

Department of Political Science
Master's Degree in International Relations
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**Decoding the European Union: Inspiring an institutional
debate over the future of the EU between Brussels, Bern
and Berlin.**

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A Robert Schuman, who was in a hurry to catch his train for London, so skillfully evaded the newspapermen's detailed questions about the future of the plan that one of them exclaimed:

'In other words, it's a leap in the dark?'

'That's right,' said Schuman soberly: 'a leap in the dark.'

Robert Schuman (May 1950) in Jean Monnet, *Memoirs*.

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List of Abbreviations

- AFSJ:** Area of Freedom, Security and Justice
- ALDE:** Alliance of Liberal and Democrats for Europe
- BVerfG:** Bundesverfassungsgericht (Federal Constitutional Court of Germany)
- CAP:** Common Agricultural Policy
- CDSP:** Common Defence and Security Policy
- CDU:** Christian Democratic Union
- CETA:** Comprehensive Economic and Trade Agreement
- CFSP:** Common Foreign and Security Policy
- Council:** Council of the European Union
- COREPER:** Committee of Permanent Representatives of the National Governments
- CT:** Constitutional Treaty
- DG:** Directorate-General
- EC:** European Communities
- ECB:** European Central Bank
- ECI:** European Citizens Initiative
- ECJ:** European Court of Justice
- ECOFIN:** Economic and Financial Council
- ECSC:** European Coal and Steel Community
- EDA:** Europe Defence Agency
- EDC:** European Defence Community
- EEAS:** European External Action Service
- EEC:** European Economic Community
- EMU:** Economic and Monetary Union
- EP:** European Parliament
- EPP:** European People's Party
- ERDF:** European Regional Development Fund
- ESF:** European Social Fund
- EMS:** European Monetary System
- ESM:** European Stability Mechanism

EZ: Eurozone

EU: European Union

EUCU: European Union Customs Union

EURATOM: European Atomic Energy Community

FAC: Foreign Affairs Council

GDR: German Democratic Republic

GFR: German Federal Republic

GG: Grundgesetz (Basic Law of Germany)

HR: High Representative of the Union for Foreign Affairs and Security Policy

IGC: Intergovernmental Conference

IMF: International Monetary Fund

KPD: Communist Party of Germany

JHA: Justice and Home Affairs

MEP: Member of the European Parliament

MP: Member of the Parliament

NATO: North Atlantic Treaty Organisation

OOEC: Organisation for European Economic Cooperation

PES: Party of European Socialists

PJCCM: Police and Judicial Cooperation in Criminal Matters

PSC: Political and Security Committee

QMV: Qualified Majority Committee

SEA: Single European Act

SED: Socialist Unity Party of Germany

SDP: Social Democratic Party of Germany (Later known as SPD)

SGP: Stability and Growth Pact

SRF: Single Resolution Fund

TCSG: Treaty on Stability Coordination and Governance in the Economic and Monetary Union

TEC: Treaty Establishing the European Community

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

VP: Vice-President of the Commission

WEU: Western European Union

WTO: World Trade Organisation

Introduction

The European integration project, which led to the European Union, has been the most ambitious political project of the last 100 years. After the end of World War II, the European Coal and Steel Community (ECSC) established by the Treaty of Paris in 1951 was a project aimed at rebuilding a disrupted Europe from the ruins of the conflict. Accordingly, the context imposed a redefinition of the relations between the main European States, first and foremost France and West Germany. The scenario offered by the Cold War was surely of help into spreading the necessity of a common integration project: the American bloc at west and the Soviet one on the east squeezed Western Europe in the middle. In 1950 the French foreign minister, Robert Schuman, made a public declaration on behalf of its government, promoting a coal and steel community with Germany, open to the participation of other European countries, this led to the formation of the ECSC, pillar of the later known European Economic Community (EEC), European Community (EC) and lastly the European Union as we know it. The long process of integration which brought to our EU has always been subject of a lively debate of which three main approaches can be found: intergovernmental, neo-functionalist and constructivist. The former group of scholars asserts that the European Union is the outcome of intergovernmental agreements between national leaders in intergovernmental conferences (Fabbrini 2015), meaning that national governments have always had the upper-hand in treaty-making, transforming the European institutions into an arena in which they each member State advocated its own national interest. According to the neo-functionalists, national governments recognised the necessity to delegate some functions to independent institutions (Fabbrini 2015), establishing an external constraint, thus the European Union can be considered of something more than an institutional arena in which each State could advocate its own interests, as according to neo-functionalists it is an actor per-se, free from national bounds. Lastly, constructivists affirm that the treaties were and have been negotiated by politicians who received advice from civil servants, thus bringing in the treaty-formation process a set of ideas and an awareness which escaped the bounds of the political logic of balance-of-power (Fabbrini, Which European Union? Europe After the Euro Crisis 2015). That said, even if the approaches are different, it is almost an undisputed point that political elites played a crucial role in the European integration process. However, while on one hand it was stated in the first

line of the Treaty of Rome itself that the EEC was considered a first step towards a European unification, and taking in consideration the failure of the European Defence Community (EDC) project in 1954, in Rome 1957 no debate around the constitutional rationale of the new European political order took place, in contrast to the American Philadelphia convention of 1787 (Deudney 1995). It was not a surprise that European politics were strongly influenced by the Westphalia balance-of-power system, therefore it was well known that said order had to be surpassed; that is when the elites thought about launching a process of institutionalised integration. However, the lack of a thorough political debate over the new political order in 1954 left the European post-Westphalian project in a condition of under-elaboration, thus the European integration process became more and more a de facto emancipation from the Westphalian system (Fabbrini 2015).

The MacDougall Report of 1977 described the European integration process of the time as a “pre-federal integration”, which can be aligned with what Sergio Fabbrini defined as a “compound democracy” (Fabbrini 2010), namely a democratic model aimed at reaching harmony between asymmetrical elements, such as States and cultures through different levels of governance. In fact, while on one hand the European Union shows a horizontal and vertical separation of powers, it does so by featuring pre-federative elements, such as a Council which represents the member States and a common European Parliament, that act as the legislative branch, an European Commission and an European Council which act as the executive branch and a Court of Justice which is the judiciary branch. However, while on paper it may seem that all the elements for a federation are laid out, the role of the member States, which hold a veto power in the Council, and of the Commission, which holds the right of legislative initiative make it clear that the European Union is far from being able to be considered as a federation of States. Which European Union is emerging as the outcome of the integration process? How did the relationship between Brussels and the nation States develop over time? Is there any way for the EU to escape its institutional stalemate? The humble purpose of this work is to offer an answer these questions by offering an analysis of the European integration process vis-à-vis two peculiar federative integration processes: one led to a federalism by aggregation, Switzerland, the other to a federalism by disaggregation, Germany. The two countries feature different histories, political elites and developments, but they both display

