



CENTRO STUDI SUL FEDERALISMO

research paper

FEDERICO FABBRINI

**A PRINCIPLE IN NEED OF RENEWAL?
THE EURO-CRISIS AND THE PRINCIPLE
OF INSTITUTIONAL BALANCE**

July 2016

ISSN: 2038-0623

ISBN 9788896871652

Copyright © Centro Studi sul Federalismo 2016

Tutti i diritti sono riservati. Parti di questa pubblicazione possono essere citate nei termini previsti dalla legge che tutela il diritto d'autore e con l'indicazione della fonte.

All rights reserved. Quotations from this document can be made according to copyright law, providing information on the source.

ABSTRACT

The paper examines the principle of institutional balance in the European Union and discusses the implications that the Euro-crisis has produced on it, especially as far as the legislative process is concerned. As the paper argues, the principle of institutional balance has traditionally represented a key constitutional idea of the EU and, since the entry into force of the Lisbon Treaty, has become an explicit feature of the EU institutional system: in particular, by enshrining the ordinary legislative procedure as the standard way of lawmaking in the EU, the Lisbon Treaty has given an equal position to the European Parliament and the Council in the EU legislative process. As the paper underlines, however, during the Euro-crisis member states have repeatedly acted outside the framework of EU law through the use of intergovernmental treaties. As the paper claims, however, the approach followed by the member states raises constitutional concerns, since it circumvents the powers of the European Parliament, thus undermining the principle of institutional balance. Hence, the article concludes that member states should resort to EU legislation rather than intergovernmental agreements whenever the EU has competence to act, and discusses the judicial and political options that are available to the European Parliament to restore the principle of institutional balance in the aftermath of the Euro-crisis.

Keywords: principle of institutional balance, ordinary legislative procedure, Euro-crisis, intergovernmental agreements, European Parliament

Federico Fabbrini is Associate Professor of European & International Law at iCourts (Center of Excellence for International Courts), Faculty of Law, University of Copenhagen.

E-mail: federico.fabbrini@gmail.com

Forthcoming in 50 Cahiers de droit européen (2016)

An earlier version of this article was presented at the 50th Anniversary Conference of the Cahiers de droit européen held on 10 September 2015 in Brussels. The author is grateful to Merijn Chamon, Gregorio Garzon Clariana, Luigi Daniele, Dominik Hanf, Koen Lenaerts, Jean-Victor Louis, Madalina Moraru, Paolo Mengozzi, Matteo Ortino, Robert Schütze and Peter van Eluswege for helpful comments and discussions on an earlier draft. Usual disclaimers apply.

1. Introduction – 2. The principle of institutional balance, checks and balances and bicameralism – 3. The Euro-crisis and the use of intergovernmental treaties – 4. Enforcing the principle of institutional balance – 5. Conclusions

1. Introduction

A central element of the constitutional architecture of the European Union (EU) is the principle of institutional balance.¹ The Court of Justice of the EU (ECJ) has recognized in its case law that the EU treaties set up a system for distributing powers among the different institutions, assigning to each of them a given role in the institutional structure of the EU and the accomplishment of specific tasks.² Hence, the ECJ ruled that “each of the institutions must exercise its powers with due regard for the powers of the other institutions.”³ Moreover, the ECJ has derived from the principle of institutional balance an obligation to safeguard the constitutional prerogatives that each institution enjoys under the treaties against encroachments from other institutions, albeit subject to the principle of sincere cooperation. Hence, specifically protecting the European Parliament (EP), the ECJ ruled that “the effective participation of the Parliament in the legislative process of the [EU] in accordance with the procedures laid down in the treaty, represents an essential factor in the institutional balance intended by the treaty.”⁴

The Lisbon Treaty of 2009 has given recognition – although not in a textual form – to the principle of institutional balance in EU primary law. Article 13 TEU now proclaims that “[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions,” and vests specific powers in each of the institutions it lists – suggesting that the EU constitutional architecture is conceived as a system of checks and balances, which cannot be altered or sidestepped at the institutions’ discretion.⁵ Moreover, the principle of institutional balance has remained a lively part of the case law of the ECJ.⁶ As recently as in April 2015, in a case involving the right of the European Commission to withdraw a legislative proposal during the early stages of the legislative procedure, the ECJ ruled that “under Article 13(2) TEU, each EU institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union.”⁷

Yet, the principle of institutional balance has recently suffered a major challenge as a result of the Euro-crisis, and the legal and institutional responses to it. As is well known, the EU member states have repeatedly decided to reform the architecture of Economic and Monetary Union (EMU) by

¹ See P. Craig, “Institutions, Power and Institutional Balance”, in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (OUP 2011), 41.

² See J.P. Jacqué, “The Principle of Institutional Balance” (2004) 41 *Common Market Law Review* 383.

³ Case C-70/88, *Parliament v Council*, judgment of 22 May 1990, ECLI:EU:C:1991:373, par. 22.

⁴ Case C-65/93, *Parliament v Council*, judgment of 30 March 1995, ECLI:EU:C:1995:91, par. 21.

⁵ See Robert Schütze, *European Constitutional Law* (CUP 2012), 84.

⁶ See also Case C-133/06, *Parliament v Council*, Opinion of AG Maduro, 27 September 2007, ECLI:EU:C:2007:551, par. 31.

⁷ Case C-409/13, *Council v Commission*, judgment of 14 April 2015, ECLI:EU:C:2015:217, par. 64.

acting outside the framework of EU law – strengthening budgetary constraints, creating a permanent mechanism of financial assistance to countries in fiscal distress and recently establishing a fund for the resolution of failing banks *through intergovernmental agreements*.⁸ Examples of this trend are offered by the Treaty on the Stability, Coordination and Governance of EMU, the so-called Fiscal Compact (signed in March 2012 by all the EU member states – with the exception of the UK, the Czech Republic, and Croatia),⁹ the European Stability Mechanism (ESM) Treaty (concluded in March 2012 by the Eurozone member states),¹⁰ and now the Agreement on the transfer and mutualisation of the contributions to the Single Resolution Fund (SRF) (signed in May 2014 by all the member states – except the UK and Sweden).¹¹

EU lawyers have discussed at length the specific features of each of these treaties, debating the reasons that have prompted recourse to intergovernmental agreements, considering the policy wisdom of this choice, and discussing the problems which are raised by the use of EU institutions outside the framework of EU law. Nevertheless, the power of the EU member states to conclude these intergovernmental agreements has not been questioned. In *Pringle*,¹² the Irish Supreme Court raised the query – which the ECJ set aside – whether the ESM Treaty violated specific provisions of the EU treaties. Nevertheless, the applicant in the case did not contest the power of the EU member states to conclude the ESM Treaty *as such*. In fact, a traditional understanding is that international law remains just one of the instruments in the toolbox of the EU member states, and, as long as they do not violate substantive provisions of EU law, “inter se international agreements between two or more member states of the EU are allowed.”¹³

The purpose of this article is to re-consider the legality of the use of intergovernmental agreements in light of the principle of institutional balance, focusing specifically on the legislative process, and the role of the EP.¹⁴ As the article explains, the Lisbon Treaty has specifically substantiated the principle of institutional balance as far as the legislative power is concerned, by designing a bicameral process for the adoption of legislation in the EU. Pursuant to Article 289 TFEU the default way by which the EU adopts legally binding norms is the ordinary legislative procedure, where the EP enjoys legislative powers which are equal to those of the Council. Although the EU treaties still foresee special legislative procedures, where the Council can pass EU laws without the involvement of the EP, these situations are regarded as exceptional, specifically indicated, occurrences. In the constitutional system of the EU, the Council (which

⁸ See J.V. Louis, “L’Union économique et monétaire de Maastricht à la crise” [2012] *Revue des Affaires européennes* 57.

