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INTERGOVERNMENTALISM AND ITS OUTCOMES: THE IMPLICATIONS OF THE EURO CRISIS ON THE EUROPEAN UNION

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ABSTRACT

The paper argues that the Lisbon Treaty has institutionalized a dual constitution, supranational in the single market's policies and intergovernmental in (among others) economic, financial, foreign and defence policies. The euro crisis has thus represented a test for verifying the validity of the intergovernmental side of the Lisbon Treaty. The measures adopted were unable to tame market's pressures on the euro bringing the member states' governments to set up two new intergovernmental treaties. Facing an existential challenge, the intergovernmental method faced a difficulty in solving the basic dilemmas of collective action between governments for answering that challenge - a difficulty that Germany and France tried to neutralize injecting massive doses of their bi-lateral leadership in the decision-making process, to the point of becoming a true *directoire*. Is this outcome of intergovernmentalism acceptable in a union of asymmetrical states?

Key words: Lisbon Treaty, supranationalism, intergovernmentalism, euro crisis, treaty reform

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Introduction

The aim of the paper is to investigate the features of the European Union's (EU) answer to the Euro crisis and its institutional and political implications. According to the Lisbon Treaty, financial policy is a prerogative of the national governments of the EU member states. It is thus a policy that should be managed through an intergovernmental method. An analysis of how the EU has dealt with the euro crisis is also an opportunity to assess the strengths or weaknesses of the intergovernmental method. Indeed, after the failure of the Constitutional Treaty in the 2005 French and Dutch popular referendum, the intergovernmental 'moment' has become predominant within the EU, to the point that the defenders of the alternative Community method had to wonder whether the latter became 'obsolete' (Dehousse 2011). However, as a result of the financial crisis that broke out in 2008, taking a serious turn for the worse in 2010 and deepening in 2011, the intergovernmental structure set up in the Lisbon Treaty soon started to totter. The financial bankruptcy of Greece and Ireland and the serious financial difficulties of Portugal, Spain and Italy determined the need to reconsider the EU intergovernmental arrangement constructed in the course of the last two decades.

Under the financial threat of the euro's collapse, the heads of state and government of the EU member states eventually ended up redefining the intergovernmental system of economic governance in Europe (and the euro-area in particular). New radical legislative measures were approved following the procedures of the Lisbon Treaty and two new intergovernmental treaties (the Treaty on the European Stability Mechanism and the Treaty on the Fiscal Compact¹) have been set up outside of the Lisbon Treaty. The new measures and treaties attempted to ameliorate market pressures on the weaker member states of the euro-area, but didn't work as expected. They appeared to arrive too late and to be too ineffective. If one defines the euro crisis as an *existential crisis* (that is, a crisis which antagonizes national interests and does not allow for a politics of normal bargaining based on side payments, trade-offs, postponed benefits, mutual recognition), then the intergovernmental method was unable to solve the dilemmas of collective action which emerged under the crisis condition. Indeed, in answer to those dilemmas, Germany and France came to stress more and more unilaterally their own bi-lateral leadership becoming *de facto* the *directoire* of EU financial policy. It is interesting to notice that a similar outcome emerged within another intergovernmental realm as foreign and defence policy. In dealing with the Spring 2011 political

¹ I use the term 'Treaty on Fiscal Compact' for the sake of simplicity. Indeed, its name is Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Of the latter, I will refer to the version of 31 January 2012. It is supposed to be signed by heads of state and government in the meeting of the European Council of 1 March 2012. Regarding the Treaty on the European Stability Mechanism, I will refer to the version of 1 February 2012. Once signed, both treaties will have to be approved by the member states' legislatures.

crises in North Africa, particularly Libya, the intergovernmental structure set up by the Lisbon Treaty proved unable to affect the events that unfolded. The EU as such played no significant role in Libya, and the difficulty in reaching a common position between national governments was resolved through the affirmation of a French-British *directoire* of military intervention in that country. The euro crisis and the Libyan crisis thus showed how intergovernmentalism, in a condition of existential crisis, generated two *directoires* (German-French in financial policy and French-British in military policy) for managing the challenges resulting from them. Is this political outcome compatible with an EU constituted by asymmetrical states?

The paper will be divided into three sections. The first section will analyse the features of the Lisbon Treaty, showing its dual logic (supranational regarding the policies of the single market, and intergovernmental regarding financial and foreign policies) in order to distinguish and identify the two different decision-making structures' and integrations' logics. The second section will describe the evolution of the two crises, showing how the intergovernmental logic tried to deal with them. Although intergovernmentalism became the predominant approach to integration in the EU after the failure of the Constitutional Treaty, the evolution of the two crisis and their political outcomes illustrate the weakness, rather than the strength, of the intergovernmentalist approach. The third section will discuss the reasons why those crises did not find a satisfactory solution through the intergovernmental method which indeed ended up creating two different *directoires*. Particularly in the case of the euro crisis, that political outcome has already activated significant counter-pressures for neutralizing its more evident negative effects. Finally, in the conclusion, I will derive some directions for the debate on the future of the Lisbon Treaty

I. SECTION -THE LISBON TREATY: THE DUAL CONSTITUTION

I.1. The supranational side

The Treaty of Lisbon came into force on 1 December 2009 (Foster 2010)². Although the Treaty of Lisbon has scrapped any constitutional symbolism, it has defined (in terms of roles and functions) the EU's institutional structure. For a large majority of policies where integration proceeds through formal acts (*integration through law*), it is plausible to argue that the Lisbon Treaty has set up a system of government (that is, using David Easton's (1971) classic formulation, a formal structure of institutions endowed with the power of allocating values authoritatively), not

² The Lisbon Treaty is constituted of the amendments to the two consolidated treaties, the Treaty on the European Union or TUE of 1992 and the Treaty on the European Community, renamed as Treaty on the Functioning of the European Union or TFUE, of 1957, plus the Declaration concerning the Charter of Fundamental Rights considered *de facto* as a third treaty.

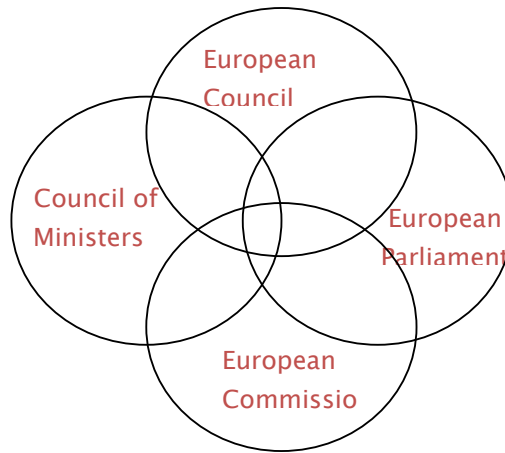
merely stabilized a system of governance (that is, an informal network of deliberative relations between public and private institutions and groups). As in all established democracies, government and governance are intertwined in the EU, i.e. vertical decision-making (typical of government) interacts with horizontal decision-making (typical of governance). Certainly, the EU has not adopted a fusion of powers model that exists all of its member states. It cannot be considered a parliamentary federation as Canada, Australia, Germany, Austria, Belgium or quasi-parliamentary federations as Spain (to mention the most relevant cases within OECD³) and of course India (outside the OECD). However, the Lisbon Treaty has formalized a governmental structure of separation of powers like those in the United States (US) and Switzerland (in the OECD countries), with the difference being that such separation is not only organized around two separated legislative chambers but also through a dual separated executive (which is not the case in both the US and Switzerland, which have a separated but unified executive, individual in the former case and collegial in the latter).

The Lisbon Treaty has brought to maturity a long process of distinction between the executive and the legislative branches. Celebrating the codecision procedure as “the ordinary legislative procedure” (TFEU, Art. 289), the Treaty has institutionalised a two-chamber legislative branch, consisting of a lower chamber representing the European electorate (the European Parliament or EP) and an upper chamber representing the governments of the member states (the Council). According to TFEU, Art. 289, “the ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission”. The Treaty has thus celebrated the growing role acquired by the EP since its direct election in 1979. The EP has finally become an institution of equal standing with the Council representing (in its various ministerial formations) the ministers of the EU member states’ governments. The inter-institutional balance between the EP and the Council has contributed legitimacy to the law making process of the EU. At the same time, by recognising the European Council (which consists of the heads of state or government of the EU member states, chaired by a president elected “by a qualified majority” of states “for a term of two and half years, renewable once”, TEU Art. 15.5) as the body responsible for setting the general political guidelines and priorities of the EU, the Treaty has finally transformed it into a political executive of the Union, while confirming the Commission in its role of technical executive of the latter. The European Council, therefore, can no longer be considered a body linked to the Council as it was in the past (Naurin and Wallace, 2008), because the latter exercises legislative functions, while the former

³ Organization for Economic Cooperation and Development instituted on 14 December 1960 and constituted (at the end 2011) by 35 countries.

executive ones (Kreppel 2011). The Lisbon Treaty has therefore built a four-sided institutional framework for governing the EU policies (on the single market), with a bicameral legislature and a dual executive branch (see Fig. 1).