federative assets born out after political disruptions (Napoleonic occupation for Switzerland and WWII for Germany). Moreover, both federative systems evolved through time following certain tendencies, which can on one hand offer us a way to attempt a prediction on the future of the European Union and on the other can even offer a new model to discuss in that very constitutive debate which was missed in 1957. The EU has incurred a dramatic change since the birth of the European Economic Community, up to the point that in the late 2010s it can be argued that the original objectives of the Community are no longer up-to-date (Cini 2010). It is ambition of this piece of work to offer some food for thought in order to get the debate on the political and institutional future of the Union out of the deadlock it has been hitherto. This work is organised as follows. Part I discusses the European integration process from the Treaty of Rome to the Treaty of Lisbon, analysing the different phases which took place in the “pre-federative integration”. It will be stressed how the EU began to feature more and more federative elements, and how this strong integrating process came to a stop after the failure of the Constitutional Treaty, and what kind of Union has been outlined in the Lisbon Treaty and its potential setbacks. Part II will analyse the institutional structure and evolution of Switzerland, from its confederative roots to the federation, which is known today, taking into account that the confederative features are still strong within the Swiss constitutional framework and political culture. Part III discusses the Federal Republic of Germany, by analysing its constitutional framework and tendencies, especially how the relationship between the *landers* and Berlin evolved through time. Part IV constitutes the final remarks of this work. Different proposals for an overhaul of the Union will be discussed on the light of the supranational and intergovernmental natures of the Union. It will be aim of this last part to show either a theoretical but encompassing approach towards reform of the Union in the light of the crisis of the eurozone. Moreover, it will also be attempted to propose something more “out of the box” in the light of the German and Swiss examples, namely a more confederate Union. In conclusion, I identify the main factors which are holding back the European Union from escaping from its institutional stalemate and become a more coherent union of States.

I - The European Union

I.I From the European Community of Coal and Steel to Maastricht.

Time and history shaped and influenced the process of European integration which gave us the European Union as we know it today. World War II was the main spark which triggered the project of European integration. Political discontent and bankruptcy after the war, combined with the experience of the peace settlement following World War I made it clear that in order to avoid further conflict among European countries, France and Germany in particular, Europe needed to find a new spirit of collaboration, which has been institutionalised by the European Community of Coal and Steel in 1951. However, the initial collaborations between Western European governments were limited in scope (Urwin 2010), as they were interested mostly in security arrangements. Besides the Benelux customs union, other treaties such as the 1947 Treaty of Dunkirk between France and the United Kingdom, the 1948 Treaty of Brussels between France, the UK, Belgium, the Netherlands and Luxembourg albeit listing common economic and cultural goals, they were mainly and concretely mutual security pacts, aimed at avoiding any possible future German aggression. By 1949 the Cold War triggered the necessity to form a stronger alliance among all the countries in the western bloc, hence NATO was the arrival (and itself a beginning) point of the anti-Soviet policy adopted by the United States. It gave to Western Europe a military shield behind which European countries could freely consider developing their economic and political agreements. This commitment was welcomed by the then leading countries, the UK and France, which however gave themselves little margin of manoeuvre towards the European integration. After World War II French political debates were dominated by the need to keep Germany weak and in check, while the UK looked with suspect any act of close collaboration with other countries, as its political class wanted to safeguard the British sovereignty and its status as a “superpower” as much as they could. Therefore, neither of the two countries was able to steer the path of a united Europe. Nonetheless, political elites from all Western Europe began to envisage a project of aimed at increasing cooperation among European countries. The dominant issue soon became not whether this European integration should take place or not, but rather what form it should take (Urwin 2010). This constituted the theme of the debate at the Congress of Europe in The Hague in May 1948. As we know today, no concrete “union” or “federation” was

born after that Congress, if not the Council of Europe, established the following year. Nevertheless, it was the first post-1945 political organisation on the European continent. Its founding Congress called for a further union among European states, a European charter of human rights and a respective European court, a common market and monetary union (Urwin 2010). Politically speaking, the new-born Council of Europe found the favour of countries who wished only cooperation, not any further commitment, like the United Kingdom, as any decision needed the unanimity of all the members in order to be adopted. Federalists accepted it reluctantly, viewing it as a starting point rather than an end. Meanwhile, the European Recovery Programme, or Marshall Plan covered the economic front of post-war Europe. The plan consisted in the offer of a massive economic aid to European countries, however the programme was intended as collective, so the countries themselves had to decide and coordinate themselves how to redirect the resources offered by the Americans. This was the reason the Organisation for European Economic Cooperation (OEEC) was born in April 1948. It was an intergovernmental organisation, just as the Council of Europe, and to operate properly it needed the unanimous consensus of all its members. Albeit both organisations were bound by the unanimity principle, they reflected a growing awareness of the inter-dependency of states in Western Europe, and that prosperity or failure in the following years was up to them. The moral source of European integration resided in the need to avoid further wars and ideological divisions on the continent (Fabbrini 2015, 3). The idea of a Community came from a Frenchman, the then Foreign Minister of the French Republic, Robert Schuman, who in May 1950 proposed a pooling of coal and steel resources, the crucial point of its declaration was *“The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe.”* This project, the so-called Schuman Plan was the first pillar of the European Coal and Steel Community, which has been formally established the following year in April 1951: it was the first organisation of all Europe which involved a certain degree of sovereignty devolution to a supranational authority. It has been signed not only by France and West Germany, but also by Belgium, the Netherlands, Luxembourg and Italy, however it was clear from the beginning that a further integration of the Community, without the Franco-German regime, was impossible, as the Paris-Berlin axis was intended as the engine of integration from the very beginning

(Hendriks and Morgan 2001). To have such a project proposed, drafted and realised was the outcome of many circumstances. Nevertheless, the Schuman Plan represented the attempt to use the critical juncture of the post-war order to start the process of European integration (Burgess 2014). Critical junctures are defined as “*situations in which the structural (namely economic, cultural, ideological, organizational) influences on political action are significantly relaxed for a relatively short period, with two main consequences: the range of plausible choices open to powerful political actors expands substantially and the consequences of their decisions for the outcome of interests are potentially much more momentous. Contingency, in other words, becomes paramount* (Capoccia and Kelemen 2007, 343)” (Fabbrini 2015, 6). The confrontation between the two superpowers which were on the victor side of the War, USA and USSR, namely the Cold War, created the conditions which favoured a steady and progressive integration of Western European countries. To avoid any further expansion of the Soviet bloc towards Western Europe, West Germany needed to be stabilised, put into track and kept militarily safe. The drafter of the Schuman Plan was the architect of the French economic architecture in France after 1945, Jean Monnet, who paved the way towards a common European economic development. Monnet was convinced that the only way to gain prosperity in the continent was through a common European effort, which could be achieved only through a *rapprochement* between France and Germany (Urwin 2010). In 1948 the tensions between East and West reached their peak, as the US, UK and France chose to form a German state by merging the western zones of occupations in the country in 1949. This decision led to the establishment of the Federal Republic of Germany, or West Germany. The establishment of an International Ruhr Authority in April 1949 to supervise the production of coal and steel in West Germany was not satisfactory enough. Monnet and Schuman’s were the way out of the climate of political dissatisfaction, and found the support of French authorities, and of the leader of West Germany, Konrad Adenauer, who saw the Schuman Plan as a valuable step towards his *Westpolitik*, namely his policy to politically, economically and militarily tie the Federal Republic to Western Europe. Finding the favour of the political elites of Western Europe, the Schuman Plan was explicitly about more than a pooling of coal and steel, as Schuman emphasised, it would have set down common bases for economic development foreseeing the institution of a European Federation (Urwin 2010). The institutional

