Directorates General through the sprawling system of cabinets, where political leadership and accountability would no longer be adequately ensured.

A possible need for discussion on reform within the Commission, however, is no justification for a general distrust towards the institutional system of the Union, because the diversity represented in the Commission finds a necessary balance through different weighting of votes in the Council and degressive proportional representation of citizens in the European Parliament.

4.3. What impact have these types of action on the separation of powers and balance within the Union?

In the European tradition, the separation of powers is one of the basic principles for the achievement of the values of freedom, democracy and rule of law as recognised in Article 2 of the Treaty on European Union. The separation of executive, legislative and judicial functions as well as ensuring their autonomy of action is an essential precondition on the side of the Union for each newly acceding Member State. All the more the institutional system of the Union needs to be measured against these principles.

The Union's institutional structure was originally constructed as a constantly interacting triangle of the Commission, Parliament and the Council, under the control of the Court as an independent judicial body. In this triangle, legislative functions were assumed together by the Parliament and the Council; by contrast, the executive functions were given mainly to the Commission[28] and in exceptional cases to the Council. Super-positions of functions of this type can be found in the constitutional systems of some Member States. This is probably more a theoretical than a practical problem. The European Council is designed to function in the institutional system of the European Union as a political body. In accordance with Article 15 TEU, it shall provide the necessary impetus, define general political directions and priorities, and shall explicitly not exercise legislative functions. Under pressure from the economic and financial crisis and strengthened by the integrative nature of its newly elected permanent president under the Treaty of Lisbon, the European Council has developed into, a de facto, new executive level within the Union. These executive functions are complementary to those previously exercised by the European Commission.

There is a clear dividing line between the executive powers of the Commission and the executive function of the European Council. The former are located in the area of competences conferred to the Union and governed by law, while the latter occupies a new area of coordination of political powers which are exercised under the

[28] As far as one can expect the Commission to hold the monopoly over the legislative proposal, in the traditional of constitutional law, the executive usually holds the legislative proposal right, but does not hold a monopoly, this could be seen differently and look at the proposal the Commission's monopoly as the sharing of legislative power.

sovereignty of the Member States. Both executive levels act to serve the common purpose of pooling the efforts of all Member States of the Union in order to enable Europe to compete under the more difficult conditions of global competition and market forces. Both levels may act in a complementary and purposeful manner, but their juxtaposition may also lead to contradictions, unnecessary friction or other unforeseen hazards.

4.4. Is the democratic legitimacy of the action taken adequately secured?

A relevant risk was identified by Habermas[29]. While the acts of the institutions of the European Union in the exercise of the powers conferred on them through the reforms of the Lisbon Treaty are subject to a level of parliamentary control which exists in no other supranational or international structure[30], the arrangements for democratic control of the European Council are relatively weak. With regard to the European Parliament, the EU Treaty provides in Article 15, paragraph 6 subsection d) only a reporting requirement for any meeting of the European Council. The European Parliament has obtained that the permanent president of the European Council answers to MEPs in a debate on his respective report. The increase of the European Council meetings could give the impression of a continuous dialogue. The express reservations which the President of the European Council has made show that he could quite easily escape any tentative to develop this dialogue through parliamentary practice into a genuine political accountability.

National parliaments of the Member States can hold the leader of their respective governments to account, however, by no means the 27 Heads of State and Government of the Union, when acting collectively within the European Council. The need for compromise at the EU level makes it an illusion that national parliaments can sufficiently scrutinise the European Council even if it acts through consensus. A central experience of more than fifty years of European integration process shows, that joint action by governments through common institutions does not benefit from

[29] Loc. cit. (Fn.2).

[30] European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286 (INI)) P6_TA (2008).

democratic legitimacy by the mere fact that each government, in the context of its national constitutional system, has a sufficient claim to democratic legitimacy.