Fig. 1 The supranational institutional system of the EU



The institutionalization of the quadrilateral decision-making system has had contradictory effects on the *Community method*, which is the origin of the EU’s transformation into a supranational organization. In fact, according to this method, “the European Commission alone makes legislative and policy proposals. Its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations. Legislative and budgetary acts are adopted by the Council of Ministers...and the European Parliament...The use of qualified majority voting in the Council is an essential element in ensuring the effectiveness of this method. Execution of policy is entrusted to the Commission and national authority. The European Court of Justice guarantees respect for the rule of law” (Dehousse 2011: 4). According to this method of integration, there is no role for the European Council in the EU decision-making system, although it has become an institution of strategic importance for the EU. At the same time, the strengthening of the EP has certainly cohered with the Community logic envisioned by Jean Monnet at the foundation of the integration process (although then the EP was an assembly constituted by representatives nominated by national parliaments). Indeed, through its irresistible institutionalization, the EP has become a legislature of a separation of powers system rather than a parliament of a fusion of powers system (Kreppel 2008; Shackleton 2005). How do we reconcile the European Council’s decision-making role with the decision-making independence of the Commission (which is the hinge of the Community method), given that both institutions

exercise executive functions? Remaining within a strict Community method perspective, it would be difficult to find an answer⁴. In any case, with the Lisbon Treaty, the European Council has formally entered into the supranational EU decision-making system with its role of defining ends and means of the integration process. Because the European Council has come to stay, I prefer to speak of a supranational, rather than Community, method for the management of single market policies.

Thus, “where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act”, the above procedure shall apply (TFEU, art. 294): the Commission has monopoly over legislative proposals (although its proposals might increasingly reflect European Council’s decisions) that have the form of a directive, regulation or decision; before submitting its proposal, the Commission will have to consult the various committees of the representatives of the member states (COREPER) supporting the activities of the Council, the parliamentary committees and interested or influential social and functional private organizations; once submitted, the Commission’s proposal will have to be discussed, amended and approved by both legislative branches (the EP and the Council). It is interesting to notice that, in the first years after the Lisbon Treaty came into force, when the Commission’s proposal was finally submitted to one or another legislative chamber it was generally approved at the first reading, avoiding passage through the time-consuming procedure of reconciliation between their different views on the proposal (Costa, Dehousse and Trakalova 2011). In sum, the governmental system on the supranational side of the EU has become quite efficient, with the competitive cooperation between the European Council and the Commission, and reasonably legitimate, thanks to the legislative role of the EP and the Council and the supervisory role of European Court of Justice (ECJ), together with member states’ constitutional courts.

In a large majority of policies where integration is taking place through legal acts, the EU decides through a complex interplay of institutions each independent from the other for operating. The European Council and the Council are expressions of member state governments, and their composition depends on the outcomes of the staggered national elections in the member states. The EP depends on the outcome of the elections organized in districts within member states every 5 years. The Commission’s president is nominated by the European Council, but should then receive the EP’s approval. The commissioners are nominated by the European Council, in cooperation with Commission’s president, but even they have to pass through a process of approval by the EP. Why

⁴ Indeed, in the most articulated study on the Community method (Dehousse 2011), there are no references to the role acquired by the European Council in the supranational EU. For a discussion on the erosion of the Commission’s power of initiative, see Ponzano, Hermanin and Corona (2012).

has the EU evolved towards a separation rather than a fusion of powers? The answer is still open to debate, and complex. It seems reasonable to argue, however, that a Union constituted by member states of such asymmetry (in demographic, economic and cultural terms) has a systemic resistance to moving in the direction of a parliamentary-based decision-making system. Separation of powers guarantees each member state an opportunity to make its voice heard (either in the EP or the Council, the European Council or the Commission) regardless of its demographic size or political clout. This has not meant that this voice (or request, or interest) was necessarily accepted, but that it was definitely heard. If the perimeter of the decision-making power is kept within the EP alone, then it would be much more difficult for its members (MEPs) representing small to medium-sized member states to exercise effective influence on the formation and decisions of the ‘European government’⁵. This unless parliamentary elections in all EU member states are run according to the same left v. right logic, thus bypassing demographic, economic, cultural, linguistic differences. But this has not been the case, although a growing coordination within the EP between the MEPS aggregated in the main party organizations (Popular Party, Socialists and Democrats, Liberal and Democrats, Greens) has been detected (Hix, Noury and Roland 2006). Horizontal separation of powers has proved to be quite successful in keeping all EU member states on board.

However, this institutional evolution toward a separation of powers has not been accompanied by a coherent constitutional vision. Likely because a parliamentary government in a fusion of powers’ system represents the most familiar institutional model for the EU political elites (Goetze and Rittberger 2010), and thus for containing the persistent neo-parliamentary critique of the EU being a governmental system with a (presumed) democratic deficit (a deficit supposedly to be reduced if the EP, on behalf of the European citizens, becomes the only or main source of political legitimacy, Majone 2009 and Hix 2008), the Lisbon Treaty has preserved a significant quota of the (traditional) neo-parliamentary rhetoric. For instance, the call directed (TFEU, Art. 17.7) to the European Council “of taking into account the elections to the European Parliament” in the appointment of the president of the Commission is an expression of that rhetoric, rather than an operational recommendation. In fact, what does that call mean when EP elections are held according to a highly proportional system, which, by its very nature, will never be able to produce an electoral majority (and will possibly justify different configurations of legislative majorities with regard to the different issues at stake)? The same can be said with respect to the claim (celebrated in the same article of the Lisbon Treaty) that the EP shall elect the president of the Commission. How

⁵ It should be stressed that the Lisbon Treaty does not apportion the 751 seats of the EP strictly according to the population of the member states. Indeed: (1) a minimum of 6 EP seats are assigned to each member states (162 seats); (2) the remaining 589 seats are assigned to member states in proportion to their population; (3) the larger member state (Germany) can obtain a maximum of 96 seats.

can one speak of election when the power to appoint the president of the Commission continues to be in the hands of the European Council? Rather, the EP has the power of ‘advice and consent’ with respect to decisions made by others, and not the power to elect, which cannot, by its very nature, be predetermined. Unions of highly asymmetrical states cannot easily accommodate the formation of permanent (although for 5 years) majorities (as in parliamentary systems).

I. 2. The intergovernmental side

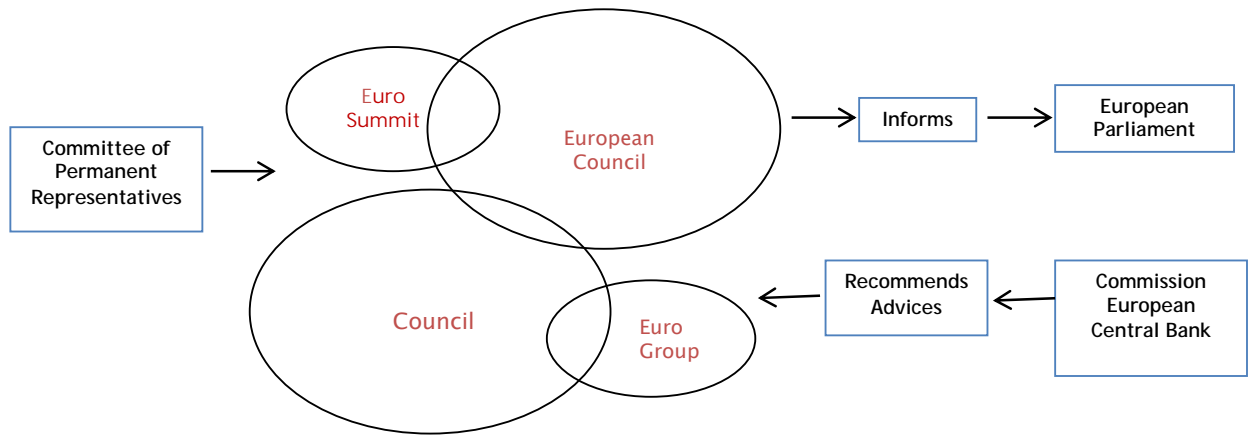
Integration through law does not represent the only logic celebrated by the Lisbon Treaty. With the extension of the integration process to policy realms traditionally considered sensitive to the national sovereignty of the member states, such as welfare and employment policies, foreign and security policy (Common Foreign and Security Policies or CFSP), military and security policy (European Security and Defence Policy or ESDP) and economic and monetary policies (and the Economic and Monetary Union or EMU in particular⁶), the EU has looked to organize the decision-making process by new modes of governance. Since the 1990s, scholars and practitioners alike have celebrated the virtues of this new approach to policy-making based on ‘open method of coordination’ (OMC): benchmarking, mainstreaming, peer review and, more generally, *intergovernmental coordination* (Trubek and Trubek 2007; Kohler-Koch and Rittberger 2006; Caporaso and Wittenbrinck 2006). Indeed, the 1992 Maastricht Treaty already recognized the need to promote integration in monetary and economic policy (EMU) as well as foreign and security policy (CFSP), but it interpreted *integration* as *growing coordination* between member states’ governments. To distinguish between different models of integration, the Maastricht Treaty set up distinct institutional pillars or decision-making regimes, to the point that some authors (Wallace and Wallace 2007) identified five regularized patterns of decision-making across the EU. The Lisbon Treaty has abolished the previous distinct pillars, giving a unified legal personality to the EU, but it has maintained the distinction between a EU operating according to the supranational method and an intergovernmental EU operating according to the various methods of coordination.