structure of the ECSC served as model for future developments and integrations. In this regard the most innovative feature was the division between executive and decision-making structure: a High Authority upheld the supranational principle, while the Council of Ministers represented the governments of the member states, protecting their interests (Urwin 2010). As it will be stressed later on, supranationalism implied the principle of sharing decision-making power between institutions representing European and national interests through majority voting, while intergovernmentalism implied the principle of pooling decision-making power within intergovernmental institutions alone, where decisions are result of national preferences (Fabbrini 2015, 7). Those institutions were the forefathers of the current European Commission and Council of Ministers of the European Union. The ECSC was, in the eyes of its institutional fathers, the opening phase of the process of European integration, the first step towards a deeper union. After the institution of the ECSC discussions began on which sector (p.e. agriculture or transports) had to be harmonised after coal and steel. The 1950s were, however, characterised not by one, but by two Paris treaties. The first, the Treaty of 1951, established the ECSC, the second, signed in 1952, aimed at establishing a European Defence Community (EDC). The EDC was spurred once again by the international climate, namely by the outbreak of the Korean war, conflict which lasted from 1950 to 1953. Concerned that the Asian conflict could escalate by triggering a major war between Western and Eastern Europe, the USA meant to strengthen NATO, process which however – in the view of Washington – needed more resources, of which its member states did not dispose, hence the American proposal of a West German military contribution. Few years after the end of the Nazi regime, the idea of a rearmed Germany raised many concerns, especially in France, where a German rearm was seen as a threat to its European policy. The ECD was prompted by Jean Monnet, who saw an integration of the European military forces as a solution and presented by the then Prime Minister of France René Pleven. The ECD proposed a defence community modelled upon the ECSC, establishing a common Western European army, that would include military units from all the member states, West Germany included. The plan, despite its French origins, was traumatically put to an end by the French National Assembly itself, which voted down the ratification of the Treaty in 1954. As a consequence, the military security of Western Europe was mainly preserved by NATO and by the Western European Union (WEU) of 1954, which

piggybacked from the Treaty of Brussels of 1948, establishing an alliance between the United Kingdom and the ECSC countries. However, the German question was ultimately solved with the entrance of West Germany in NATO in 1955. While the shutdown of the ECD filled with dismay the spirit of many European leaders, among which Jean Monnet himself (Urwin 2010), the commitment of further integration survived in the six members of the ECSC, up to the point that in 1955, at a meeting of the foreign ministers of the ECSC's member states in Messina, the six members pledged to keep the integration going. Building on the Dutch proposal of 1952 for the abolition of tariffs and quotas within the ECSC and for the introduction of an external tariff common to all the Community members, a plan for a customs union was set in motion, closing the post-war critical juncture with the signing of the two Rome Treaties of 1957 that gave birth to the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). The security side of the European community has been kept aside for a while, as a consequence of the failure of the EDC, however this did not come without contradictory effects (Fabbrini 2015, 7). European states could in fact maximise their economic growth and reconstruction in the post-war period, as they were under the protection on the NATO umbrella for military matters. On the other hand, the American security "blanket" made the process of European integration less spontaneous, concealing the need for greater integration. The Treaty of Rome officially inaugurated the process of merger of many European international relations into a single European polity. To do so, intergovernmental agreements were necessary, but insufficient, an external, supra-national constraint was necessary to make the structure effective: in the provisions of the Treaty of Rome, supranational institutions were considered as a guarantee to protect the entire EU from rivalries and instabilities coming from within the member States. As the organisation of the EEC ranged over an extremely wide range of policy areas, the provisions of the Treaty of Rome were far more complex than those of the ECSC. It has been made clear that it was intent of the Treaty to establish a common market, defined in the "four freedoms": free movement of goods, persons, services and capital. Moreover, another objective of the Treaty was to lay down the conditions to harmonise national economic policies and develop common policies; the idea to create a more embedded community, something more than a common market was the political aim of the Treaty was manifest from the beginning (Urwin 2010). The EEC developed from the ECSC,

establishing an institutional model that combined two different interests: the national interests, represented in the Council, intergovernmental and decision-making body, and the European interests, represented by the Commission and its monopoly of the right of initiative (Fabbrini 2015, 10). The former had to counterbalance the motor force of the integration represented by the latter. Those executive bodies were faced by a weak assembly, the European Parliamentary Assembly, known today as European Parliament, soon engaged in a perpetual struggle with the other institutions in order to enhance its own authority. The parliamentary assembly held an initially limited role due to its indirectly elected nature, within the initial framework of the EEC, the Parliament had nothing more than a consultative role in the Union's decision-making. Its members were appointed by national parliaments, and until 1979 its role has been marginal. Although it gained an involvement in the signing of trade agreements with non-EEC countries and within the resolution of interinstitutional disagreements, it was from 1979 that the European Parliament gained momentum and progressive recognition as something more than a marginal institution.

The final major EEC institution was the European Court of Justice, which swiftly became – altogether with the Commission – the most committed institution to the European project. Last but not least, it is worth reminding that the European Court of Justice (ECJ) also became one of the main motion forces behind the integration of European integration beginning with two sentences: in 1962 *van Gend en Loos*, which established that European law has a direct effect on individuals and firms, and, in 1964, *Costa v. Enel*, which established the principle that European law is superior to national law. This interpretation of the treaties was in support to the needs of economical actors of the Union, enforcing the existing provisions envisaged by the Treaties, allowing them to operate in a harmonised context. These two sentences allowed the Commission to define a better structured supra-national regulatory regime vis-à-vis the member States. The *Dassonville* (1974) and *Cassis de Dijon* (1978) rulings further reinforced the single market, by preventing member states from discriminating foreign goods produced in accordance with the standards of another member state (Leuffen, Rittberger and Schimmelfennig 2013, 115). Although the ECJ cannot exercise its judicial review over the member states' laws *ex officio*, article 177 of the Treaty of Rome allowed national courts to seek recourse to the ECJ to solve disputes over the interpretation of Union law (Stone Sweet 2000). Thus, as a result of intertwined

relations and alliances between the ECJ and national courts, and with the contribution of interests groups, the ECJ has been able to establish its role as one of the main arbiters behind the European integration (Fabbrini 2015, 11), applying Union law over national law to guarantee the provisions and the four freedoms established by the Treaties.