⁹ Treaty on the Stability, Coordination and Governance of the Economic and Monetary Union, available at: http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (last visited 10 August 2014).

¹⁰ Treaty establishing the European Stability Mechanism, available at: http://www.european-council.europa.eu/media/582311/05-tesm2_en12.pdf (last visited 10 August 2014).

¹¹ Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT> (last visited 10 August 2014).

¹² Case C-370/12, *Pringle v. Government of Ireland*, judgment of 27 November 2012, ECLI:EU:C:2012:756.

¹³ See B. De Witte, “European Stability Mechanism and the Treaty on Stability, Coordination and Governance: Role of EU Institutions and Consistency with EU Legal Order”, in *Challenges of Multi-Tier Governance in the EU*, study commissioned by the European Parliament AFCO Committee, March 2013, PE 474.438, 78, 81.

¹⁴ For a broader analysis of the principle of institutional balance in the Lisbon Treaty see B. Smulders and K. Eisele, “Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon” (2012) 31 *Yearbook of European Law* 112.

represents the member states' governments) equally shares legislative power with the EP (which represents the EU citizens). Moreover, even when not all states are willing to exercise the competences of the EU, the enhanced cooperation procedure allows a sub-group of them to pass legislation within the framework of EU law – but again with the involvement of the EP.

Given the institutional prerogative that the EP enjoys under the EU treaties to pass legislation, the article endeavors to claim that the use of intergovernmental agreements outside the framework of EU law by the member states, even when EU law would provide a perfectly suitable venue to adopt a specific legal measure, constitutes a violation of the principle of institutional balance governing the EU law-making regime. Because member states are represented in the Council, by concluding inter-se international agreements at will, the member states effectively sidestep the constitutional position of the EP, which is today a necessary legislator in the EU. While the thesis that the member states enjoy freedom to act in the international realm, unless they violate substantive EU law, might have been acceptable at a time when the member states were de facto monopolizing the EU law-making process (within the Council), this thesis is unsustainable in a situation when the production of EU norms is subject also to the approval of an institution like the EP, which is not the propagation of member states' governments.

The article therefore advances a constitutional argument based on the principle of institutional balance against the freedom of the member states' governments represented in the Council to act outside the framework of EU law, in all the areas in which the EU has competence (including competences it shares with the member states). As the article suggests, the member states should no longer enjoy a unilateral power to decide whether to act inside the EU legal order or outside it at will. Rather, in any areas where the EU has competence, the member states are required to act within the EU framework – in case by using the enhanced cooperation procedure. By stepping outside the EU legal order, in fact, the member states upset the EU constitutional balance and undermine the institutional role of the EP – even if the agreements they conclude do not formally violate any substantive provision of EU law. As the article reports, the EP had raised this problem at the time of the conclusion of the SRF agreement,¹⁵ but eventually gave up on its point due to the pressure to establish a single resolution mechanism for failing banks before the conclusion of the 7th parliamentary term.¹⁶

Based on the above, the article considers how the EP could inject new life into the principle of institutional balance and ensure its application also in the field of EMU in the aftermath of the Euro-crisis. To this end, it assesses two strategies, or a combination thereof: a legal, and a political strategy. To begin with, the article focuses on how the ECJ's case law on institutional balance – with the recognition that the rules laid down by the treaties “are not at the disposal of the Member States or the institutions themselves”¹⁷ – provide an important precedent which the EP could invoke to protect its status. Nevertheless, the article also warns that the judicial strategy

¹⁵ See Letter from the Chair and members of the European Parliament ECON Committee to the Council Presidency regarding the intergovernmental agreement negotiated within the framework of the SRM regulation, 15 January 2014, available at: <http://www.europarl.europa.eu/document/activities/cont/201401/20140116ATT77594/20140116ATT77594EN.pdf> (last visited 23 February 2015).

¹⁶ See further F. Fabbrini, “On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context” (2014) 21 *Maastricht Journal of European & Comparative Law* 444.

¹⁷ Case 68/86, *United Kingdom v Council*, judgment of 23 February 1988, ECLI:EU:C:1988:85, par. 38.

may not suffice in itself, given several procedural hurdles – notably the fact that when the member states decide to act outside EU law there is no formal act of the institutions that the EP could challenge. Therefore, the article considers also how the EP could exploit the new budgetary powers it has acquired since the entry into force of the Lisbon Treaty to obtain concessions from the states that they will not act outside the EU legal framework. Regardless of the strategy to be followed, the article concludes by claiming that the principle of institutional balance should be renewed in EU law and practice to remain a lively feature of the EU constitutional architecture.

The article is structured as follows. Section 2 provides a brief overview of the principle of institutional balance in the case law of the ECJ, and explains how the Lisbon Treaty has constitutionally enshrined a system of checks and balances between institutions, mandating bicameralism as the standard process to adopt legislation in the EU. Section 3 explores the challenges that the Euro-crisis and the responses to it have posed to the principle of institutional balance. Here, in particular, I focus on the use by the member states of intergovernmental agreements outside the EU regime and, challenging the conventional view, I claim that this represents a circumvention of the legislative powers of the EP, which should not be permitted in all the areas in which the EU has competence to legislate. Based on this critical argument, section 4 considers how the EP could defend its institutional status, discussing the potentials and the limitations of both a judicial and a political strategy designed to prevent the member states from acting outside the framework of EU law. Section 5, finally, briefly concludes making the case for strengthening the principle of institutional balance in EMU after the Euro-crisis.

2. The principle of institutional balance, checks and balances and bicameralism

The principle of institutional balance has a long history in the EU legal order – sometimes having been described as the EU’s peculiar version of the principle of separation of powers.¹⁸ At its core, the principle of institutional balance performs a structural, systemic function.¹⁹ Its purpose is to guarantee to each institution of the EU that its treaty-mandated tasks and powers will not be abridged by the action of any other EU institution.²⁰ Although the relations between the various EU institutions has been subject to changes across time as a result of subsequent treaty amendments, the ECJ has repeatedly resorted to the principle of institutional balance to arbitrate conflicts between EU institutions.²¹ In particular, arguments about institutional balance have

¹⁸ See Craig (n 1), 42 (discussing institutional balance and separation of powers). See also G. Conway, “Recovering a Separation of Powers in the European Union” (2011) 17 *European Law Journal* 304, 319 (defining the principle of institutional balance as unclear and suggesting that the ECJ should shift to the concept of separation of powers).