Nevertheless, one should not portray this situation in negative terms. European integration has always taken place gradually, and usually steps to improve the legitimacy were following to new steps on the path of integration. It is not yet clear whether the new role of the European Council as the executive organ for macro-economic governance at the EU level is a definitive achievement or will only have a transitional character. Once the chosen path has brought positive results and the current crisis is overcome, it could in the future become more difficult to work out in the European Council the necessary consensus for macro-economic governance. Just as before the entry into force of the Treaty of Lisbon in the area of freedom, security and justice, the lack of Community decision making mechanisms would then be perceived as problematic. Perhaps by then, sufficient practical experience can be gained, which would facilitate a compromise on the appropriate legal forms of macro-economic governance by the Union.

Economic governance by the European Council, if measured against the provisions of the Treaty of Lisbon on democratic legitimacy, is not without problems. It is expected that the European Parliament will continue to struggle in holding the European Council politically accountable. Initiating European economic government by arrangement of a temporary nature in order to deal with the current development is certainly better than a haphazard ad hoc response to the crisis. Would the doubling of the European executive become a permanent solution, at least the institutional arrangements for democratic scrutiny would have to be improved.

4.5. What are the long-term effects of these choices on the European integration process?

During the mid-nineties in the face of growing resistance to the pursuit of the European integration process, the method of differentiated integration was advocated as an adequate response. D. Tsatsos highlighted the dangers of adopting such an approach. He called for differentiated integration to be used only temporarily and for

emergency situations in order not to endanger the unity of the emerging political order, which he later named sympoliteia[31]. Tsatsos was less concerned about those who lacked political will for further integration. Their right to leave the Union was recognised in Article 50 TFEU. The concern for Tsatsos at the time was about those who were unable to participate in further steps of integration, although they supported them in principle. His concern was that those willing to participate in deeper integration should not be marginalised and this form of integration would de facto lead to a lasting split in the European Union. He did not oppose exemplary pilot projects such as the Schengen Agreement, or the introduction of a common currency by a limited number of Member States because these integration steps were conceived so as to include other Member States when the time was right for their inclusion.

The same conceptual approach is relevant for the assessment of the recent developments in the field of economic governance. If the political resistance to common forms of action in the field of economic governance is so significant within some Member States that essential actions such as the Euro-Plus Pact or the permanent stability mechanism currently need to be created outside the framework of the law of the Union, then it is essential when achieving these important tools that they do not develop any momentum to work towards a permanent split in the sympoliteia. Specifically, this means that intergovernmental instruments such as the new permanent stability mechanism which may be inevitable as a preliminary step should preferably not be set up with autonomous institutional structures which will tend to become independent and threaten to split the Union in the long term.

In the discussions on the proposal to amend Article 136 TFEU, the rapporteurs of the Constitutional Affairs Committee of the European Parliament, Elmar Brok and Roberto Gualtieri, perceived this threat with a great strategic vision. In a frank dialogue with leaders of the European Council and the European Commission they could obtain assurances that at the level of the analysis and implementation in the future, the Commission would be satisfactorily involved in the stability mechanism[32]

---

31 *D. Tstatsos*, European Sympolity, Brussels 2009, idem (ed.) The European Union's constitutional structure, Handbook on the European Constitution, Berlin 2010, Introduction pp. 1 ff.

32 See European Parliament legislative resolution of 23 March 2011 to the draft decision of the European Council to amend Article 136 of the Treaty on the Functioning of the European Union in terms of a stability mechanism for Member States whose currency is the euro, P7_TA-PROV

which would be constituted as an intergovernmental instrument and that information of the European Parliament by the Council and the Commission will at least enable an initial form of parliamentary scrutiny. In this manner there seems to be less danger of new autonomous institutions being created and the Union being split in the long run. From a cost perspective, this solution is much cheaper, which is a relevant argument in times of budgetary austerity.

The long-term implications of the choices made are not yet fully perceivable. For areas of economic governance, in which no transfer of sovereignty to the Union is under consideration because of the intention to maintain the Member States' identity and substantive freedom of political action, a permanent doubling of executive functions at the level of the European Council may not be excluded. In this case the challenge is to provide sufficient democratic legitimacy for this kind of political action. It is also conceivable, however, that in response to the present strategic challenges the European Union overcomes the economic government by the European Council and achieves a new quality of political integration.