The new EEC shared its assembly and court with the ECSC and the EURATOM, however the three Communities retained separate executive structures until the Merger Treaty of 1965 (and effective in 1967), which fused them into a single institutional framework, the European Communities (EC). By the end of the 1960s, the EEC's customs union was successfully implemented, internal trade flourished and the work on establishing a common agricultural policy (CAP) began. Although the historical and political climate were promising, the 60s also bore a substantial setback on the European integration: Charles de Gaulle. The General was generally supportive of the EEC, as he saw it as a tool to enhance France's influence on Western Europe; however, he was suspicious that the EEC might as well act as a brake on his French ambitions, if Paris stopped being its propulsive force (Urwin 2010). The first issue that heightened the tensions among De Gaulle and the EEC made itself evident at the beginning of the 60s. The EEC as a trading bloc after 1958 was so successful that other Western European states which previously refused to get involved with the European project revised their opinions and began to advocate for their membership. In 1961 the United Kingdom applied for membership, and again in 1963 and 1967, however all of the three applications received the veto of De Gaulle, as he suspected that the close ties of London with Washington and the Commonwealth could bring the EEC out of his grasp, and bringing it too close to the United States. Secondly, the 60s were also a period in which the EEC was supposed to evolve its institutional nature: an extension of the qualified majority voting (QMV) in the Council of Ministers was on the table. At the same time, during the approval of the financial arrangements for the CAP, the Commission proposed to enhance its supranational authority, which – altogether with an enhanced QMV - implied a reduction of national sovereignty. The implication of an extended QMV was that for many decisions a two-thirds majority could suffice, and a state could be outvoted without being able to exercise its veto anymore, as a consequence, in 1965, De Gaulle provoked the so called “empty-chair crisis”, by withdrawing all French participation in the Council of Ministers, except for technicalities and low-level issues. The crisis came to resolution in 1966, with the

“Luxembourg Compromise”, said agreement stated that in cases in which the vital national interest of a member state in the Council was at stake, it would aim to find a consensus solution, thus creating a de facto veto right (Urwin 2010). In case of the Council, member states were more willing to accept an extension of the QMV, knowing that – if push came to shove – they could invoke the veto right guaranteed by the Luxembourg Compromise. The consequence for the Commission is that it had to make sure that its proposals would not impact upon the national interests of any member state, making it more wary in its policymaking activity. Any further development of the European project had to await the retirement of De Gaulle in April 1969. Few months later, in July, a summit was held in The Hague to discuss the enlargement of the European Communities, especially to Great Britain, now that De Gaulle was no longer in power. The idea to go towards an Economic Monetary Union (EMU), initially through a common exchange rate system was discussed as well. The summit brought some results, as in 1973 the UK, Denmark and Ireland became members of the EC. The other candidate for membership, Norway, withdrawn from the negotiations as a result of a referendum in 1972. In 1974 the practice of holding summits between the leaders of national governments was formalised within the European Council. Moreover, the harmony between the member states and the Union was enhanced by the two structural funds established after the mid 1970s: the European Regional Development Fund (ERDF) and the European Social Fund (ESF), pivotal in providing aid for economic and employment sustenance. In 1972 the Common Agricultural Policy, the main item of expenditure of the Union, was fully operative as well. An element of crisis was given by the dollar shock and the oil shock of 1971 and 1973, which created a worldwide economic crisis, prompting the European Communities to establish a European zone of stability with the so called “monetary snake” of 1972: a system by which European currencies’ exchange rates could float within a set value against the US dollar (Urwin 2010). The snake, as a first attempt to coordinate monetary policy within the EEC, became unsustainable and failed due to the oil crisis, leaving Western Europe open to the growing unemployment and inflation. The subsequent attempt of monetary policy coordination happened with the European Monetary System (EMS) of 1979 proposed by the Jenkins Commission, which set currency stabilisation as an objective, by linking the currencies of its members altogether, in order to prevent large fluctuations. On the field of the broader

process of European integration, the birth of the European Council in 1974 was pivotal. It was in this very occasion that European leaders agreed to implement the direct election of the European Parliament, which followed in 1979. Even if the EP came to be directly elected, the right of initiative was, and still is, prerogative of the Commission. To gain relevance the EP needed to take on board an increasing number of issues (Urwin 2010) among which the EC's budget and the way in which national contributions to it were determined, the management of the CAP, including its market-distorting consequences, and its obvious political repercussions. The Union saw further enlargements in 1981 with Greece and in 1986 with Spain and Portugal. In the same year, the Single European Act (SEA) was signed. It represented the first substantial update of the Merger Treaty of 1965 and set the establishment of a common market by 1992 as a priority. The SEA represented a change of paradigm, enhancing not only an harmonisation in the enforcement of the four freedoms, but a follow-up to the intense judicial activity of the ECJ, which, in the meanwhile, established the supremacy of EU law over national law and a progressive favour of an harmonised integration and promotion of the free movement of persons, goods, capitals and services. The SEA committed its members not only to establish a fully operative common market by 1992, but also to cooperate on the convergence of economic and monetary policies, and in terms of social policies (Phinnemore 2010). In order to achieve these objectives, the SEA tuned the very institutional structure of the European Community. The use of qualified majority voting in the Council was extended, thus departing from the deadlock of the Luxembourg Compromise. A Court of First Instance to assist the ECJ was created, a formal reconnaissance of the European Council was given altogether with an extension of the decision-making role of the European Parliament. The EP was granted the power of reject EC enlargements and international agreements, its consent was required for all those pieces of legislation aimed at completing the single market, thus establishing the so called "cooperation procedure" (Fabbrini 2015, 12). The procedure envisaged a cooperation between Council and EP, that began to act steadily more and more as a higher and lower chamber of a parliament. The powers of EP have increased steadily since the direct election of its members was implemented: as MEPs became directly elected, they demanded more and more involvement in the EC policymaking, in order to deliver some results to their constituencies (Farrell and Scully 2007). The Europeanisation of