¹⁹ See Jacqué (n 2), 383. See also F. Le Bot, *Le principe de l’équilibre institutionnel en droit de l’Union européenne*, PhD Thesis at Université Paris I Panthéon-Assas, 2012.

²⁰ See K. Lenaerts and A. Verhoeven, “Institutional Balance as a Guarantee for Democracy in EU Governance”, in C. Joerges and R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (OUP 2001), 47 (stating that the principle of institutional balance requires that: (i) each institution should enjoy a sufficient independence in order to exercise its powers; (ii) institutions should not unconditionally assign their powers to other institutions; and (iii) institutions may not in the exercise of the own powers encroach on the powers and prerogatives of other institutions).

²¹ See e.g. C-409/13 *Council v Commission*. But see also Case 9/56 *Meroni*, judgment of 13 June 1958, ECLI:EU:C:1958:7 (stating that the treaties create a balance of powers which limits the ability of any EU institution to delegate power to other bodies).

often been embraced by the ECJ to protect the position of the EP.²² Moreover, the ECJ has dynamically used the principle of institutional balance to fill gaps in the rules governing the relations between EU institutions,²³ again mainly to the advantage of the EP. Most strikingly, in the *Chernobyl* case the ECJ allowed the EP to bring infringement proceedings against the Council, notwithstanding the fact that the treaties at that time did not explicitly foresee this possibility, arguing that the recognition of a remedy for the EP ought to be derived from the institutional balance designed by the treaties.²⁴

Today, the Lisbon Treaty has given a more explicit – albeit not a textual – recognition of the principle of institutional balance in EU primary law. Article 13 TEU proclaims that “[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions,” and vests specific powers in each of the institutions it lists. As it has been suggested, the Lisbon Treaty essentially enshrines a logic of “checks and balances” in EU law, ensuring that no institution will arbitrarily exercise its tasks.²⁵ Moreover, the Lisbon Treaty has specifically substantiated the principle of institutional balance with regard to the EU legislative power, by establishing the rule that the EP and the Council act as co-equal legislative branches.²⁶ Article 289 TFEU defines the process whereby the EU adopts legislation with the approval of both the Council and the EP as the “ordinary legislative procedure” – while situations whereby the Council can pass EU laws without the need to involve EP are defined as “special legislative procedures” and considered as exceptional occurrences. In requiring that EU legislation be subject by default to a bicameral approval process, the Lisbon Treaty has largely codified in EU primary law the so-called ‘Community method.’²⁷

In the EU ordinary legislative process, the power to initiate legislation in the EU is vested exclusively in the European Commission. Pursuant to Article 294(2) TFEU “[t]he Commission shall submit a proposal to the European Parliament and the Council.” Moreover, the Commission has the power to withdraw a legislative proposal, hence terminating the law-making process, as recently confirmed by the ECJ.²⁸ The attribution of a monopoly of legislative initiative to the Commission is a unicum which has been justified in light of the Commission’s special task in

²² See e.g. Case C-65/93 *Parliament v Council*. But see also Case 138/79 *Roquette Frères*, judgment of 29 October 1980, ECLI:EU:C:1980:249 (holding that failure to consult the EP when this was compulsory required by the treaties unlawfully infringed the principle of institutional balance).

²³ See S. Prechal, “Institutional Balance: A Fragile Principle with Uncertain Contents”, in T. Heukels, N. Blokker and M. Brus (eds), *The European Union after Amsterdam* (Kluwer 1998), 280.

²⁴ See Case C-70/88 *Parliament v Council*, par. 21.

²⁵ See Schütze (n 5), 84. But see already K. Lenaerts, “Some Reflections on the Separation of Powers in the European Community” (1991) 28 *Common Market Law Review* 11 (applying idea of checks and balances to the EC Treaty).

²⁶ See P. Craig, *The Treaty of Lisbon: Law, Politics and Treaty Reform* (OUP 2010).

²⁷ See R. Dehousse, “The Community Method at Sixty”, in R. Dehousse (ed), *The Community Method* (Palgrave MacMillan 2011), 3 (defining the ‘Community method’ as the default process of law-making in the EU). See also R. Repasi, “Gemeinschaftsmethode Sticht Unionsmethode”, *Arbeit Wirtschaft*, 7 February 2014 (contrasting the ‘Community method’ and the ‘Union method’).

²⁸ See Case C-409/13 *Council v. Commission* on which see M. Chamon, “Upholding the ‘Community Method’: Limits to the Commission’s Power to Withdraw Legislative Proposals” (2015) 40 *European Law Review*.

“promot[ing] the general interest of the Union.”²⁹ Moreover, smaller member states have traditionally defended the powers of the Commission to initiate legislation as a way to protect their interests against those of the larger member states.³⁰ Be that as it may, in reality the Commission’s monopoly of legislative initiative has been eroding over time.³¹ On the one hand, the EU treaties have incremented the number of special areas where “legislative acts may be adopted [also] on the initiative of a group of Member States, or of the European Parliament.”³² On the other, even where the Commission formally maintains its monopoly, the legislative proposals it advances are today increasingly the result of requests it receives from other EU institutions: while the EP can ask the Commission to advance a legislative proposal,³³ the European Council has become since the eruption of the Euro-crisis extremely assertive vis-à-vis the Commission in tasking it to adopt legislative proposals in policy areas it deemed in urgent need of supranational regulation.³⁴

Once the European Commission has advanced a legislative proposal, the EP (as the institution representing the EU citizens) and the Council (as the institution representing the EU member states) must read and approve it on the same terms.³⁵ To take into account the involvement in the EU law-making process of two very different bodies such as the Council and the EP, Article 294 TFEU sets up a highly formalized procedure to pass EU laws – which includes up to three readings of the text by the two legislative branches, with the possibility for each to amend the bill approved by the other within a specific amount of time, and with the option to institute in the final stage a conciliation Committee to tease out possible divergences between the two houses. Technicalities aside, nevertheless, the substance of inter-institutional bargaining in the EU does not differ from that at play in e.g. the Congress of the United States (US), where the existence of a House and a Senate requires mechanisms to reconcile different political positions and efforts to coalesce sufficient support in both legislative houses.³⁶ At the same time, in anticipation of the conciliation stage foreseen by Article 294(10) TFEU, a practice which has increasingly taken hold in the EU to pass legislation is to set up “dialogue meetings” between the EP and the Council – or “trilogues”, which involve also the Commission – in which selected groups of legislators from the two houses meet at an early stage to strike compromises on draft bills.³⁷

In sum, while the principle of institutional balance finds its roots in the case law of the ECJ, the Lisbon Treaty has taken important steps to constitutionalize checks and balances in the EU.³⁸

²⁹ Art 17(1) TEU.

³⁰ See S. Bunse and K. Nicolaidis, “Large versus Small States: Anti-Hegemony and the Politics of Shared Leadership”, in E. Jones et al (eds), *The Oxford Handbook of the European Union* (OUP 2012), 249.

³¹ See P. Ponzano et al., “The Power of Initiative of the Commission: A Progressive Erosion?” *Notre Europe Studies and Research No. 89/2012*.

³² Art 289(4) TFEU.

³³ Art 225 TFEU.