Certainly, the boundary between the supranational and intergovernmental methods is not fixed and insurmountable, as shown by the home affairs and justice policy that has been gradually transformed from an intergovernmental to a supranational policy. Nonetheless, the Lisbon Treaty has formally entrenched the intergovernmental method, thus celebrating an alternative model of integration based on (Allerkamp 2009: 14): (a) “policy entrepreneurship from some national capitals and the active involvement of the European Council in setting the overall direction of

⁶ The EMU is constituted by the member states whose currency is the euro.

policy”; (b) “the predominance of the Council of Ministers in consolidating cooperation”; (c) “the limited or marginal role of the Commission”; (d) “the exclusion of the EP and the ECJ from the circle of involvement”; (e) “the involvement of a distinct circle of key national policy-makers”; (f) “the adoption of special arrangements for managing cooperation, in particular the Council Secretariat”; (g) “the opaqueness of the process to national parliaments and citizens”; (h) “the capacity on occasion to deliver substantial joint policy”. What we have here is a system of governance, not a government system (see Fig. 2).

Fig. 2 The intergovernmental institutional system of the EU



Moreover, regarding CFSP and EMU in particular, the intergovernmental Lisbon Treaty has formally eschewed the principle that integration should proceed through legislative acts that are directly binding for all subjects involved. These policies are based on *soft law*, not *hard law*. As TEU, Art. 24.1, states expressly, in CFSP “the adoption of legislative acts shall be excluded” and the decisions are implemented through actions and positions (TEU, Art. 25). Thus, not only is the EP excluded from the decision-making process, but, as TEU, Art. 24 clarifies, “the Court of Justice of the European Union shall not have jurisdiction with respect to these provisions”, unless the foreign policy decisions infringe upon fundamental principles and rights the EU should respect, as stated in TEU, Art. 2 (“The Union is founded on the values of respect for human dignity...”) and TEU, Art. 3 (“The Union’s aims is to promote peace...”). It is certainly plausible to argue that the EP may be indirectly involved in foreign policy through its connection with the High Representative of the Union for Foreign Affairs and Security Policy (HR). Indeed, reformation of the HR’s role has been considered by many scholars one of the main innovations introduced by the

Lisbon Treaty for bringing foreign and security policy as close as possible to the supranational institutions. The HR role was initially introduced in the 1997 Amsterdam Treaty with the aim of giving technical support to the Council on Foreign Relations. Through the HR, the latter did not need to rely solely on the work of the General Affairs Council' secretariat, thus giving the Council of Foreign Relations an autonomous functional structure.

The Lisbon Treaty has apparently transformed this technical role into a more political one. According to the Treaty (TEU, Art. 18.2), the HR must now wear a 'double hat', being assigned the role of vice-president of the Commission and permanent chair of the Foreign Affairs Council. He or she must be appointed by the European Council in agreement with the president of the Commission – an appointment that must then be approved by the EP. The HR is a member of both the executive (in his/her capacity as vice president of the Commission) and legislative branches (because s/he permanently presides over the Foreign Affairs Council, the only configuration of the Council not chaired by the half-yearly rotating presidency of the Council). The Treaty has tried to institutionalize a sort of ambiguous role for the HR, expecting s/he might bridge the supranational culture represented by the Commission and the intergovernmental interests protected by the Foreign Affairs Council. Indeed, the Lisbon Treaty has left unanswered the question of whether the HR should be a facilitator or a promoter of a common foreign policy position, or better whether s/he should help the coordination process among the ministers of foreign affairs constituting the Council, or whether the HR should reframe the interests of the member states in a more integrated perspective. However, the expectation was the EU finally had the opportunity to speak 'with one voice' in the international relations. Indeed, it was argued (Wallace and Wallace 2007) that CFSP functions according to a model of 'intensive transgovernmentalism' that fosters a process of deepening socialization between national civil servants and ministers engaged in this policy realm, more than function according to the traditional intergovernmentalism. Nevertheless, the Lisbon Treaty clearly recognizes the Foreign Affairs Council as the only institution able to decide 'actions' and 'positions' (Thym 2011).

A similar logic governs the functioning of the economic and monetary policy of the EU (and in particular, of the economic and monetary union, or EMU) (Heipertz and Verdun 2010). As stated by TFEU, Art. 119, "the adoption of an economic policy (...) is based on the close coordination of Member States' economic policies". Economic and monetary policy are controlled by the Council with the Commission playing a very important but technical role in monitoring the economic performance of member states. Regarding excessive deficit procedures of the euro-area member states (annexed as a Protocol n. 12 to the Lisbon Treaty, called the Stability and Growth Pact, or

SGP, as regulated by TFEU, Art. 126) in particular, the Council monopolizes the policy's decision, although the latter is generally based on reports or recommendations of the Commission. As stated in TFEU, Art. 126.14, "the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions" for implementing agreed-upon economic guidelines. According to the special legislative procedure, the Council, acting either unanimously or by a qualified majority depending on the issue concerned, can adopt legislation based on a proposal by the Commission after consulting the EP. However, while being required to consult the EP on legislative proposals concerning economic and monetary policy, the Council is not bound by latter's position. Indeed, the Council took frequently decisions without even waiting for the EP's opinion. The Council (in its configuration as Council on Economic and Financial Affairs generally known as ECOFIN) is supported in its activities by an Economic and Financial Committee whose task (TFEU, Art. 134) is to supervise the economic and financial situations of the member states. It is an advisory body to ECOFIN, to which "the Member states, the Commission and the European Central Bank shall each appoint no more than two members" (TFEU, Art. 134.2). One might argue that also the EMU functions according to a variant of the intergovernmental method, a model that Puetter (2012) has defined as 'deliberative intergovernmentalism'. However, either through recommendations or special legislative procedure, the ECOFIN is the institution with the power of making decisions concerning the economic and financial policies of the Union.

Certainly, it is recognized (TUE, Art. 126.6 and 126.7) that the Commission might initiate a procedure against a member state running an excessive budget deficit, but the Commission's recommendation has the status of a proposal, because only the Council can take the appropriate measures (that may go from requests of information addressed to the member state that fails to comply to fines imposed on it). It is thus up to the Council to decide whether or not to proceed along the lines of the Commission's proposal (as it didn't do in 2003, when the Commission proposed opening an infringement procedure against France and Germany, who were not respecting the parameters of the SGP). This is why economic and monetary policy are based on voluntary coordination. The sanctions for excessive deficits and debts are always subject to the wills of member states' governments (or, their financial ministers in the ECOFIN). This is even truer for euro-area member states, whose main deliberations take place in the Euro Group (the ministers of economics and finance of the EU member states adopting the common currency, the euro, as regulated by Protocol n. 14 annexed to the Lisbon Treaty), with the technical support of the Commission. The Euro Group has the status of an 'informal institution,' embodying a specific approach to policy-making defined as 'informal governance' (Puetter 2006). Protocol n. 14 doesn't

even mention the EP, at least as the institution that requires information about the decisions made. And, as in the CFSP, no supervisory role is recognized or assigned to the ECJ. By establishing a common currency (the euro) and its adoption by 17 member states (as of 2011), the EU has thus centralized monetary policy (assigning its management to a proper federal institution, the European Central Bank). At the same time, by introducing the coordination framework, it has allowed for the decentralization of those fiscal and budgetary policies which are structurally connected to monetary policy.

The terms of coexistence between the supranationalism of the policies for the single market and the intergovernmentalism of the CFSP and EMU in particular were left uncertain by the Lisbon Treaty. In both realms, the Treaty has given a strategic role to the European Council, which is now the real political head of the Union (Scoutete 2011). Certainly, the permanent president of the European Council (although the half-yearly rotating presidency has remained in all configurations of the Council but Foreign Affairs) was supposed to dilute the strictly intergovernmental nature of the institution. Indeed, the first new president (Herman Van Rompuy) was quick to set up his permanent office in Brussels (at the Justus Lipsius building), which also symbolized that the European Council's presidency is now based in the Union's capital and no longer in those of member states. At the same time, the decision to maintain a commissioner for each member state in the Commission (although due to contingent reasons⁷) had the effect of introducing intergovernmental guarantees into the traditionally most supranational institution of the Union⁸. That notwithstanding, it appears doubtless that the Lisbon Treaty has formalized two different basic decision-making regimes for dealing with the policies of the single market, and the policies of financial stability and military security (as well as welfare and unemployment policies). For this constitutional reason, it is the intergovernmental decision-making regime that was tested by the dramatic events of the financial crisis and the challenge of a political crisis in the 'European backyard' (Libya). For the very first time since its post-2005 ascent to dominance, the pretension of the intergovernmental method being more adept in dealing with integrational challenges than the supranational method has possibly been empirically falsified.

⁷ The decision was made in order to appease Irish voters required to vote on the Lisbon Treaty for a second time (on October 2009) after having rejected it in a previous referendum (on June 2008).

⁸ Certainly, the Lisbon Treaty, TEU Art, 17.5, states that each member state has a right to propose a national as commissioner till 1 November 2014, thus adding that after that date the Commission will be composed of "two thirds of the number of the Member States, unless the European Council, acting unanimously, decides to alter this number". However, it is likely that the small member states will exert pressure to preserve the *status quo*, exactly because they want to guarantee the equally-weighted geographical composition even within the Commission regardless of what the treaty states.