many policy areas, especially on the economic sector, became more and more accepted by the member states. If the Commission, the EP and the ECJ had an institutional interest into enlarging the policy competences of the Union, the intergovernmental institutions (Council and European Council), benefited from the constraint (the so called *vincolo esterno*) caused by the devolution of sovereignty. The institutionalisation of the supranational system allowed either to member state to solve problems that they could not address on their own (Milward 2000) or to have at disposal a political scapegoat upon which blame any domestic policy failure. The result of this process that took place between 1957 and 1986 was the formation of a trilateral institutional decision-making system or supranational system (Fabbrini 2015, 14), with the Commission at its centre (since its monopoly of the right of initiative), and a sort of “bicameral” legislature, with the Council (more powerful than the parliament) and the EP acting as the upper and lower chamber; all under the supervision of the European Court of Justice. The SEA gave form and consolidated the process of “Union-building” which began with the Rome Treaty, but needed a follow-up just few years later, with the end of the Cold War (conventionally set with the fall of the Berlin Wall in 1989 and dissolution of the Soviet Union in 1991), thus creating a new critical juncture (Fabbrini 2015, p.14). The end of the Cold War, among the other things, made possible the reunification of Germany, which prompted European national leaders to establish a tighter institutional framework in order to keep in check the reunited German Republic, the solution adopted was the Economic and Monetary Union (EMU): the surrender of the German Deutschemark was considered as a condition to make possible the reunification of Germany (Fabbrini 2015, 15). Thus, the intergovernmental conference (IGC) held in Maastricht in 1991 was the beginning of a new chapter in the history of European integration, as had to deal with an unprecedented scenario. Intergovernmental conferences (IGC) are political summits in which the member states negotiate agreements on the treaties constituting the European Community (before) and the European Union (later). As a matter of fact, if states wish to reform the EU or the EC, they need to amend the constitutive treaties, formally done via the IGC. In the conference agreed amendments are brought together in an amending treaty which is then signed and ratified by all the parties. Ratification may require either a parliamentary vote or a referendum, depending on the political requirements of the member state (Phinnemore 2010). The IGC of Maastricht in 1991

resulted in the Treaty on the European Union (TEU), also known as the Maastricht Treaty.

The Maastricht Treaty saw a reinforcement of the supranational management of the Union, the “Community Method”, according to which is up to the European Commission alone to make legislative and policy proposals, since it is independent it is able to represent the Treaties while doing so and representing the Community in international negotiations. Then is up to the European Parliament and to the Council of Ministers to adopt legislative and budgetary acts, all under the supervision of the European Court of Justice (Dehousse 2011, 4). The TEU was designed to extend the scope of European integration, process furthered by the finalisation of the communities’ merger: the EEC (renamed European Community), the ECSC and the EURATOM were finally reunited as a single entity, to be called “European Union”. The European Union saw the institutionalisation of the abovementioned community method, the EP was fully recognised as the popular branch of a bicameral, European, legislative; its increasing role was however contained within the policy realm of market policies. Even if the TEU recognised the supranational approach based on the cooperation between supranational and intergovernmental institutions, the new policy realms of the Union were to be kept under strict surveillance by the member states, thus outside the conventional institutional framework (Laursen 2012). The TEU in fact introduced different institutional regimes to deal with different policy realms, namely the three “pillars”. Single market policies, the 1951 ECSC Treaty (expired in 2002), the amended 1957 Rome Treaty instituting the EEC (now called Treaty Establishing the European Community, TEC) and the EURATOM Treaty were all components of the first pillar. The first pillar also contained the EMU project and the introduction of a single currency (Laursen 2012, 121). The second pillar consisted of the Common Foreign and Security Policy (CFSP), namely cooperation for foreign policy and security matters. The third pillar was named “Justice and Home Affairs” (JHA). These last two pillars consisted of intergovernmental cooperation in which the member states had the last word on their respective policy areas, while the first was hinged within a supranational framework. In fact, the policies of the first pillar were managed through the hybrid supranational model of decision-making, thus establishing a balanced context in which Commission, Council and EP cooperate (Fabbrini 2015, 17). In the second and third pillars the national governments had the last word on any decision

within the Council's formations (namely Foreign Affairs Council, FAC and the Justice and Home Affairs Council, JHA), which were chaired by one of the member states' governments on a rotating six-month basis. This framework represented a setback for many supporters of supranational integration, as they saw the intergovernmental pillars as a threat to the Community method (Phinnemore 2010), however, the adoption of a mix of supranational and intergovernmental pillars was the formalisation of a pre-existing practice, as intergovernmental cooperation was already pursued outside the framework of the EC. Moreover, the TEU introduced opt-outs from certain policy-areas for some member states. Instance of this is the EMU, as it was set to create a three-tier EU, with the states divided between those that would become full members, those who would fail to meet the convergence criteria and those that availed of opt-outs: namely the United Kingdom and Denmark. Moreover, it was also agreed that the United Kingdom could opt-out from the social policy of the Union. Lastly, Denmark could enjoy an opt-out from involvement in the areas of foreign policy and security. If before differentiation between the member states was present, yet temporary, now it has been institutionalised, with the fear that any future member could choose any policy sector to further integrate, and those from which opt-out (Phinnemore 2010). Such concerns were quelled with the 1995 enlargement, in which the EU refused to concede opt-outs or exemptions from the *acquis communautaire* to Austria, Finland and Sweden, which however managed to not get into the common currency by not complying with all of the convergence criteria.

I.II From the Maastricht compromise to the Constitutional Treaty

The biggest innovation of the Maastricht Treaty was surely the launch of the EMU. Despite an initial abandonment of the project in the 70s due to the crisis, it was revamped with the European Monetary System in 1979 and then recovered with the Single European Act. In 1988 a committee chaired by the then President of the Commission, Jacques Delors, and made up of the governors of the central banks of the twelve member states, set up the blueprint of a monetary union, known later as "Delors Report" in 1989 (Otmar 2008). The reunification of Germany provided some context in which inject the proposal of the Delors Report, as a common currency was expected to keep in check a reunited Germany as a European Germany (Jabko 2006). The introduction of a common European currency, today's euro, was based on three

specific phases. To begin with, on January 1st, 1994 a European Monetary Institute (EMI) was established as the forerunner of today's European Central Bank (ECB), which was created officially on June 1st, 1998 based on the institutional framework of the German Bundesbank. Secondly, on December 31st, 1998 the currencies of the countries participating to the EMU and the set value of the euro were linked together, hence the exchange rates harmonised and pegged. Lastly, on January 1st, 2002 the euro began to circulate regularly (Martin and Ross 2004). On the policy management side, the set of policies connected with the common currency were hinged within a hybrid framework, putting the monetary policy under control of a supranational, technocratic institution, the ECB and the economic policies as an exclusive policy realm of the Council in its Economic and Finance formation (ECOFIN), under the supervision of the European Council. The system was partially bicephalous, as the political logic of the EMU was determined by the ECOFIN and then assured by the ECB, whose mandate is only to "maintain price stability". The system was mainly a political compromise under an economic-technocratic guise, as for countries such as France the EMU was the opportunity to drop the existing exchange-rate system based on the Deutschmark, with a European-level currency managed by a president and the governors of the member states' central banks. The system was, as Majone pointed out, incomplete and any analogy with the American context in this case could be misleading, in fact *"the ECB is not a politically independent institution operating in the context of a democratic government [...]. Rather, it is a 'disembedded' non-majoritarian institution, free (indeed, obliged) to operate in a political vacuum, without a European government, or at least a European finance minister, to balance its powers."* (2014, 52). In absence of such supranational control, be it a European government or a common finance minister, the EMU – certainly of hybrid nature – came to be mostly on the intergovernmental side rather than the supranational, since European leaders opted to not extend the supranational regime over the monetary union (Fabbrini 2015, 19). Therefore, within the three-pillar structure of the Maastricht EU, the EMU fell within the first pillar, albeit intergovernmental in nature. Moreover, even if the foreign and justice affairs were part of the second and third pillar, MEPs got to be more and more involved in those policy areas, especially for what concerns human rights. Lastly, even if not formalised in the TEU, the European Council (the institutional summit of the government leaders of the member states), came to be