³⁴ European Parliament Research Service, “European Council Conclusions: A Rolling Check-List of Commitments to Date”, study, 7 October 2014, PE 536.359.

³⁵ Art 10 TEU.

³⁶ See A. Kreppel, “Understanding the European Parliament from a Federalist Perspective: The Legislatures of the USA and EU Compared”, in A. Menon and M. Schain (eds), *Comparative Federalism: The European Union and the United States* (OUP 2006), 245.

³⁷ See also H. Wallace et al (eds), *Policy-Making in the European Union* (OUP 2010).

³⁸ See also R. Schütze, “The Principle of Institutional Balance and Delegated Powers” (2016) 50 *Cahiers de droit européen*.

Moreover, the principle of institutional balance has been entrenched as far as the legislative process is concerned, by the requirement that both the Council and the EP approve EU legislation. The Lisbon Treaty, in fact, designed a complex, yet balanced, bicameral process for legislating in the EU and established that the ordinary legislative procedure shall be the main avenue to adopt EU laws. With the exception of the special legislative procedures, and notwithstanding the fact that – confusingly – the EU treaties attribute to the Council also some executive functions,³⁹ in the ‘Community method’ the Council and the EP can be appropriately regarded as the upper and the lower houses of the EU bicameral legislature.⁴⁰ In fact, as Paul Craig has explained, the Lisbon Treaty has crowned the incremental process of making the EP equal to the Council in the EU law-making process, by extending (with minor adjustments) the application of the ordinary legislative procedure also to the adoption of the EU budget:⁴¹ because in the EU, just like in any other constitutional system, the power of the purse represents a major “lever through which to secure further concessions from other institutions within the polity,”⁴² the new budgetary role of the EP endow it with a powerful tool to shape the policies of the EU.

3. The Euro-crisis and the use of intergovernmental treaties

Notwithstanding the possibilities offered by EU legislation, since the explosion of the Euro-crisis the EU has experienced a surge in the use of inter-governmental agreements outside the framework of EU law.⁴³ As mentioned, the EU member states have repeatedly decided to reform the EMU – strengthening budgetary constraints,⁴⁴ creating a permanent mechanism of financial assistance to countries in fiscal distress,⁴⁵ and establishing a fund for the resolution of failing banks⁴⁶ through intergovernmental agreements. This is consistent with what Jean-Paul Keppenne has defined as a semi-intergovernmental logic of crisis management in the EU.⁴⁷ In fact, in the aftermath of the Euro-crisis the European Council emerged as the leading institution in the EU system of governance,⁴⁸ and the dominance of national executives prominently manifested itself in “the adoption of decisions and the conduction of policy by means other than the Community method, whether within or without the EU framework.”⁴⁹

³⁹ See Art 16 TEU.

⁴⁰ See also W. Van Gerven, *The European Union: A Polity of States and People* (Hart Publishing 2005), 362.

⁴¹ See P. Craig, “The Role of the European Parliament Under the Lisbon Treaty”, in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?* (Springer 2008), 110.

⁴² Ibid 129.

⁴³ See F. Allemand and F. Martucci, “La nouvelle gouvernance économique européenne – Partie I” (2012) 47 *Cahiers de droit européen* 17 and “– Partie II” (2012) 47 *Cahiers de droit européen* 409.

⁴⁴ See Fiscal Compact.

⁴⁵ See ESM Treaty.

⁴⁶ See SRF Agreement.

⁴⁷ See J.P. Keppenne, “Institutional Report”, in U. Neergard et al (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU. Proceedings of the XXVI FIDE Congress* (Djøf 2014), 179.

⁴⁸ See S. Fabbrini, “Intergovernmentalism and Its Limits: Assessing the European Union’s Answer to the Euro Crisis” (2013) 46 *Comparative Political Studies* 1003.

⁴⁹ A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 87.

For sure, intergovernmentalism represented a feature of EMU well before the Euro-crisis.⁵⁰ Moreover, the growing resort to intergovernmental agreements has not meant abandoning tout court EU legislation.⁵¹ In fact, the ‘Community method’ has continued to be used during the crisis to pass important reforms of EMU.⁵² Nevertheless, intergovernmentalism, and the use of international agreements outside the framework of EU law, has affected the EU legislative process: to a large extent, EU legislation has been used to complement, or anticipate, broader legal and institutional reforms undertaken through international treaties.⁵³ This strategy of crisis management has produced important institutional implications on the EU balance of powers.⁵⁴ A major victim of this state of affairs has been the EP: Although the EP had been defined as the winner in the Lisbon Treaty, “the financial crisis has suddenly forced us to reconsider this assumption, at least for the crucial sector of European economic governance.”⁵⁵ Not only the EP was sidelined – or given a purely observer status – in the negotiations leading to the drafting of the intergovernmental agreements; but also, it saw its capacity to shape policy outcomes plummet even when legislating within the EU legal order, due to the pressure extolled from the European Council.⁵⁶

In the scholarship much has been written on the use of EMU-related intergovernmental agreements outside EU law.⁵⁷ Attention has been given to the difficulties that are produced when intergovernmental treaties concluded by only some EU member states impact upon the activities of the EU institutions, which “belong” to the totality of the EU member states.⁵⁸ Moreover, scholars have dissected the arguments that – case by case – have been advanced by national governments to adopt international agreements outside the framework of EU law.⁵⁹ Elsewhere, for instance, I have criticized the justifications adduced by the German Ministry of Finance in favor

⁵⁰ See U. Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

⁵¹ See B. Rittenberger, “Integration without Representation? The European Parliament and the Reform of Economic Governance in the EU” (2014) 52 *Journal of Common Market Studies* 1174.

⁵² See R. Dehousse and L. Boussaguet, “L’impact de la crise sur la gouvernance européenne” (2014) 149 *Pouvoirs* 7.

⁵³ See President of the European Parliament, Martin Schulz, “Fiscal Union without Parliamentary Control is Unacceptable”, Speech, Brussels 30 January 2012 (regretting use of intergovernmental negotiations and stating that a fiscal union without parliamentary oversight would be unacceptable).

⁵⁴ See M. Dawson and F. De Witte, “Constitutional Balance in the EU after the Euro-crisis” (2013) 76 *Modern Law Review* 817.

⁵⁵ C. Fasone, “European Economic Governance and Parliamentary Representation. What Place for the European Parliament?” (2014) 20 *European Law Journal* 164.

⁵⁶ See E. Bressanelli and N. Chelotti, “Legislating in the Shadow of the European Council: Empowering or Silencing the European Parliament?”, paper presented at the workshop “The Centrality of the European Council”, CEU Budapest, 28 November 2014 (on file with the authors) 2 (emphasizing the limited ability of the EP “to shape policy outcome when acting ‘in the shadow’ of the European Council [because] if the EP demands too much [...] there exists the credible threat that the government will resort to intergovernmental negotiations.”).

⁵⁷ See e.g. A. Dimopoulos, “The Use of International Law as a Tool for Enhancing Governance in the Euro Area and its Impact on EU Institutional Integrity”, in F. Fabbrini et al (eds), *The Constitutionalization of European Budgetary constraints* (Hart Publishing 2014), 41.