II. SECTION –INTERGOVERNMENTALISM: ASCENT AND CRISIS

II.2 Theory and politics of intergovernmentalism

The intergovernmental development of the EU has been supported by a powerful theory and specific constellation of political factors. Let's start with the former. The intergovernmental interpretation of the EU is simultaneously a descriptive and a normative theory. Particularly thanks to the sophisticated elaboration of Moravcsik (1998), it has become one of the main theories explaining why the EU emerged in the first place and how it functions. According to intergovernmental interpretation, the EU dynamic is necessarily controlled by the member states and the integration process advances as long as the member states decide it. According to this view, while supranational institutions like the Commission and the ECJ are necessary for reducing the transaction costs of the inter-states process of negotiation (Moravcsik and Schimmelfenning, 2009), this doesn't seem to be the case for the EP. From this perspective, the EP is a redundant institution, given that the legitimization function within the EU is performed much more effectively by the parliaments of its member states. Analytically, the EU is thus interpreted as an 'intergovernmental organization plus', that is, an organization which coordinates member states' policies plus supranational institutions allowed to manage common interests in limited fields to reduce the uncertainties of the intergovernmental bargaining process (Moravcsick, 2005). Thus, a system of governance has been set up around the inter-states negotiation according to specific *ad hoc* procedures that need not take into account the criteria (of decision-making and legitimacy) that inspire the functioning of domestic democratic systems.

The fundamental distinction (either institutional or functional) in each system of government between the executive and the legislative branches (and between these and the judiciary) is irrelevant in the intergovernmental view of the EU. For intergovernmentalists, institutions are instrumental to the solution of contingent problems and their features constitute *ad hoc* arrangements regardless of their long-term effects. Indeed, for intergovernmentalists, whether the EU is organized according to the (undemocratic) principle of confusion of power rather than in accordance with the (democratic) principle of a distinction of powers is not an issue. As long as the confusion of power concerns the EU but not its member states, it will not be an issue for intergovernmentalists. This approach has been thus enriched by scholarship on the new modes of governance, which has gradually slipped (with the crisis of the constitutionalization process of the

EU in the mid-2000s) into a normative theory of *how* the EU should function⁹. This new scholarship has come to argue that the new modes of governance represent an effective alternative to the Community method in advancing the integration process, not only in policy realms sensitive for the member states. As argued some time ago (Idema and Keleman 2006), the new approach has not only exaggerated the efficacy of the new modes of governance, but it has above all contributed to a reappraisal of the view of integration as institutional and judicial formalization. More generally, from a normative point of view, the various streams of intergovernmentalism fit into the diffused view of the EU as a *sui generis* organization (Weiler, 2000)¹⁰. In sum, once the EU entered the throes of a crisis after the failure of the Constitutional Treaty in the French and Dutch popular referendum of 2005, an established theory was available to indicate an alternative view of integration. As *The Economist's Charlemagne* (2012) wrote (with satisfaction), after “the French and Dutch voters killed the proposed EU constitution ... intergovernmentalism (became) the new fashion”.

Of course, throughout the financial crisis, the intergovernmental twist in EU politics has also been supported by a specific constellation of political factors. From 2009 to 2011, French and German governments – likely for the first time – converged towards an intergovernmental interpretation of the integration process. President Sarkozy, elected in 2007, has been the coherent heir of Charles De Gaulle’s vision of a “Europe of nation states”, that is, of a process of integration primarily controlled by the member states’ executives (Calleo n.d.). In Sarkozy’s vision (as in De Gaulle’s) there is no room for the EP and the Commission in the decision-making process¹¹, not to mention the ECJ. One might argue that, in France in particular, after the popular refusal of the Constitutional Treaty in the 2005 referendum, this vision has come to be shared by much of the ruling elite of the country, not only by Gaullists (Grossman 2008). Yet, this vision appears to cohere quite well with a domestic semi-presidential system based on the decision-making primacy of the president of republic. This vision caused one of the most dramatic institutional conflicts with the Commission of the 1960s (known as the crisis of the ‘empty seat’), because of the latter’s attempt to

⁹ I am aware of the fact that not the entire literature on the new modes of governance can be considered coherent with intergovernmentalism. However, it shares with the latter an emphasis on the importance of voluntary coordination and an underestimation of the process of legalization.

¹⁰ For instance, in a speech given at Humboldt University of Berlin on 9 May 2011, Michel Barnier, European commissioner for internal market and services, echoed this view asserting that the EU “is unique in history and in the world”. The view that the EU is an exceptional political system, unprecedented due to “its unique institutional nature” (Orbie, 2009: 2), “different to pre-existing political forms (because of) its historical context, hybrid polity and political-legal constitution” (Manners, 2002: 240-242) is largely shared also by scholars and not only practitioners.

¹¹ It may be interesting to note that, on 11 January 2012, the French minister for European Affairs, Jean Leonetti, has even proposed the creation of a Euro-area parliament, consisting largely of parliamentarians of the national parliaments of the Euro-area, thus returning to the assembly of the 1950s and 1960s which was indirectly formed (and consequently had no power). Again, the legitimizing role of the EP is totally ignored by the French government presided by Nicolas Sarkozy.

establish its supranational independence from the national governments (Pederson 1998). In sum, with Sarkozy's arrival to power, the intergovernmental vision of integration has become the dominant one for the French government, thus obscuring the action of other French politicians, from Jean Monnet to Jacques Delors, who indeed elaborated and developed the Community method.

At the same time, it may be surprising that such an intergovernmental vision of Europe has come to be shared also by the German government of Angela Merkel, particularly after 2009. Certainly, after Helmut Kohl's chancellorship, a new generation of German politicians with no experience of WWII, has come into power. This change emerged clearly with the Schroeder government which followed the last Kohl government in 1998 and which lasted till 2005. Since then, "generational change...allowed (German) political leaders to *normalise* EU policy in the sense of becoming more like other large member states" (Sloam 2005: 98), and in particular the new generation was "ready to articulate material German interests" (Ibidem: 88). During the first half of the 2000s, the social-democratic and green governmental elites began questioning the paymaster role that Germany traditionally played within the process of European integration (for instance, asking for a renegotiation of the EU budget), did not refrain from mobilizing German military force abroad (for instance, participating in the 1999 Kosovo war), and articulated a vision of a German interest distinct from the general European interest¹². However, this new German assertiveness remained within the federal perspective of an increasingly economically- and politically-integrated Europe. This continuity was clearly expressed by the famous and influential speech by the Foreign Affairs Minister Joschka Fischer at Humboldt University in Berlin on 12 May 2000, a speech not by chance titled "From Confederacy to Federation: Thoughts on the Finality of European Integration".

When Angela Merkel took power for the first time in 2005¹³, the generational change was not only recognized, but appropriated new connotations for territorial reasons. Angela Merkel was and is the first chancellor coming from the Eastern *laender* of Germany – that is, the area under Soviet control during the Cold War era, and which was not involved in the public self-analysis of German responsibilities for the Holocaust and WWII and that instead developed in the Western hemisphere of the country. As is frequently observed, Angela Merkel seems to be a European more in the head than the heart¹⁴. However, since the outcome of the 2009 German elections, which led to

¹² In a famous 1997 statement, the new leader of the SPD (Social-democratic Party) Gerhard Schroeder said: "Kohl says the German have to be tied into Europe or they will stir up old fears of the 'furum teutonicus'. I say that's not the case. I believe that Germans have become European not because they have to be, but because they want to be. That is the difference" (now in Sloam 2005: 89).

¹³ She was elected chancellor of a grand coalition government constituted by her party (the Christian Democratic Union, CDU), the sister party of the latter (the Christian Social Union, CSU) and the Social Democratic Party (SPD).

¹⁴ See Charlemagne, 'Angela the lawgiver', *The Economist*, <http://www.economist.com/blogs/Charlemagne>.

the formation of a coalition government between the CDU and the *Freie Demokratische Partei* (FDP), the chancellorship of Angela Merkel has assumed an increasingly intergovernmental tone. This change has been due to several factors. The FDP has increasingly taken a clear euro-sceptical position, quite unusual for German politics. The German constitutional court or *Bundesverfassungsgericht* (BVerfG)¹⁵ has introduced powerful hurdles to the further transfer of national sovereignty to the EU. The German public has seemed increasingly wary of paying taxes to aid countries with high public debts and deficits. It was probably this combination of factors that led Merkel's government to search for intergovernmental solutions to the euro crisis that would not be questioned by the Court, her coalitional partner, or her voters. Merkel's government has thus gradually moved from a re-affirmation of national interests to a preference for an intergovernmental solution to the crisis – a preference that has continued to clash with the political structure and public culture of her country. The German parliamentary-federal system is quite different from the French semipresidential-unitary system. In Germany the bicameral legislature (the *Bundestag*, representing the citizens, and the *Bundesrat*, representing the *laender's* executives) plays a crucial role in the policy-making process, and the judiciary is the indispensable mediator of any constitutional dispute. Thus, if France has come to adopt the German economic paradigm, enshrined in the two new intergovernmental treaties, Germany has come to adopt the French political paradigm, accepting that decision-making power in the EU should remain in the exclusive hands of the governments meeting within the European Council. This marks a significant change for a country like Germany, which was traditionally the defender of the Commission and the EP (Pederson 1998). Finally, among the larger countries, the intergovernmental vision was supported not only by the British coalition government of David Cameron (elected in 2010), but also by the Italian government of Silvio Berlusconi (2008-2011), the latter in clear discontinuity with the previous government of Romano Prodi (2006-2008) and the nation's traditional preference for a supranational approach.