recognised as the place in which political strategies of the Union had to be discussed. Maastricht was indeed a watershed with the past, the shock provoked by the end of the Cold War, the reunification of Germany and the dissolution of the Soviet Union forced the countries of the Union to act as a proactive entity. If in fact until 1989 one of the driving forces behind the European integration was to offer a European alternative to the Soviet bloc, now the Union was facing the challenge of unifying a continent, thus matching institutional Europe with geographical Europe (Van Middelaar 2013, 183). As in many constitutional processes, the Maastricht Treaty was mainly a compromise, which is inevitable when there are so many veto players involved. The first compromise was institutional, a balance between the range of policies within the grasp of the Union and the role that national government could exert in collectively deciding such policies. As supranationalism *tout court* turn up the noses of many European leaders, France in particular, the policies came to be Europeanised, but under the control of national governments. The political compromise was necessary to establish the EMU.

Aside from the geostrategic rationale of the EMU in constraining the prowess of Germany within a European framework, there was also the issue of having its political rationale unacceptable for some EU member states (mainly the UK). The solution was the opt-out regime from the monetary union. The same solution was adopted in the case of Denmark, after the rejection of the Maastricht Treaty in a popular referendum in 1992, then accepted in 1993 thanks to the possibility to opt-out from the need to adopt the euro (Fabbrini 2015, 22). The last was an economic compromise. As stressed before, it emerged from the need to balance German's request of a politically independent European Central Bank to manage monetary policy and the French urge to keep the control of economic policies under the check of national political institutions. According to Tuori and Tuori (2014, 26-7): "*EMU was established as a part of the Maastricht package, whose aim was to further political not only economic integration. France held a strong negotiating position as one of the Four Powers and could decisively influence not only the establishment of EMU, but even the shape it received. Thus, the combination of centralised monetary policy with mainly national fiscal and economic policy was largely due to French misgivings, while Germany had pushed for more extensive centralisation of fiscal and economic policy as a precondition for successful common monetary policy.*" Maastricht was indeed a

turning point in the integration process. Yet, those who drafted the TEU knew that it was just a stepping stone, part of an ongoing process. As we know today, even the pillar structure, which seemed unavoidable, has been eroded by time, reforms and enlargement. And that is the context in which the 1996 IGC over a TEU revision took place in Amsterdam. In 1995 the Union counted 15 members and was ready to admit in large numbers applicants from Central and East Europe (CEE), as per commitment of the European Council in held in Copenhagen in 1993. Few years after Maastricht, the shortcomings of EU's structure were highlighted in reports of the Commission, Council and EP in 1995. The pillar structure was being perceived as mild and not efficient, especially in the sector of foreign policy, as the EU was unable to address the Yugoslavian disintegration efficiently. It was clear that before enlarging the Union, it was necessary to tune up its institutions. First of all, the qualified majority voting: it had to be extended to save the Union to avoid decision-making deadlocks. Finally, the need for allowing flexible mechanisms allowing groups of willing states to engage into a "closer cooperation" were promoted during the IGC (Phinnemore 2010). The Treaty of Amsterdam of October 2nd, 1997 was a small, but significant step towards a further European integration. Firstly, many of the JHA activities were shifted within the first pillar altogether with the Schengen agreements, thus the third pillar was refocused on police and judicial cooperation in criminal matters (PJCCM). Furthermore, among the objectives of the EU the establishment of an "area of freedom, security and justice" (AFSJ)¹ was added, yet with the opt-outs of the United Kingdom, Ireland and Denmark. Mechanisms for closer cooperation were introduced as well. Under their regime, member states that wished to pursue enhanced cooperation among themselves could do so. The mechanisms were conceived to be used as a last resort, in a way that a majority of states could begin a project of closer cooperation open all other member states. Moreover, this closer cooperation could not derogate the principles of the EU or the *acquis communautaire* and could not be pursued in CFSP matters. Lastly each member state was provided with a de facto veto power over projects of closer cooperation, as last guarantee. The first formal use of this provision was not until 2008 and not without any previous amendment, yet it was the establishment of an

¹ Collection of justice and home affairs policies, the areas covered by the AFJS include policies on border controls, provisions on visas, immigration and asylum policies.

institutional tool which allowed further differentiation within the EU. Amsterdam was also the opportunity to reduce the distance between the EU and the citizens, to do so the social policy competences of the EU were increased, an employment policy chapter was introduced, and competences over consumer and environmental production and transparency were reinforced. Even if the member states managed to avoid a *communitarisation* of the CFSP, the role of the Council was increased and the figure of the High Representative for the Common Foreign and Security Policy was introduced, making it coincidental with the role of Secretariat-General of the Council. It is worth reminding that the portfolio of the Representative provided by the Amsterdam Treaty was much more limited in scope than the present one created by the Lisbon Treaty. Nevertheless, some efforts towards a better coordination of CFSP have been done, and the “constructive abstention” in CFSP activities was introduced, so that members abstaining from CFSP initiatives voting would not block them. The Amsterdam Treaty was conceived, however, with the idea to prepare the EU for its institutional enlargement, while it partially did so, it left some room for improvement (Phinnemore 2010). The QMV was extended in 19 instances, but far less than desired, but the issues of the size of the Commission and the distribution of votes in the Council were not addressed. Yet, the size of the EP was capped at 700 members, its legislative role was strengthened through the extension of the co-decision procedure to new policy realms in the area of the single market (Bogdandy 2000). Towards the end of 1990s, momentum was building towards the accession of the ten CEE countries, plus Malta and Cyprus. Albeit the Amsterdam Treaty brought some significant tweaks to the institutional framework of the EU, it was perceived as still insufficient; it was feared that policymaking could halt if such a wide number of countries joined the EU without any major amendment to its structure (Phinnemore 2010). Moreover, the CEE countries were transitional economies, which were shifting from planned to open market. The EU had to be part of this process, which is something it had never happened, the need to enlarge the Union was faced against the need to keep the Union stable and guarantee the safety of the “ever closer union” principle. The Treaty of Amsterdam entered into force on May 1st, 1999, yet the European Council had already identified some prospects for a major and further reform in 1998, which came to be the three core issues of the IGC which was set to be held in 2000: the size and the composition of the Commission, the weighting of votes in the Council, the extension