⁵⁸ Compare S. Peers, “Towards a New Form of EU law? The Use of EU Institutions in Treaties between Member States” (2013) 9 *European Constitutional Law Review* 37 with P. Craig, “Pringle and the Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance” (2013) 9 *European Constitutional Law Review* 263.

⁵⁹ See e.g. A. Kocharov et al, “The Fiscal Compact: Another Legal Monster?” EUI Law Department Working Paper 9/2012 (criticizing the adoption of the Fiscal Compact and suggesting that its substance could be adopted through secondary EU legislation).

of concluding the SRF Agreement:⁶⁰ this treaty requires member states to collect from national banks and to transfer into an EU fund the contributions necessary for the resolution of failing banks. As I explained, the claim that an EU regulation – and specifically the EU regulation establishing a single resolution mechanism (SRM), at that time under approval by the Council and the EP⁶¹ – could not impose this requirement on the member states clashed with the function that EU regulations have played since the beginning of the process of European integration.⁶²

As a matter of fact, however, the *legality* of the use by the EU member states of international agreements outside the EU legal framework has not been challenged. In *Pringle*,⁶³ the Irish Supreme Court raised the query – which the ECJ set aside – whether the ESM Treaty violated specific provisions of the EU treaties. Nevertheless, the applicant in the case did not question the power of the EU member states to conclude the ESM Treaty *as such*.⁶⁴ At the same time, the Fiscal Compact introduced a provision stating that the treaty only “shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach the competence of the Union to act in the area of the economic union.”⁶⁵ And the same clause has been enshrined also in the SRF Agreement.⁶⁶ While the recognition that these treaties are valid only as long as they are not in violation of specific provisions of EU law confirms that the member states are bound to respect the EU Treaties, it also implies that they are entitled to choose the means that they please to set rules for the EU: implicitly, in fact, these provisions assert that as long as intergovernmental treaties do not violate substantive provisions of EU law, member states are free to conclude them.⁶⁷

The view that EU member states are free to act outside the framework of EU law is consistent with a traditional international law reading of the EU.⁶⁸ From a purely formalistic point of view, the EU is founded on international treaties – unanimously concluded by all the member states’ governments and ratified by their respective parliaments or peoples according to each country’s specific constitutional requirements.⁶⁹ Most prominently, the German Bundesverfassungsgericht has stressed since its judgment on the Maastricht Treaty the international-law origin of the EU treaties, proclaiming that the EU member states remain the “Masters” thereof.⁷⁰ And even

⁶⁰ See Fabbrini (n 16), 456.

⁶¹ See now Regulation (EU) No. 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council OJ 2014 L 225/1.

⁶² See Fabbrini (n 16), 456.

⁶³ Case C-370/12, *Pringle*.

⁶⁴ See further D. Thym and M. Wendel, “Préserver le respect du droit dans la crise: la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt *Pringle*)” (2012) Cahiers de droit européen 733.

⁶⁵ Art 2(2) Fiscal Compact.

⁶⁶ Art 2(2) SRF Agreement.

⁶⁷ See B. de Witte, “Chameleonic Member States: Differentiated Integration by Means of Partial and Parallel International Agreements”, in B. De Witte et al (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001), 231.

⁶⁸ See e.g. T. Schilling, “The Autonomy of the Community Legal Order” (1996) 37 Harvard International Law Journal 389.

⁶⁹ See Art 54 TEU.

⁷⁰ See BVerfGE 89, 155 (1993), para C.II.1.a (stating that “even after the Maastricht Treaty has entered into force, the Federal Republic of Germany remains a member of an inter-governmental community [...] German is one of the Master of the Treaties”) cited in J. Kokott, “Report on Germany”, in A.M. Slaughter et al (eds), *The European Courts and National Courts* (Hart Publishing 1998), 77, 100.

recently, in an edited volume on the worlds of European constitutionalism, Bruno de Witte has provocatively argued that the EU remains ultimately an international organization, based on classical international law.⁷¹ Seen from this perspective the surge in the use of intergovernmental treaties in the aftermath of the Euro-crisis is nothing special: international law remains just one of the instruments in the toolbox of the EU member states, and, as long as they do not violate EU law, “*inter se* international agreements between two or more member states of the EU are allowed.”⁷²

In my view, nevertheless, this interpretation is increasingly problematic. Not only the mainstream understanding among EU lawyers is that the EU is nowadays no longer an international organization:⁷³ starting with the seminal work of Joseph H.H. Weiler,⁷⁴ the dominant academic interpretation is that the EU has transformed into a type of constitutional regime, endowed with mechanisms to protect fundamental rights, checks and balances and inherent powers.⁷⁵ More importantly, the thesis that member states are free to conclude international agreements outside the EU legal order as long as they do not violate EU law is at odds with the constitutional balance enshrined in the EU treaties – to which the member states have subjected themselves.⁷⁶ As mentioned above, the Lisbon Treaty has designed a complex system of checks and balances, and a bicameral process through which the EU and its member states can adopt binding norms, which involves the EP as a necessary co-legislator. The thesis that the member states are free to step outside the EU legal order, even when EU law would provide a perfect venue to adopt a specific legal measure, essentially implies that the member states can by-pass the EP, thus undermining the constitutional balance between the institutions designed in the EU treaties.

There is therefore a constitutional argument that can be made on the basis of the Lisbon Treaty to restrict the freedom of the member states to act outside the framework of EU law at will.

Besides substantive EU law,⁷⁷ also the principle of institutional balance poses limits on what the states can achieve through inter-se cooperation. While the thesis that the member states enjoy freedom to act outside EU law unless they violate substantive EU law might have been acceptable at a time when they were de facto monopolizing the EU law-making process (within the Council), this thesis is unsustainable in a situation when the production of EU norms is subject also to the approval of an institution like the EP, which is not the propagation of member states’ governments. If we were to accept after the entry into force of the Lisbon Treaty that the

⁷¹ See B. De Witte, “The European Union as an International Legal Experiment”, in G. de Búrca and J.H.H. Weiler (eds), *The Worlds of Legal Constitutionalism* (CUP 2011), 19.

⁷² See De Witte (n 13), 81.

⁷³ See also A. Boerger and M. Rasmussen, “Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993” (2014) 10 *European Constitutional Law Review* 199.

⁷⁴ J.H.H. Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403 (explaining constitutional transformation of Europe) and J.H.H. Weiler and U. Haltern, “The Autonomy of the Community Legal Order – Through the Looking Glass” (1996) 37 *Harvard International Law Journal* 411 (faulting international law reading of the EU legal order).

⁷⁵ See also A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009). On the EU system for the protection of fundamental rights see also F. Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014).

⁷⁶ See also P. Craig, “The Financial Crisis, the EU Institutional Order and Constitutional Responsibility”, in F. Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015), 17 (stressing responsibility of the member states for the current EU institutional system).