In sum, at the turn of the first decade of the 2000s, the consensus was that integration has reached such depth that only member states' governments can drive it properly. As President Sarkozy made clear in his speech in Toulon on 2 December 2011, "the reform of Europe is not a march towards supra-nationality. (...) The crisis has pushed the heads of state and government to assume greater responsibility because ultimately they have the democratic legitimacy to take decisions. (...) The integration of Europe will go the intergovernmental way because Europe needs to make strategic political choices". A month before President Sarkozy's speech, on 2 November

¹⁵ From the sentence of 30 June 2009 stating that the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) is compatible with the German Basic Law to the sentence of 6 September 2011 upholding the country's participation in bailing out financially-ailing Eurozone member states such as Greece.

2010¹⁶, German chancellor Angela Merkel clearly assessed that “the Lisbon Treaty has placed the institutional structure (of the EU) on a new foundation”, to the point of making out-dated traditional distinctions between the “Community and the Intergovernmental methods”¹⁷. Indeed, she added, the EU is already functioning according to a “new Union method”, which consists of “coordinated action in a spirit of solidarity”. If such coordination does not occur naturally, then other structural factors might help foster it. In fact, it was market speculation and fear of national defaults which pressured the weakest euro-area member states to abide by the conditions imposed by Germany, although it seems difficult to call this convergence ‘policy coordination in a spirit of solidarity’. Thus, the explanation is not that Germany and France have become sceptical of the European integration process, as many observers continue to argue. Indeed, all the decisions made by the European Council under German and French pressure during the euro crisis, including the new intergovernmental treaties, had and will have the effect of further reducing national sovereignty in the field of budgetary and fiscal policies. However the new measures and treaties were finalized to keep under budgetary and fiscal integration of euro area member states under the control of national. It was this intergovernmental strategy that did not work as expected.

II.2 Two crises and their dynamics

The financial crisis was initially circumscribed to Greece (which gave wrong data on its deficit and public debt to the Euro Group, the ECOFIN and the Commission). But, given the uncertainty of the European Council’s answer to the Greek financial crisis, the crisis gradually began expanding to other euro-area member states. Strategic divisions for dealing with the crisis between the larger member states of the euro-area (France favouring a new ‘economic government’ for the euro-area and Germany insisting on radical cuts in public spending in the member states involved in the financial crisis) and radical divergences in the domestic electoral interests of the incumbent governments (governments with a sound budget did not want to pay for the difficulties of indebted countries whose governments expected help to survive politically) made the decision-making process within the Council and the European Council especially burdensome. In fact, continuous meetings of the European Council were organized in 2010 and 2011¹⁸, but none was decisive. In particular, two rounds of crucial decisions were taken concerning the economic

¹⁶ Opening ceremony of the 61th academic year of the College of Europe in Bruges.

¹⁷ On this, see Dehousse (2011).

¹⁸ It is interesting to note that, while the Lisbon Treaty (TUE, Art. 15.3) states that “the European Council shall meet twice every six months”, in the 2010 it met 6 times (8 times if one considers two meeting of the Euro-area member states’ heads of government) and in 2011 7 times (9 times if one considers also the meetings of the Euro-area member states’ heads of government).

governance of the EU in 2011: the first between the European Council of 24-25 March and the European Council of 23-24 June; the second, between the European Council of 17-18 October and the European Council of 9-10 October.

Of the decisions taken in the first semester of 2011, six consisted of legislative measures finalized to tighten economic policy coordination among the EU member states through a stronger Stability and Growth Pact (SGP) (Micossi 2011). All of these were operative by 13 December 2011. They were: (1) the strengthening of the surveillance of budgetary positions and coordination of economic policies through a regulation amending Council Regulation 1466/97 approved with the codecision procedure on Commission's proposal; (2) the speeding up and clarification of the excessive deficit procedure through a Council regulation amending Council Regulation 1467/97 approved with a special legislative procedure (with the EP only consulted); (3) the enforcement of budgetary surveillance in the euro area through a new regulation approved with the codecision procedure on Commission's proposal; (4) the definition of a budgetary framework of the member states through a new Council directive implemented with a non-legislative procedure (with the EP only consulted); (5) the prevention and correction of macroeconomic imbalances through a new regulation approved with the codecision procedure on Commission's proposal; (6) the enforcement of measures for correcting excessive macroeconomic imbalances in the euro area through a new regulation approved with the codecision procedure on Commission's proposal.

To these measures, there should be added: (7) a previous decision on the European Semester, approved by the Council on 7 September 2010, and entering into force by January 2011, that was finalized to coordinate ex ante the budgetary and economic policies of the EU member states, in line with both the SGP and Europe 2010 strategy; (8) the Euro Plus Pact, consisting of a political commitment (a sort of intergovernmental agreement) between the euro area member states, but also open to non-euro area ones (Denmark, Poland, Latvia, Lithuania, Bulgaria and Romania) aimed to foster stronger economic policy coordination; (9) the European Stability Mechanism (ESM), establishing a new treaty among the euro-area member states, with its own institutions¹⁹, "as an intergovernmental organisation under public international law" to enter into force after June 2013 (and then anticipated to July 2012), located outside the EU institutional framework although justified by an amendment proposal to TFEU, Art. 136 which states that "the member States whose

¹⁹ The Conclusions of the European Council of 24-25 March 2011 states: "The ESM will have a Board of Governors consisting of the Ministers of Finance of the euro-area Member States (as voting members), with the European Commissioner for Economic and Monetary Affairs and the President of the ECB as observers. The Board of Directors will elect a Chairperson from among its voting members. (...) The ESM will have a Board of Directors which will carry out specific tasks as delegated by the Board of Governors. (...) All decisions by the Board of Directors will be taken by qualified majority (...) A qualified majority is defined as 80 percent of the votes", *EUCO 10/11, Concl 3*, pp. 22-23.

currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole”. Considered in its entirety, the decisions taken in the first semester of 2011 appear ambivalent to their institutional implications. Whereas the first six legislative measures moved predominantly in the direction of strengthening, along with the codecision procedure and the supranational side of the Lisbon Treaty, the same cannot be said for the last three decisions, which shifted in an intergovernmental direction, with the establishment of the ESM Treaty and the Euro Plus Pact. At that time, these measures and decisions seemed to many observers to have put “the EU system...in the throes of a revolution (although) like all revolutions, this one (too) displays numerous evolutionary features” (Ludlow 2011:5).

However, that revolution was not sufficient to appease the financial markets that indeed began demanding higher interest rates for buying public bonds from Italy and other southern and peripheral euro-area member states. Market pressures became so powerful that many of these countries with high ratios of public debt to GNP had to register the collapse of their incumbent governments. In some cases (Ireland, Portugal, Spain), the crisis was resolved through new elections, while in others (Greece, Italy) it was resolved through the substitution of the ‘party/ies in government’ with a ‘national solidarity’ executive composed by technocrats and supported by a large trans-parties alliance in the parliament (Greece and Italy). The formation of executives independent from electoral consensus was considered necessary not only to promote the required reforms (that were vetoed by powerful electoral constituencies), but also to guarantee to virtuous euro-area member states (Germany, Netherland, Finland, Austria) that Greece and Italy would be serious in cutting their public debt and rationalizing their general systems of public expenditure. The hope was to show the financial markets (and the domestic electorates of the virtuous countries) that the entire euro-area was committed to achieving financial stability. But even these highly costly domestic changes were not considered sufficient. Germany’s reluctance to allow the European Central Bank (ECB) to operate as lender of last resort or to allow the Euro Group to issue bonds guaranteed by all the euro-area member states for keeping interest rates low has increased the uncertainty about the euro’s future.

Thus, in the second half of 2011, other crucial decisions were made, particularly during the European Council’s meeting of 8-9 December 2011. Under the irresistible leadership of German chancellor Angela Merkel, followed by French president Nicolas Sarkozy, a proposal to amend the Lisbon Treaty and integrate the fiscal policies of the member states was advanced. This time, automatic mechanisms of sanctions on member states who would not respect more stringent criteria of deficit-GNP percentage (0,5 per cent a year) and debt-GNP percentage (60 per cent, with the

downsizing of 1/20 of the over stock every year) were advanced, with the request that each member state would introduce the golden rule of a mandatory balanced budget domestically at the constitutional or equivalent level. The United Kingdom's (UK) opposition to pursuing fiscal integration within the Lisbon Treaty, motivated by the need to protect the London financial district from possibly-restrictive fiscal regulations, made it necessary to move beyond the Lisbon Treaty, an outcome that the French president, given his mistrust if not distrust of the supranational features present in the Lisbon Treaty, aimed for. Indeed, it may have been possible to recur to the procedure of reinforced cooperation (TEU, Art. 20), on the basis of which a group of EU member states is allowed to advance towards deeper integration in policy fields that are not of exclusive competence of the Union or do not concern the common foreign and security policy (CFSP) (Dyson K. and Sepos, 2010).