5. Strategic Challenges

Since the beginning of modern history, Europe has pursued a process of economic expansion on a global scale, which in the meantime has reached a dimension beyond Europe's own forces. In light of the analysis carried out by the working group „Horizon 2020 – 2030“[33], headed by the former Spanish Prime Minister Felipe González[34], the backwardness of Europe compared to global developments in the area of financial markets, energy, demography and social situation pointed to the question: „Europe: a museum or laboratory?“ And relevant to this question is not whether any of the larger Member States of the European Union has noticeable influence at the global level. The concern is that in relations with China, India and the emerging

(2011) 0103, especially in the fourth indent above letter the President of the European Council, President of Euro Group and of the responsible commissioner (Brok-Gualtieri A7 Doc 0052/2011).

33 Project Europe 2030: Challenges and Opportunities, Office for Official Publications of the European Union, Luxembourg 2010.

34 Speaking before the Committee on Constitutional Affairs of the European Parliament in Brussels on October 4, 2010, quoted in an informal transcript.

regional groupings in the Americas and Asia, the European Union of 500 million inhabitants does not have the necessary dimension and sufficient resources to ensure the welfare of its citizens. Should the Union, for the sake of maintaining a balance of equilibrium with these new powers, form regional alliances with the countries of the Mediterranean, the Arabian Peninsula and the Turkish speaking countries, in order to survive within global competition through combining complementary resources? In less far-reaching terms, but no less serious, the then Italian Minister of Economy and Finance Giulio Tremonti recently[35] argued that the economic and financial crisis and the instability caused by private financial actors, the geopolitical crisis, with a chain of reactions causing the Arab spring revolutions and their resultant migration flows, along with the events of the Fukushima nuclear crisis, represented a real turning point in the history of European integration. In his view, the European treaties which were written before these events do well contain some conceptual tools that can enable the European Union to act in response to this turning point. This requires, however, that the paradigmatic historical change is used as an opportunity for a new interpretation of the texts under the guiding point for the need of solidarity action. The institutional framework of the Treaty of Lisbon has not been questioned by Tremonti, but some of the examples he used (e.g. Eurobonds) show that the intended renewal of the interpretation of the basic concepts and its implementation in practice will not be possible without some changes to the wording of the existing European Treaties.

In the face of such challenges, can the current model of the European sympolity be durable? Or will history force Europe to merge into a true federal union in order to ensure its own or the euro currency's survival? The process of European integration is still open-ended. The sympolity characterised by the protection of national identities and autonomies has the advantage of maintaining diversity, which ensures spiritual and economic creativity, with other words political „biodiversity“. But it also presupposes the will, as required by Tremonti to act together in solidarity, to develop the ability to merge national interest positions in European compromise and to be willing to subordinate national power to the law which is common to the Union. The Treaty of Lisbon has not yet exhausted the potential to further develop the sympoliteia along these guiding concepts. The double executive level of the Union as already

35 Speaking before the Committee on Constitutional Affairs of the European Parliament on 19 April 2011 in Brussels, quoted from an informal transcript.

described could in a first step be reduced by the European Council electing as its own President a President of the European Commission, a possibility that is not excluded under the existing Treaties. Further steps such as ensuring full democratic accountability of the European Council will be more difficult to achieve, but will become a necessary requirement if the current forms of economic governance become permanent. Majority voting in the European Council and real scrutiny rights for the European Parliament would sooner or later become an inevitable step. The further deepening of the European polity may in some Member States of the Union require the adoption of a new national constitution. Here and now, one can have doubts whether e.g. in the German population the majorities could be found which are required for adopting a national constitution, that would allow Germany to participate in European integration beyond the limits defined by the Federal Constitutional Court in its ruling on the Lisbon Treaty. If, however, the European states and citizens continue to focus on the concept of the nation state, then an opportunity for further development of the European sympoliteia would not be seized, then they may in the not too distant future be forced by historical realities to accept integration into a federal European state. And such a development would affect their identity and rights of self-determination much more significantly. In the words of Dimitris Tsatsos: Who ignores the realities, will be punished by history.