⁷⁷ See D. Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos 2004), 308.

member states are free to act outside the EU legal order – even when they do not violate EU law, and when EU law would provide a perfect venue to enact a specific measure – this would imply that the legislative function constitutionally entrusted to the EP by Article 14 TEU would be at the mercy of the member states in Council. Hence, only a reading of the treaties which compels the member states to act within the EU legal order whenever the EU has the competence to do so is compatible with the logic of checks and balances, and bicameralism, underpinning the EU institutional balance.

In fact, recent case law of the ECJ supports this view. In its Opinion in *Re: the EU accession to the ECHR*,⁷⁸ the ECJ – while confirming that “the EU is, under international law, precluded by its very nature from being considered a State”⁷⁹ – emphasized how the EU is endowed with “its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.”⁸⁰ From this constitutional reading of the EU legal order, the ECJ drew the conclusion – of particular relevance for our discussion here – that “the Member States have, by reason of their membership of the EU, accepted that the relations between them as regards matters covered by the transfer of power from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.”⁸¹ While the ECJ articulated this argument to single out the provisions in the draft accession agreement of the EU to the ECHR which were “liable to upset the underlying balance of the EU”⁸² – the reasoning of the ECJ can be applied *a fortiori* when considering the legality of intergovernmental agreements concluded by EU member states in the field of EMU. Because the conclusion of these agreements in areas when EU legislation is possible upsets the EU constitutional balance, the states should be prohibited from doing so, even if they do not violate any substantive provision of EU law.

Moreover, the argument being made here can find support *ceteris paribus* also in the ECJ case-law concerning the choice of legal basis. In the *Titanium dioxide* case, in particular, the ECJ held that in a situation where two different legal bases, both of which reflected the objectives of a given legislative measure, could be chosen, the Council was compelled to act on the basis of the treaty provision which “would not jeopardize” the involvement of the EP in the EU legislative process.⁸³ If the ECJ held then that within the EU legal framework preference should be given to legislative procedures which ensures the involvement of the EP – since “that participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly”⁸⁴ – *ex analogia* today preference should be given to action within the EU legal framework, which involves the EP, to action outside the EU legal framework, which cuts the EP off.⁸⁵

⁷⁸ Opinion 2/13, *In Re: the EU Accession to the ECHR*, opinion of 18 December 2014, ECLI:EU:C:2014:2454.

⁷⁹ *Ibid.* par. 156.

⁸⁰ *Ibid.* par. 158.

⁸¹ *Ibid.* par. 193.

⁸² *Ibid.* par. 194.

⁸³ Case C-300/89 *Commission v. Council*, judgment of 11 June 1991, ECLI:EU:C:1991:244, par. 20.

⁸⁴ *Ibid.*

⁸⁵ See also Case C-130/10 *Parliament v. Council*, judgment of 19 July 2012, ECLI:EU:C:2012:472, par. 46 (stating that the *Titanium dioxide* approach “is still valid after the entry into force of the Lisbon Treaty in the context of the ordinary legislative procedure”) on which see P. van Elsuwege, “The Potential for Inter-

An important caveat should however qualify the argument that I am making. Because the EU is based on the principle of conferral,⁸⁶ the member states certainly remain free to conclude international agreements – including inter se – in all those areas which fall within their residual competences. In fact, this is what the ECJ implied in *Pringle*, where it held that the treaties “d[id] not confer any specific power on the Union to establish” a permanent stability mechanism for the Eurozone.⁸⁷ A *contrario*, the statement of the ECJ should be read to mean that in all the areas in which the EU has competence (including competences it shares with the member states), the EU member states are no longer free to step outside the framework of EU law and regulate a given field through international agreements.⁸⁸ The EU treaties design a constitutional regime, premised on a delicate system of checks and balances, which the member states cannot bypass. While the member states continue to have a prominent voice in the Council, the EP is constitutionally vested with law-making functions which cannot be circumvented by national governments. Otherwise, even when only a handful of member states want to adopt a specific legal measure, the treaties foresee the mechanisms whereby they can do so *within the EU legal order*: through the enhanced cooperation procedure a sub-group of EU member states can pass legislation in the Council.⁸⁹ This legislation only binds the participating member state.⁹⁰ But its passage requires the approval of the EP – thus securing the involvement of both houses of the EU legislature.⁹¹

In conclusion, therefore, the Lisbon Treaty provides multiple constitutional grounds to claim that by stepping outside the EU legal order, the member states upset the EU institutional balance and undermine the constitutional role of the EP – even if the agreements they conclude do not formally violate any substantive provision of EU law. Ironically, in the December 2014 final Council Presidency report on “Improving the functioning of the EU”⁹² the then Italian Presidency reported that discussion among national delegations in the Council “on inter-governmental agreements signed outside the existing Treaties framework [had] confirmed that working within the EU legal order is the preferred option and should be the norm. Delegations pointed out that intergovernmental agreements risk leading to fragmentation of the legal framework and producing unsuitable and uncalled for discrepancies among Member States.”⁹³ However, as I

Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty”, in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing 2014), 115, 121.

⁸⁶ See Art 5 TEU.

⁸⁷ See Case C-370/12, *Pringle* par. 64.

⁸⁸ In *Pringle* the ECJ also held that in the absence of a clear attribution of competence to the EU in the treaties, the member states were not obliged to use the flexibility clause of Art 352 TFEU, which requires unanimity for its operation. See *Ibid.* par. 67. However, in my view this statement should not be read as an encouragement by the ECJ towards action outside the EU legal framework by the member states. To the contrary, in fact, see Joined Cases C-274/11 and C-295/11 *Spain and Italy v. Council*, judgment of 13 April 2013, ECLI:EU:C:2013:240 (concluding that the member states have ample opportunity to resort to the enhanced cooperation procedure to pass secondary legislation within the EU legal order).

⁸⁹ See Art 330 TFEU.

⁹⁰ See Art 20(4) TEU.

⁹¹ See further F. Fabbrini, “Enhanced Cooperation Under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary” (2013) 40 *Legal Issues of Economic Integration* 197 (discussing institutional protections involved in the use of enhanced cooperation).

⁹² Council Presidency, “Improving the functioning of the EU” – Final Presidency Report from the Friends of the Presidency Group, 12 December 2014, Doc. 16544/1.

⁹³ *Ibid.* par. 24.

have endeavored to argue, action by the states within the EU legal order – rather than outside it – should not be a simple question of political opportunity. It should be seen as a legal obligation, stemming from the comprehensive constitutional architecture for law-making created by the Lisbon Treaty. In any areas where the EU has competence,⁹⁴ the member states are required to act within the EU framework – in case by using the enhanced cooperation procedure.

4. Enforcing the principle of institutional balance

If the analysis I developed in Section 3 is correct, the follow-up question is this: if there is a persuasive constitutional argument against the freedom of the member states to act outside the EU legal framework whenever the EU is competent to legislate, what instruments are available to the EP to prevent the member states from stepping outside the EU and concluding intergovernmental agreements? How can the EP defend its institutional position? Arguably, the EP could embrace two strategies, or a combination thereof: a legal, and a political strategy. From the legal point of view, the EP could bring a case before the ECJ, asking it to enforce the principle of institutional balance. As Jean-Paul Jacqué has explained, the ECJ has repeatedly acted to maintain the inter-institutional compromises made by the EU treaties, and its case law shows that it “is therefore not acceptable for one institution to extend its powers unilaterally to the detriment of another institution.”⁹⁵ In fact, the ECJ held that “observance of the [principle of] institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions.”⁹⁶ In this light, the EP could challenge the use of intergovernmental agreements claiming that – by the action of its representatives (the member states) – the Council circumvents the bicameral process designed for law-making by the Lisbon Treaty, to the detriment of its institutional position.