However, this institutional strategy was not considered viable further because of German domestic reasons (chancellor Merkel had to appease her electoral constituencies by displaying her capacity to impose stricter rules on the Euro-area member states) and also because the activation of the reinforced cooperation's procedure would have required (TFEU, Art. 326-334) the consent of the entire Council (UK included). For these reasons, it was decided that a new intergovernmental treaty, the Fiscal Compact Treaty, with its own governance structure would be set up outside the Lisbon Treaty and signed by all the 17 Euro-area member states plus those non-euro area states (all of them, apart from the UK and the Czech Republic) interested in participating in the treaty. Thus, after two years of financial crisis, intergovernmental EU has produced a multiplicity of treaties: the Lisbon Treaty, which has remained in force, the ESM Treaty for the management of financial stability and the Fiscal Compact Treaty for the control of the budgetary policies. Nevertheless, throughout these two years, the most audacious decisions arrived late for answering to the market's pressures, were too limited in their reach and were imposed by the German and French governments on those of the other member states.

In a similar vein, the political crisis that exploded in North Africa in the first months of 2011 illustrated the inadequacy of the institutional mechanism defined in the Lisbon Treaty in pursuing both a Common Foreign and Security Policy (CFSP) and a European Security and Defence Policy (ESDP). The intergovernmental Foreign Affairs Council and its HR played no significant role in the crisis, and experienced a stalemate in the face of the contrasting perspectives of its larger member states. Following Germany's decision to abstain from the United Nations Security Council vote on Resolution n. 1973, approved on 17 March 2011, which allowed for military intervention in Libya, France and the UK decided unilaterally to intervene in the North African country, backed by the

United States (US) and with the support of other European and Arab countries, although the intervention was later re-framed as a NATO military operation. Certainly, ESDP is a peculiarly intergovernmental policy strongly interwoven with military cooperation taking place within NATO (Dyson T. 2010; Howorth 2007). Because of the peculiar nature of this policy, it was certainly difficult for the HR to muster a united position among the EU member states. However, the divisions between the member states accompanied by the free-riding position assumed by other member states had the effect of creating the conditions for the French and British decision to militarily intervene in Libya, a decision to which other member states adapted only later. In sum, the contradictory evolution of the euro crisis and the traditional solution given to the Libyan crisis do not seem to vindicate the claim that intergovernmentalism constitutes a more effective method (than the supranational one) for dealing with the challenges of integration. The euro crisis is to the intergovernmental method what the French and Dutch referendum were to the Community method.

III. INTERGOVERNMENTALISM: DILEMMAS AND REACTION

III.1 The dilemmas of intergovernmentalism

Intergovernmentalism as a decision-making method based on voluntary policy coordination did not work because it was unable to solve the basic dilemmas of collective action in conditions of existential crisis (as is the euro crisis). Let's consider these basic dilemmas. The *first* is the *institutional dilemma*: how to neutralize veto positions in a decision-making process requiring intergovernmental consent? This dilemma accompanied the entire evolution of the euro crisis, bringing the European Council to answer the crisis regularly 'too late and too little'. Indeed, for neutralizing the British veto on the fiscal compact, it was necessary to move outside of the Lisbon Treaty itself. Or, to avoid jeopardizing the entire project by the possible rejection of one or another intergovernmental treaty by few of their contracting parties, the Fiscal Compact Treaty (Title VI, Art. 14.2) states that it "shall enter to force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification". If this decision has eliminated unanimity as a barrier to activating the new treaty (a very important step forward in the EU institutional history), it will nevertheless reveal more new problems than it solves old ones. What will the consequences be for the euro area as a coherent monetary system if some euro area member states approve the treaty and other euro area member states will not? Will those that approved the treaty continue in their fiscal integration while those that did not play a free-riding role? Indeed, anticipating plausible rejection of the Fiscal Compact Treaty, the ESM Treaty states (Point 5) that "the granting of financial assistance...will be conditional, as of 1 March 2013, on the

ratification of Fiscal Compact Treaty by the ESM Member concerned”. Will this threat be sufficient to cool the euro-sceptical mood of Irish voters or the anti-European mood of Greek voters? At the same time, majority voting is extended even in the ESM. In fact, its Board of Directors “shall take decisions by qualified majority, unless otherwise stated in this Treaty” (Art. 6.5). However, it may be impracticable to recur to majority voting in a treaty justified by international public law. And, above all, it is certainly incoherent, at least from an institutional perspective, to establish new treaties to solve the contradictions of an old treaty and keep them alive simultaneously²⁰. It is reasonable to argue that in the future, such coexistence between different treaties will be the source of new legal, technical and political problems that might constrain the proper functioning of each.

The *second* is the *non-compliance dilemma*: how to guarantee the respect of rules decided voluntarily by contracting governments when that respect no longer fits their interests? This dilemma exploded when it became apparent that Greece cheated the other member states’ governments (manipulating its statistical data regarding public deficit and debt) to enter and then remain in the Euro-area. However, the same dilemma emerged in 2003, when France and Germany were saved from sanctions by a decision of the ECOFIN (and in contrast to a Commission’s recommendation) notwithstanding their disrespect for the SGP’s parameters. The Fiscal Compact Treaty tries to deal with the non-compliance possibility providing for a binding intervention of the ECJ upon those contracting parties that do not respect the agreed rules. It is stated (Art. 8.1) that “where a Contracting Party considers, independently of the Commission’s report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter before the Court of Justice. (...) the judgment of the Court of Justice shall be binding on the parties in the procedure”. This also applies when the Commission issues a report on a contracting party failing to comply with the rules established by the Treaty. In the latter case, if the Commission, after having given the contracting party concerned the opportunity to submit its observations, still confirms the non-compliance by the contracting party in question, the matter will be brought to the ECJ. Art. 17 of the Fiscal Compact Treaty even stresses that, in order to neutralize a recommendation of the Commission to intervene against a member state breaching a deficit criteria, “a qualified majority of the member states (should be) opposed to the decision proposed or recommended”.

Thus, the discretion of the Council seems to have been reduced (if compared with the rules concerning the SGP institutionalized in the intergovernmental side of the Lisbon Treaty), recognizing the need to rely on third actors (the ECJ or the Commission) for keeping the contracting

²⁰ It is like, considering the US case, as if the Founding Fathers had decided to keep into force the (intergovernmental) Articles of Confederation of 1781 after they agreed on the (supranational) Philadelphia Constitution of 1787. With the difference that, in the EU, the framers of the new treaties went in the reverse direction of the one pursued by the framers of the US constitution.

parties aligned with the agreed aims of the Treaty. Even the ESM Treaty states that, in case of a dispute between an ESM Member and the ESM (Art. 37.2), “the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgement within a period to be decided by said Court” (Art. 37.3). However, this solution of the non-compliance dilemma seems problematic. It is problematic, in fact, that a new organization (set up by the Fiscal Compact Treaty or ESM Treaty) might use an institution (such as the ECJ) of another organization (the EU set up by the Lisbon Treaty) to bind its own member states. This may also apply to the technical expertise of the Commission or ECB, upon which both treaties rely. In the ESM Treaty, for instance, it is stated (Art. 17.5) that “the Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the Commission, ... the disbursement of financial assistance to a beneficiary Member state” or (Art 18.2) that “decisions on interventions...shall be taken on the basis of an analysis of the ECB recognising the existence of exceptional financial market circumstances...” although the Commission and the ECB are not allowed to play an independent role in the decision-making process. Certainly, the intervention of the ECJ is justified by TFEU, Art. 273, that states: “the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties”. However, it is also certain that the ECJ or the Commission are institutions also composed by the contributions countries (such as the UK and the Czech Republic) that did not agree upon the Fiscal Compact Treaty that utilizes them. Which are the political implications of this discrepancy? Moreover, it also seems problematic to assume that the procedure of a reverse qualified majority will finally neutralize discretionary decisions of the Council. In fact, it remains to be seen whether it is so difficult to build a qualified majority when the member state to save is a large one with its persuasive resources for affecting the choices of the other small and medium sized member states.

The *third* is the *legitimacy dilemma*: how to guarantee legitimacy to decisions reached by national executives in the Council that were never discussed by the institution representing the European citizens (the EP)? Indeed, this dilemma became evident as the crisis deepened and the citizens of the indebted member states had to pay high costs for making the structural adjustment of their country possible. Not only did they have to abide by decisions imposed by impersonal financial markets, but also by the national executives of the larger member states within the Council and the European Council they never voted. The legitimacy of the intergovernmental decisions cannot be guaranteed by the ECJ’s involvement in the Fiscal Compact Treaty framework.

International organizations may function on the basis of decisions taken in a club of governments, supervised by their respective judicial organs, but this is not the case for the EU, which is not an international organization. The intergovernmental framework cannot identify a satisfactory solution to this dilemma because it has assumed, theoretically and politically, that the legitimacy of the EU derives from the legitimacy of its member states' governments, as asserted by President Sarkozy in his Toulon speech. However, as shown by the protests in the streets of many European capitals, the legitimacy of decisions taken on behalf of the EU cannot be a derivative of the legitimacy enjoyed by the governments of its member states, contrary to what President Sarkozy asserted. Decisions made at the EU level require a legitimizing mechanism at that level, not at the level of its member states. Without proper involvement of the EP in those decisions, the latter will lack the justification sufficient to be accepted by the European citizens affected by those decisions.