of the QMV, also known as “Amsterdam Leftovers” (Phinnemore 2010). The main motion force behind this new IGC was however the so called “Agenda 2000” a document published by the Commission in July 1997, which showed its blueprints for a substantial enlargement of the EU. Following the document, the Luxembourg European Council agreed to launch an inclusion process in December 1997 with all applicant states (save for Turkey), and to open negotiations with only six applicants. After the 1999 Kosovo conflict attitude towards enlargement radically changed, more open towards a large-scale enlargement, which of course made the need to address the shortcomings of Amsterdam as soon as possible. The 2000 IGC was organised in Nice in December 2000, resulting in the Treaty of Nice, signed on February 26th, 2001. The initial agenda was limited to the Amsterdam Leftovers, yet, European leaders such as the French president Jacques Chirac or Germany’s foreign minister, Joschka Fischer, held speeches advocating for a Constituent debate over the EU, in general many proposals over the future of the EU followed during the conference (Phinnemore 2010). Notwithstanding the concerns of a European Union unready and unfit to accept a wide enlargement, the Treaty of Nice was signed, with largely unsatisfactory institutional outcomes (Fabbrini 2015, 27). Although presented as a Treaty paving the way towards an enlarged Union, for many it produced suboptimal solution to the prospects of institutional enlargement that the EU was facing. QMV was extended to nearly 40 more provisions, however, of these, many instances concerned the nomination of officials rather than decisions impacting on policy-making. Votes in the Council were re-weighted, however votes for bigger and smaller countries were increased in a way that the proportion of votes required for a majority was still the same as before (Phinnemore 2010). The Treaty of Nice also provided some solutions to the issue of the Commission’s size. From the following enlargement, each member would have one commissioner, while on the EP side, the number of MEPs was capped at 732. Foreseeing an enlargement including former Soviet countries, it has been expected that some issues linked with human rights may arise, hence a “yellow card” procedure, today’s article 7 (suspension clause) of the TEU, was finalised. Thanks to the Treaty of Amsterdam the possibility to suspend the voting and other rights of a member state in cases of extreme urgency had been already approved. According to Nice’s provision, the Council, acting by a majority, may determine if a member states is breaching the values of the Union, in which case is able to draft recommendations to it, in order to

halt the process. If the member state is found unwilling to comply, the Council votes by qualified majority to suspend rights of the accused country. The Nice Treaty was also important as it was the first instance of EU integration to recognise the European Charter of Fundamental Rights, yet this step was perceived as insubstantial as the Charter was recognised but not integrated as EU law. Yet, the outcomes provided by Nice were deemed as unsatisfactory, hence the European Council reunited in Laeken (Belgium) on December 15th, 2001 adopted a “Declaration on the Future of Europe”, which committed the Union to convene an IGC in order to draft a European Constitution, thus reaching “an ever closer union”. It had been, however, agreed, that the debate on what came to be known as the Constitutional Treaty (CT) would not feed directly into an IGC. Instead it has been chosen to establish a Convention in Brussels, from February 2002 to June 2003, comprising representatives of the national governments, MPs, MEPs, representatives of the Commission and representatives from the governments and parliaments of the candidate countries. Nevertheless, this round of reform, just as those of Nice and Amsterdam, revealed – as it will be stressed - that divergence of opinion among member states was dominant when there was the need to decide the *finalité politique* of the EU or its political design and future, contenting themselves with tweaks and harmonisations, but without any major overhaul.

I.III From the Constitutional Treaty to the Treaty of Lisbon

Despite the concerns of the many, the Convention worked in a spirit of openness and transparency, yet it was unable to attract the focus of the media and remained anonymous and “distant” from the citizens of the Union. In June 2003 the draft of the CT was presented to the European Council, IGC negotiations followed shortly afterwards, in September 2003. The draft needed some amendments, as no member state was willing to adopt it as it was. Some countries were doubting the new double majority voting system in the Council, others had doubts concerning the extended QMV or the proposed EU Minister for Foreign Affairs; it was impossible however, to deliver a result by December. In 2004 some governments, such as in Spain, changed, and the positions became somehow more accommodating, allowing negotiations to resume, and in little time an agreement was reached. The European Council in Brussels agreed upon the text in June 2004: the text was mainly the same of the Convention

and was just slightly amended. The final version of the Constitutional Treaty was signed on October 29th, 2004 in Rome. No agreement was so similar to a constitution like the CT, thus transforming the EU integration project from a *constitutional project* (Walker 2004) to a *constitutional process* (Shaw 2005). The document was divided into four parts and designed to replace all the existing treaties. It began with a preamble setting out the purpose of the Union. Part I outlined the institutions of the Union, and their competences, in a way similar to many constitutions. Part II contained the Charter of Fundamental Rights, making it part of the treaties and a legally binding source of law. Part III contained the expanded and detailed provisions of part I and consisted in a sort of merger between the Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC). Part IV and the final act contained revision and ratification procedures of the treaties and some provisions concerning international law. The document itself, overall, was more of a reorganisation of the existing treaties rather than something new. The CT was set to dissolve the European Community and the pillar structure, merging everything within the European Union. The ordinary legislative procedure was harmonised, involving joint commitment of both the Council and the EP, the outputs of the procedure were renamed as “laws” instead of regulations and directives. Furthermore, the use of QMV was extended, keeping unanimity still necessary for matters of constitutional sensibility, such as taxes, the accession of new members and the revisions of the Constitutional Treaty. The CT changed the requirements of the Council’s double majority, now planned to consist of 55% of member states representing 65% of the EU’s population. The Constitution also gave a permanent place to the European Council among the institutions of the EU and, more importantly, established the Union Minister for Foreign Affairs. Its holder was to be member of the Commission and Chair of the Foreign Affairs Council at the same time, assisted by the European Union External Action Service (EEAS). Furthermore, the revision procedures introduced by the CT allowed for easier mechanisms than the usual IGCs, needed for any alteration to the Treaties. More than increasing the powers of the Union, the Constitutional Treaty rationalised and clarified its policy competences, enumerating as of exclusive domain of the EU the customs union, competition policy, the Eurozone’s monetary policy and the common commercial policy, while on the other hand defining the policy areas of which the competence was to be shared with the member states. Said areas included internal market, social policy,

environment and Schengen. Lastly, in other areas the role of EU was merely subsidiary, as they were sole competence of the member states. The CT also specifically mentioned for the first time some competences in which the EU has already been active, such as tourism, civil protection, administrative cooperation and energy. Notwithstanding all of the work of the European Convention and the IGC to provide one document, they did not manage to increase the legitimacy of the EU in such a way to create unanimous support of the project (Church and Phinnemore 2010). It was aim of the CT to replace a confusing micro-cosmos of treaties and provisions with one, to codify the human rights charter within the binding legal system of the Union and to allow the EU to be fully prepared to become an organisation of 27 member states (with the enlargements of 2004 and 2007). It is undeniable, however, that the approval of the Constitutional Treaty would have meant the prevalence and the confirm of the supranational nature of the Union, thus entailing political consequences. After being signed in October 2004, the Constitutional Treaty needed a final ratification from the member states. Despite most member states ratified the CT through parliamentary vote, France and the Netherlands conducted the ratification process via referendum. 53.3% of French voters and 61.07% of Dutch voters rejected the CT on referenda held respectively on the 29th of May and on the 1st of June 2005.