Nevertheless, there are some legal questions surrounding the potentials of such a judicial strategy. Leaving aside the deference that the ECJ may want to accord to the EU political branches – especially when they also have political, rather than legal, means to handle their divergences⁹⁷ – there are procedural issues that need to be addressed for the EP to be able to mount a legal challenge against the states’ use of intergovernmental agreements. Pursuant to Article 263 TFEU, the EP may sue another EU institution, and the ECJ shall have the power to review “the legality of legislative acts, of acts of the Council [...and of acts] of the Union intended to produce legal effects vis-à-vis third parties.” Yet, technically speaking, when the EU member states choose to act outside the EU legal order, there is no act of the Union that can be challenged, and no institution of the EU that can be brought to court. It is true that in *ERTA*, the ECJ held in dicta that the Council equates to the member states,⁹⁸ which could be taken to mean

⁹⁴ See further R. Bieber, “The Allocation of Economic Policy Competences in the European Union”, in L. Azoulay (ed), *The Question of Competence in the European Union* (OUP 2015), 86 (discussing competences of the EU in the field of economic policy, and suggesting that the EU institutions enjoy significant space to act in the field).

⁹⁵ Jacqué (n 2), 384.

⁹⁶ Case 70/88 *Parliament v Council*, par. 22.

⁹⁷ See *infra* text accompanying nn 102-106.

⁹⁸ See Case 22/70 *Commission v. Council (ERTA)*, judgment of 31 March 1971, ECLI:EU:C:1971:32, par. 70 (stating that the Council “does not enjoy a discretion to decide whether to proceed through inter-governmental or [Union] channels.”).

that the former could be sued in lieu of the latter.⁹⁹ However, the following solution would not work where, as is the case with the EMU-related intergovernmental treaties, only a sub-set of member states concluded an inter-se agreement outside EU law. In this situation the only feasible option seems to be for the EP to sue the member states severally and jointly, claiming that the lack of an explicit recognition of this possibility in the treaties should not imply the absence of any judicial remedy. In fact, the ECJ in *Les Verts* held that the locus standi provisions of the treaties ought to be interpreted in order to avoid gaps in the EU system of judicial protection.¹⁰⁰ However, to these days there are no cases where the EP sued (a group of) member states, and it is unknown whether the EP could convince the ECJ that its case passes the hurdle for admissibility.¹⁰¹

An alternative strategy the EP could follow, therefore, is the political one – which builds on the new budgetary power that the Lisbon Treaty has vested in the lower house of the EU legislature. As indicated above, the Lisbon Treaty has assigned to the EP the power to approve the EU budget on par with the Council – and since the entry into force of the Treaty in 2009 the EP has made effective use of its new prerogatives. In fact, the EP has vetoed three times (in 2010, 2012 and 2014) the budget proposal advanced by the Commission and endorsed by the Council – thus forcing the two institutions to come up with a budgetary plan closer to EP priorities.¹⁰² In November 2014, for instance, the EP walked out of the Conciliation Committee convened with the Council due to disagreement on how the budget bill dealt with outstanding payments from the previous fiscal year.¹⁰³ And the European Commission was forced to come up with a new draft budget,¹⁰⁴ incorporating several of the EP’s requests,¹⁰⁵ which was eventually approved also by the Council in December 2014, just before the beginning of the new fiscal year.¹⁰⁶ The EP aggressive use of its budgetary authority suggests that it could exploit the power of the purse to prevent the member states in the Council from acting outside the EU legal order by threatening retaliation in the budgetary negotiations if they do so.

With that said, I am all too well aware that also the budgetary power of the EP is not a perfect weapon. As it is well-known, the size of the EU budget is limited, and the member states still

⁹⁹ See R. Schütze, *Foreign Affairs and the EU Constitution* (CUP 2014), 141.

¹⁰⁰ See Case C-294/83 *Les Verts v. Parliament*, judgment of 23 April 1986, ECLI:EU:C:1986:166 (holding that EP acts could be reviewed before the ECJ for their legality – even if the then EC treaties did not mention EP acts among those which could be subject to an action for annulment – since the treaties as the constitutional charter of the EC create a complete systems of judicial remedies).

¹⁰¹ See also *ceteris paribus* Case C-50/00 P *Unión de Pequeños Agricultores v Council*, judgment of 25 July 2002, ECLI:EU:C:2002:462 (maintaining a restrictive interpretation of the locus standi of private applicants in annulment proceedings).

¹⁰² See European Commission, Press release, “Budget 2015: Commission Makes New Proposal to Parliament and Council”, 28 November 2014 (reporting that the conciliation procedure failed in 2010, 2012 and 2014).

¹⁰³ See Council of the EU, Press release, “EU Budget Talks to Restart from a Fresh Commission Proposal,” 17 November 2014, PRESSE 593 (reporting failure to reach conciliation on budget proposal).

¹⁰⁴ See European Commission, Draft General Budget of the European Union for the Financial Year 2015, 27 November 2014, COM(2014)723 final (proposing new budget bill).

¹⁰⁵ See European Parliament Resolution of 17 December 2014 on the Council Position on the New General Budget of the European Union for the Financial Year 2015, P8_TA(2014)0100.

¹⁰⁶ Council of the European Union, Council Position on New Draft Budget of the European Union, 12 December 2014, Doc. 16739/2014.

handle separate national budgets.¹⁰⁷ In fact, the EU institutions – including the EP – rely on the EU budget to operate, while the member states don't.¹⁰⁸ At the same time, Article 315 TFEU provides that “[i]f at the beginning of a financial year, the budget has not been definitively adopted, a sum equivalent to not more than one-twelfth of the budget appropriation for the preceding financial year may be spent each month in respect of any chapter of the budget.” This provision – which prevents the hypothesis of a government shutdown – introduces a base-line scenario of replication of one year's budget into the next. But because historically the EU budget has been growing, rather than shrinking,¹⁰⁹ Article 315 TFEU gives a stronger stance to the Council – which is generally less willing to increase expenditures, due to the fact that, currently, EU revenues are mainly made up of states' transfers.¹¹⁰ In this situation, the EP faces greater pressures than the Council in reaching compromise on a given budget bill: from the Council conservative point of view, the replication of a year's budget into the next may not be the worse-case scenario, while for the EP it may imply giving up on ambitious proposals to undertake programs at the supranational level.¹¹¹

In conclusion, it is unclear to what extent the courts, or the political process could successfully protect the institutional position of the EP against the use by the member states of international treaties outside the EU legal order. And yet, from a historical perspective, the challenges faced by the EP today are not unprecedented. Few would have imagined before the *Chernobyl* case that the EP would win from the ECJ the right to sue the Council beyond the letter of the (then) EC treaties¹¹² – especially considering that the ECJ had previously rejected a similar claim.¹¹³ But in that case the principle of institutional balance offered the constitutional language that the EP could use to protect its position in the law-making system of the EU¹¹⁴ – and nothing excludes that similar pressures from the EP will not succeed in the future. In fact, as I have reported elsewhere, the EP raised serious objections to the decision of the Eurozone member states to conclude the SRF Agreement outside EU law.¹¹⁵ Although in the end, the EP conceded due to the desire to

¹⁰⁷ See European Commission, “The EU Budget Explained: Myths and Facts”, available at: http://ec.europa.eu/budget/explained/myths/myths_en.cfm (reporting that the EU budget amounts to about 1% of the GDP of the EU).