The difficulty in dealing with the basic problems of collective action has increased the stake of the leadership's role in driving the EU toward the necessary answers. However, as the financial crisis deepened, the bi-lateral leadership of Germany and France was transformed into a *directoire* of the EU financial policy. Analytically, it is not clear where to locate the boundary between bi-lateral leadership on one side and bi-lateral *directoire* on the other. To be sure, as Heipertz and Verdun (2010: 20) argued, "when Member States governments bargain with one another, the largest countries have the greater influence". And, of course, the bi-lateral leadership of France and Germany has historically represented the engine of the integration process, although the various waves of enlargement, increasing the number of the EU member states, have inevitably reduced its efficacy (Cole 2010). However, their bi-lateral leadership was not resented by the other member states as long as the two countries, although sharing a strategic goal, "started from quite diverging points when it came to sketching the road toward this common goal" (Schild 2010: 1380). As Webber (1999: 16) put it, the greater the divergence between French and German preferences on the policy before reaching a common goal, the easier it was for the other member states to 'multilateralize' that common goal. The deepening of euro crisis prevented this multilateralization, thus bringing French and (above all) German influence into predominance, for two reasons.

First, Germany and France came to share the same ends and means for dealing with it. Although France initially used a strategy different than Germany's, fear of playing victim to market speculations if unprotected by an alliance with Germany, brought France closer and closer to the Germany's restrictive monetary position (no role for the ECB to act as lender of last resort, no Euro-bonds, no expansive policies either at the EU or domestic level). With the coordination of the Brussels office of President Herman van Rompuy, the European Monetary Union (EMU) has come

to be controlled by Berlin and Paris sharing not only the same strategic goals (financial stability and fiscal integration), but also policies with which to reach them (the introduction of a balanced budget clause in the constitution of the member states through a new treaty, domestic structural reforms, fiscal discipline).

Second, Mr Sarkozy and Mrs Merkel, in their attempt to bypass the constraints of the intergovernmental method, came to ‘verticalize’ the decision-making process. They regularly met (in Berlin or Paris more than in Brussels) before the European Council meetings to identify common or shared positions that were later imposed in the following formal meeting of the heads of state and governments²¹. Indeed, it became common to talk in the press of a ‘Merkozy’ government within the intergovernmental European Council. This outcome seems paradoxical: when Germany and France are divided, the European Council is stalled. When they finally agree on everything, then the European Council becomes a mere mouthpiece. At the same time, the French-British leadership in military policy also came to be transformed into a *directoire* as the Libyan crisis and the stalemate between the larger EU member states deepened. In this case, the two countries converged not only on their objective – regime change in Libya – but also on the military means to achieve it. And also in this case, the decision to intervene was made in Paris rather than in Brussels, in a meeting convened by the French presidency, not by the HR or the European Council’s president in Brussels. The traditional competition between France and UK that helped ‘multilateralize’ the EU foreign and defence policy in the past disappeared during the Libyan crisis, also because the US left the leadership of the intervention to Europeans²². In conclusion, with the deepening of the euro crisis, intergovernmental Europe became a German-French Europe, and with the acceleration of the Libyan civil war, European defence policy went back to the French-British *entente cordiale*.

III.2 Reacting to intergovernmentalism

Very soon, discontent over the *directoires* went public (Castle 2011: 4) through a statement subscribed by three small and medium sized member states (but also among the founders of the EU) – Belgium, the Netherlands and Luxembourg. The influential think-tank Friends of Europe made public on 22 June 2011 a document which denounced “the trend in which Europe’s national

²¹ It is worthwhile to read the chronicles of the preparation of the various European Council held into 2011 by Peter Ludlow with their detailed description of the triangulation between chancellor Angela Merkel and her staff, president Nicolas Sarkozy and his staff and the office of president. Herman Van Rompuy. A good example is Ludlow (2011a).

²² The US decision thus contributed to reduce the traditional contrast between the two countries, with the UK generally following the US policy and France generally claiming the need to have an independent European policy (Garton Ash 2004).

governments rather than the EU are increasingly in the driving seat...This is especially true in the economic domain where there is a global perception that Germany matters more than the EU and on security issues where France and the UK eclipse the rest of Europe" (Friends of Europe 2011). Or, commenting on the decisions to be taken by the European Council of 8-9 December 2011, an influential European group denounced "the temptation of a Franco-German *coup de chefs d'Etat*"²³. In the condition of an existential crisis, the intergovernmental approach might end up institutionalizing hierarchical relations between national governments within the Council and the European Council. From an intergovernmental point of view²⁴, the emergence of a French-British *directoire* in foreign policy and German-French *directoire* in financial policy seems to be a reasonable *political* outcome in a Union that exists thanks to the will of domestic governments. Indeed it was argued that the political crisis in Libya developed in the space of days and hours, leaving little room for the patient and necessarily slow-moving diplomacy of the HR whose action requires the support of 27 member states' governments. The French-British *directoire* was then the only viable option to prevent Muammar Gaddafi from getting rid of the opposition; a viable solution given that France and UK have cooperated in coordinating their military structures and operations since the Saint-Malo declaration of December 1998. After all, in foreign and defence policy, France and the UK are unlike the other member states: they have permanent seats on the United Nations (UN) Security Council, they have nuclear power, they rely on efficient diplomatic corps; they have the political outlook proper of great powers. At the same time, with regard to the establishment of the ESM and the Fiscal Compact Treaties, it was argued that Germany inevitably had to play a domineering role in setting them up and defining the policy's priorities of the euro area, given its condition as the continent's most powerful economy and the major financier of the various instruments of financial stability.

However, these intergovernmental statements seem unwarranted. Regarding foreign and defence policy, the French-British intervention was effective in preventing Gaddafi's troops from seizing the rebellious regions of Libya because it was supported by the US military forces leading NATO (although *from behind*). France and the UK are no longer self-sufficient military powers, in particular in a situation of dramatic downsizing of their military budgets, and they can no longer seriously assume that their *directoire* in foreign policy will generate a common good for all other EU member states. Indeed, their *directoire* may incentivize the decline of European defence, if the

²³ Statement by the Spinelli Group (a coalition of influential politicians and scholars) based in Brussels made public on 8 December 2011.

²⁴ This view was largely diffused in the press by 'realist' observers (journalists, analysts, politicians).

US will indeed reduce its military presence in the European theatre²⁵. No single country *per sé* may offset US withdrawal, on both the economic and military level, nor may any single European country play a significant international role in a system of continental giants (such as China, Russia, India and Brazil, apart from the US). But also with regard to financial policy, the intergovernmental assumption is unwarranted. German-French *directoire*, based on the German predisposition to spread its own economic model and interests to the entire continent, might backfire, leaving Germany or Germany along with France to preside over a declining continent. No major European economic power (Germany included) has the capacity to appease the financial markets and restore confidence in the common currency. Germany, as a single country, is a medium-sized economic power unable to affect the political economy's logic of a world structured around a few powerful continental economies. In sum, the intergovernmental view did not consider the German-French *directoire* ineffective during the euro crisis or that, in the Libyan crisis, the French-British *directoire* was effective due to US support. Moreover, that view did not consider that both *directoires* ended up beating their heads against a wall of legitimacy.

Indeed, facing the German-French writhing in intergovernmental logic, the EP and the Commission started to react, more and more vociferously, to the *directoire* and its lack of legitimacy. Particularly under EP's pressure, both intergovernmental treaties were subjected to several revisions. The Fiscal Compact Treaty, which passed through five different drafts in less than two months (8-9 December 2011-31 January 2012) before a final version was published, was particularly affected (Krellinger 2012). In the final version, for instance, it refers to the necessity of applying it (Art. 2.1) "in conformity with the Treaties on which the European Union is founded (...) and with European Union law". Moreover, because of the EP's mobilization, the Treaty declares that (Art. 16) "within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in compliance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union". Indeed, the EP was fast to notice, already during the decision to create the ESM Treaty, that the latter "poses a risk to the integrity of the Treaty-based system" of the EU²⁶. At the same time, the supranational institutions' criticism of the Fiscal

²⁵ The previous US secretary of Defence Robert Gates said on 10 June 2011 at the Security and Defence Agenda Conference held in Brussels: "The blunt reality is that there will be dwindling appetite and patience in the U.S. Congress, and in the American body politic writ large, to expend increasingly precious funds on behalf of nations that are apparently unwilling to devote the necessary resources or make the necessary changes to be serious and capable partners in their own defense".

²⁶ Text adopted by the European Parliament at the sitting of Wednesday 23 March 2011, O.7.

Compact Treaty pressured the Treaty's framers to recognize that the operation of the intergovernmental Summit of the Heads of State and Government should rely on the president of the Commission. As stated in Art. 12.4, "the President of the Euro Summit shall ensure the preparation and continuity of Euro Summits meetings, in close cooperation with the President of the European Commission."

The Fiscal Compact Treaty has finally arrived to formalize (Art. 10) the possibility for member states whose currency is the euro to recur "to enhanced cooperation as provided for in Article 20 of the Treaty on the European Union (TEU) and in Articles 326 to 334 of the Treaty on the function of the European Union (TFEU)", thus making the same new Treaty *de facto* redundant. After a long negotiation, the Fiscal Compact Treaty has come to recognize, first, that the Commission's role in monitoring the excessive deficit's member states is necessary and, second, that the EP cannot be considered an outsider on par with the EU member states whose currency is not the euro (both conditions absent in the initial announcement of the Fiscal Compact Treaty). However, if the Commission has been finally absorbed in the policy-making process, the EP continues to be kept on the margins. According to Art. 12.5, "the President of the European Parliament may be invited to be heard (by the Euro Summit, *ndr*). The President of the Euro Summit shall present a report to the European Parliament after each of the meetings of the Euro Summits". Thus, the EP has entered the Treaty, but its powers on Euro Summit's Reports remain undefined. At the same time, the EP is never mentioned in the ESM Treaty. Although the intentions of the German and French promoters of the new treaties were originally much more intergovernmental, the reaction coming from the EP and the Commission has tamed them, but only to a certain extent. Nevertheless, the intergovernmental logic does not authorize any significant role to be given to the popular legislature, either as an institution checking the governments' decisions or as an institution legitimizing the decision-making process.

To be sure, popular legislatures or parliaments at the national level play a minor role in foreign and financial policies. These policies are largely defined, managed and executed by the national executives (Lijphart 1999). In fusion of powers systems, as in parliamentary Britain, foreign and military policies are traditionally at the core of the Cabinet structure, protected by secrecy, informality and bi-partisanship. The parliament has a limited role unless it has to discuss crucial issues concerning war and peace, as happened in the 2003 debate on the invasion of Iraq, although the leader of the shadow cabinet is kept regularly informed by the prime minister on the main foreign and military challenges the country is facing. In the French semi-presidential Fifth Republic, foreign and military policies are centralized at the Elysée, the site of the presidency of the

republic, not in the parliamentary Cabinet. Indeed, both policies are considered a '*domain réservée*' of the president of the republic, protected by the vagary of partisan politics, with the parliament consequently playing a limited role. Executive predominance is unquestionable in budgetary policy as well. Before the introduction of the European Semester, in the main EU member states, it was already recognized that the executive held the power to submit the yearly financial law to the parliament, with the latter unable to introduce new programs unless it agreed to cut a program of equivalent size. In both policies, however, although nobody questions the executive's dominance, there is also a general expectation that, within the legislature, opposition parties have a duty to question the executive's priorities and solicit a public debate on them.

This is even truer in the US separation of powers system. It is recognized that the president plays a preeminent role in foreign and military policy, and has a power of initiative in budgetary policy. However, in both policies, the executive's prerogatives are constitutionally constrained by the legislature's powers (Jones 2005). Separation of powers incentivizes a permanent contrast between the president and the Congress, and not only when they represent different partisan majorities (a situation called *divided government*). The Senate is a crucial institution for checking the president's foreign policy choices, and the House of Representatives has never given up its constitutional role of controller of public budget (Polsby 2003). Certainly, the executive branch has tried to escape these constitutional constraints, particularly where foreign policy is concerned (Silverstein 1997), but the two legislative branches have not let it play any exclusive decision-making role. Thus, the decision-making discretion enjoyed by the European Council and the Council in foreign and financial policies cannot be equated to executive predominance of those policies in parliamentary or presidential democratic systems. Moreover, in the intergovernmental EU, the transfer of decision-making power on crucial policies to the European Council and the Council has implied an inevitable weakening of the checking role of domestic legislatures on the national governments. Because that weakening has not been offset by a strengthening of the EP, it derives that crucial policies (such as foreign and financial ones) are escaping the basic mechanism of democratic accountability (Lord 2011; Sjursen 2011).

From a comparative perspective the EU – to satisfy criteria of effectiveness and legitimacy – should increase the political and functional autonomy of its dual executive and the balancing and oversight capabilities of its legislature (the EP in particular). Regarding the former criteria, the decision-making role of the European Council should be recognized as a realistic condition for promoting integration in very sensitive policies such as EMU and ESDP. Indeed, it has already emerged as the main decision-making body of the EU and its president a more influential actor than

the Commission's. Although one can assume that the future evolution of the EU will eventually lead to a re-composition of the two presidencies in a single person²⁷, what it is now necessary to recognize is that, in the two crises, the European Council and its president have established their roles as political executives of the EU²⁸. However, the recognition of the role of the European Council cannot become the veil for hiding *directoires'* practices within it. The increased decision-making role of the European Council's president should be supported by a strengthening of his/her legitimacy and representativeness. The European Council's and Commission's presidents should thus find ways to protect the functional autonomy of the executive from the attempts of the member states' governments to encroach upon it. At the same time, regarding the latter criteria, if it is true that in a democratic polity all powers (in particular those at the highest level) should be checked and balanced, then the strategic role given to the European Council and its president had to be kept under the control of a strengthened EP, whose checking and balancing role should be extended to *all EU policies*. Even in those policies where decisions do not have a legislative form, the EP should provide oversight and call the European Council's president and the members of the Commission to account for their choices or non-choices to the European public it represents.

Conclusion

The intergovernmental 'moment' has been called into question by the euro crisis in particular. The emergence of a new constellation of political factors is fostering an anti-intergovernmental critique. A part from the EP and the Commission, the governments of some member states did not feel at ease with an EU which might be dominated by *directoires*. The new Italian government of Mario Monti (that substituted that of Silvio Berlusconi in November 2011) has unmoored Italy from the intergovernmental coalition, returning the country to its supranational position. Medium-sized member states such as Belgium and the Netherlands have clearly distanced themselves from intergovernmental consensus, stressing the importance of recognizing the role of the supranational institutions within the new treaties. New electoral turnouts in France (April and

²⁷ As stated by Michel Barnier in his speech at the Humboldt University in Berlin on 9 May 2011, "one day a future president of the European Union...should both preside over the European Council and chair the European Commission" thus adding that "the individuals who would become president of the European Union on a proposal from the heads of state and government could have their power vested in them by a Congress comprising both the European Parliament and representatives of the national parliaments...in the future they could obtain a direct mandate from the peoples of Europe".

²⁸ As Ludlow (2011b: 6) asserted, "this does not mean a radical downgrading of the Commission. It does however mean that the *simpliste* vision of the Union...which still prevailed in the Convention, and which, remarkably enough, still survives in certain features of the Lisbon Treaty ... ought to be buried once and for all. The EU is now concerned with matters of such seriousness that only a Union of States represented at the highest level can deal with them". For this reason, it may be appropriate to call the European Council the *European Presidency*, not only to avoid the current terminological confusion with the other (legislative) Council but also to signify its clear executive role.

May 2012) and Germany (October 2013) might generate different leaderships and governmental coalitions. Indeed, in Germany, Chancellor Merkel has already begun to distance herself from the *sovereignist* position of the French president. In a talk given at the Berlin's *Neues Museum* on 7 February 2012, she indicated the need for "a political union, something that wasn't done when the euro was launched", thus stressing the importance of having an effective Commission and a strengthened EP within an established bicameral legislature (Peel 2012). Moreover, the growing isolationism of UK is contributing to the further weakening of the coalition in favour of the intergovernmental approach²⁹.

There are several strategies the anti-intergovernmental coalition might pursue (Piris 2012). The strategy pursued by the EP and the Commission is to fold the new intergovernmental treaties into the Lisbon Treaty, the sooner the better. This strategy has its strength in the effort to re-constitute a unified legal order in the EU. However, because of the dual constitution of the Lisbon Treaty, bringing the new treaties back into it may be insufficient for re-instating supranationalism.. An alternative strategy, discussed by civil associations supporting the perspective of a federal Europe, is instead to maintain the separation between the EU of the single market and the EU of the common currency, in order to make the latter the core group of a more integrated EU. The two strategies might be combined through the use of the various clauses of reinforced or enhanced cooperation celebrated in the Lisbon Treaty, clauses that allow differentiation between the two Europes existing within the same Lisbon Treaty's framework. The dualism of the Lisbon Treaty has institutionalized a divide, which accompanied the constitutional conflict in the 2000s (Dehousse 2005; Magnette and Nicolaidis 2004), between those favouring a supranational EU and those willing to strengthen the intergovernmental EU. At its turn, expression of a divide internal to the scholarly community, between those interpreting the EU as an intergovernmental confederacy and those interpreting it as a supranational federacy. In both cases, it is a divide between two different visions of integration, not between pro- and anti-integration forces. For both visions, integration is necessary. However, for the former vision, its path should be governed by the supranational structure of the Brussels' institutions, while for the latter by the national governments organized in the European Council and the Council. However, while this debate is starting again, it seems paradoxical to notice that the more integrated Europe (the Europe of the Fiscal Compact Treaty and the ESM Treaty) will operate according to the intergovernmental constitution and the less integrated

²⁹ The *European Union Act*, enacted in UK on 19 July 2011, calls even into question the constitutionalization of the EU brought about by the European Court of Justices decisions of the 1960s on direct effect and supremacy of Community law. Indeed, it states that "there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community Law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself (...). The conditions of Parliament's legislative supremacy in the UK necessarily remain in the UK's hands".

Europe (the Europe of the single market) is functioning according to the supranational constitution of the Lisbon Treaty.

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