¹⁰⁸ See also F. Bassanini and M.T. Salvemini (eds), *Il finanziamento dell'Europa* (Passigli 2010).

¹⁰⁹ See European Council Conclusions, 7/8 February 2013, EUCO 37/13 (emphasizing that budgetary reasons required reducing for the first time the overall size of the EU budget for the financial period 2014-2020). The decision by the European Council to reduce the size of the EU budget prompted a negative reaction by the EP. See European Parliament Resolution of 13 March 2013 on the European Council conclusions of 7/8 February concerning the Multiannual Financial Framework, P7_TA(2013)0078, par. 1 (voting against the proposal of the European Council to reduce the overall EU budget).

¹¹⁰ See G. Benedetto, “The Balance of Power over the EU Budget: European Expenditures since the Lisbon Treaty”, Swedish Institute for European Policy Studies, Policy Analysis No. 15/2015.

¹¹¹ See also European Parliament Resolution on the report ‘Towards a Genuine EMU’, 20 November 2012, P7_TA(2012)0430, Recommendation 2.4 (stating that the Commission should return to the spirit and letter of the Treaties and develop a budgetary capacity funded by own resources, rather than member states' transfers).

¹¹² See Case C-70/88 *Parliament v. Council*.

¹¹³ See Case C-302/87 *Parliament v. Council*, judgment of 27 September 1988, ECLI:EU:C:1988:461.

¹¹⁴ See Case C-345/04 P, *Gestoras Pro Amnistia v. Council*, Opinion of AG Mengozzi, 26 October 2006, ECLI:EU:C:2006:418, par. 168 (stating that the ECJ in *Chernobyl* gave “a systematic teleological interpretation or one conducted in such a way as to ensure an outcome consistent with general principles or requirements of [EC] law [] such as observance of the institutional balance.”).

¹¹⁵ See Letter from the Chair and members of the Economic and Monetary Affairs Committee of the European Parliament to the Council Presidency (n 15). See also, Letter by the President of the European Parliament to the President of the European Commission on the Single Resolution Fund, 20 January 2014,

secure the swift establishment of the SRM, the event revealed a growing awareness by the lower house of the EU legislature of the problems associated with the use by the member states of intergovernmental agreements outside the EU legal order, and signaled a potential change in approach for the future.¹¹⁶

5. Conclusions

The principle of institutional balance represents a crucial systemic feature of a complex constitutional regime like the EU. While the relations of power between the various EU institutions have been subject to subsequent redefinitions through treaty amendments, the ECJ has systematically held that it has a responsibility to safeguard the structural balance designed by the treaties. Since the entry into force of the Lisbon Treaty the EU architecture is characterized by a complex system of checks and balances, which in the legislative sphere is reflected in the institutionalization of a bicameral process to adopt EU norms. By requiring as a default rule the involvement of both the EP and the Council in the adoption of EU legislation, the treaties have expressed their choice for a compound process of law-making in which the body representing the member states must reach agreement with the institution directly representing the EU citizens. Yet, notwithstanding the potentials offered by the EU legislative process, in the aftermath of the Euro-crisis member states have recurrently decided to step outside the framework of EU law, concluding intergovernmental agreements with direct implications for EMU governance.

This article has endeavored to shed a critical light on this development, questioning whether the use by the member states of intergovernmental agreements outside the EU legal order could be squared with the principle of institutional balance. As I have argued, whereas the thesis that the member states enjoy freedom to act outside EU law unless they violate substantive EU law, might have been acceptable at a time when the member states were de facto monopolizing the EU law-making process (within the Council), this thesis is unsustainable in a situation when the production of EU norms is subject also to the approval of an institution like the EP, which is not the propagation of member states' governments. Hence, I have concluded that given the current institutional balance designed by the treaties, member states should be prohibited from acting outside the EU, in any areas where the EU has competence to legislate. Moreover, to give teeth to my claim, I have considered both the legal and the political strategies that the EP could pursue to protect its institutional status – but I have also emphasized the obstacles that any attempt to enforce the principle of institutional balance through the political process or the courts would face.

In the scholarship, growing concerns have been recently raised about the institutional implications of the Euro-crisis and the responses to it.¹¹⁷ At the same time, criticisms have been voiced against the erratic embrace of the principle of institutional balance by the ECJ in its case

www.europarl.europa.eu/document/activities/cont/201401/20140121ATT77977/20140121ATT77977EN.pdf.
(last visited 23 February 2015).

¹¹⁶ Fabbrini (n 16), 463.

¹¹⁷ See D. Curtin, “Challenging Executive Dominance in European Democracy” (2014) 77 *Modern Law Review* 1.

law.¹¹⁸ As this article has suggested, the use by the EU member states of intergovernmental treaties outside the EU legal order in the aftermath of the Euro-crisis offers an opportunity to renew the core value of the principle of institutional balance in the structure of the EU.¹¹⁹ The responsibility to safeguard the institutional balance does not only rest on the ECJ: in fact, also the EP has political instruments, including the power of the purse, to uphold the EU constitutional charter. Be that as it may, in my view the EU would benefit from a renewal of the principle of institutional balance in EMU, and beyond: in normative terms, making sure that the member states cannot act outside the framework of the treaties at will when they could legitimately act within the EU legal order would reaffirm that checks and balances, and bicameralism, are foundational institutional features of our basic constitutional charter: the treaties.¹²⁰

¹¹⁸ See M. Chamon, “The Institutional Balance, and Ill-Fated Principle of EU Law?” (2015) 21 *European Public Law* 371.

¹¹⁹ See further F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2016) (discussing options for a new horizontal and vertical constitutional settlement in the EMU).

¹²⁰ See Joined Cases C-402/05 P and C-415/05 P *Kadi*, judgment of 2008, ECLI:EU:C:2008:461, par. 281 (stating that in the EU “neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [] Treaty.”).

**Other Research Papers published by Federico Fabbrini
with the Centro Studi sul Federalismo:**

On Banks, Courts and International Law

February 2014

**The Financial Transaction Tax: Legal and Political Challenges Towards
a Euro-zone Fiscal Capacity**

October 2013

The Enhanced Cooperation Procedure: A Study in Multispeed Integration

October 2012

CENTRO STUDI SUL FEDERALISMO

Via Real Collegio 30
10024 Moncalieri (TO)

Tel. +39 011 670 5024

Fax. +39 011 670 5081

www.csfederalismo.it

info@csfederalismo.it