Contestations followed, the supranational narrative was halted, and the intergovernmental logic was once again legitimised (Fabbrini 2015, 28). While it has been argued that complex constitutional treaties are bound by failure when they need to be approved by popular referenda (Hierlemann 2008), it is also true that the CT received approval in those very popular referenda held in Spain, Luxembourg and Romania. It has been made clear that the issues were inherent of the unanimity criterion needed to adopt any kind of overhaul of the Treaties, needing compromising coalitions to pass any amendment. The CT was only part of the problem. The reasons which led to the rejection of the project in the Netherlands and in France were broadly different. In the former case the text was found problematic and excessively compromising: it was seen mostly as a patchwork of many treaties into one and not as a synergetic output of a harmonised political community. For the French electors the issue was not to be found within the provisions of the CT (Church and Phinnemore 2010). The French citizens had national and social concerns, as they saw the EU as becoming more and more liberal, and the provisions they rejected were mostly in part

III, coming from the existing treaties, not by new provisions: it was evidence that the people were becoming aware of the real provisions of the Treaties with years of delay, as neither they were interested nor the governments managed to engage their citizens in debates about the European integration. It has been widely assumed that the CT was popularly rejected as a result of a broader alienation and detachment of the people from the EU. Efforts to communicate Europe were half-hearted and questioned the commitment of political elites to keep the process of European integration inclusive (Church and Phinnemore 2010).

I.IV The Lisbon Treaty and beyond

The failure of the CT caused the European Council to call for a period of “reflection”. The Lisbon Treaty is the compromising outcome of this period of reflection and managed to feature most of the contents of the CT by avoiding supranational symbology (Fabbrini 2015, 29). The rejection of the Constitutional Treaty caused the topic to be laid aside for a while and the period of reflection called by the European Council in June 2005 was extended to the following year, as no solution seemed to be in sight. Things began to change with the German presidency of the Council on the 1st of January 2007. Angela Merkel was a strong believer in the Treaty, thus she announced that it was objective of her presidency to reach a roadmap for further reform by June 2007. On the contrary with the CT experiment, the way she conducted this reforming process involved confidential meetings with the representations of the governments of the member states, ensuring that a rejection like the one by the hands of the French and the Dutch would never happen again (Church and Phinnemore 2010). The election of Nicholas Sarkozy as French president helped Angela Merkel gain political weight, then, by 14 June 2007 a list of all the issues to take in consideration for the incoming IGC was already circulating. On the 21st of June, one week later, a mandate for an IGC was produced and approved by the European Council. The mandate was surprisingly detailed, its first half outlined the amendments to be made to the existing treaties, and the second part where and how to implement them. On the 1st of July Portugal took over the Council’s presidency, making the completion of the new amendment treaty its objective. The IGC commenced work few days after, on the 23th of July, finally, and after many compromises, producing a final draft on the 2nd of October. The Treaty was then adopted by the European Council in Lisbon on the

18th of October, which polished and refined the final text, which was signed in Lisbon on 13 December 2007. The Treaty of Lisbon, which still outlines today's institutional framework of the EU, is formally a short document, made up of seven, long and detailed, articles. The first two articles were in fact a list of amendments to the existing treaties. Article 1 amended the Treaty on the European Union (TEU), with 61 amendments, while article 2 amended the Treaty establishing the European Communities (TEC), now called Treaty on the Functioning of the European Union (TFEU), with 286 amendments (Church and Phinnemore in Cini 2010). The other articles reorganised the articles and the elements of the Treaty, then followed by 13 legally binding protocols, an annex a final act and 65 declarations. Five of the protocols were already present in the CT, and covered the role of national parliaments, of the principles of subsidiarity and proportionality, the Eurogroup, the elements of permanent cooperation and EU's accession to the European Convention of Human Rights (drafted by the Council of Europe, not to be confused with the Charter of Fundamental Rights of the EU). The remaining eight protocols are totally new and include transitional provisions, elements for the interpretation of shared competences in the EU and, among other things, the provisions to repeal or amend existing protocols. In a nutshell, the Lisbon Treaty managed to overhaul the TEU and the TFEU which are now the basis for the governance of the Union. Thanks to this reform, the TEU came to be more similar to a Constitution, to what the Constitutional Treaty wanted it to be, outlining the structure and purpose of the European Union, the democratic principles upon which it is based and the aims, objectives and institutions of the Union. Moreover, out of the six titles of the newly revamped TEU, title V focuses on enhanced cooperation, external action and on the Common Foreign and Security Policy (CFSP), managing to offer those provisions that the Constitutional Treaty failed to deliver. Nevertheless, it is important to remember that the TEU has the same legal status of the TFEU, therefore it cannot be used to escape the need for an IGC for any major and further overhaul of the treaties. The TFEU is longer than the TEU, with seven parts and 358 articles. The first two parts are a set of areas of union competences, common provisions and rules on citizenship. Part III is the longest and most relevant of the TFEU, as it deals with the policies of the Union: internal market, free movement of goods, persons, services and capital, agriculture, area of freedom, security and justice, transport, competition, taxation, economic and monetary policy, employment, social

policy, education and culture, public health, consumer protection, industry, economic and social cohesion and many others. Part IV sets rules on the so called Association of the Overseas Countries and Territories, which is tasked with the management of the relations and cooperation of the Union with the Special Territories of the European Union, mainly outermost territories that due to their distance from the mainland they have derogations from some EU policies (p.e. the French *départements et régions d'outre mer*). Part V provides the norms of the External Action, part VI concerns the institutional and financial provisions, while part VII, the last, provides general and financial provisions.

The Lisbon Treaty managed to bring a simplification and reorganisation of the legal apparatus of the Union, leaving the Union as the sole structure of integration by removing the European Community. While Lisbon manages to spread the Community method by reorganising the provisions of the existing treaties, it also makes clear that the whole European Union is an entity based on its member states, which takes form and power from them, according to principles of subsidiarity and proportionality. Thus, any suspicion of the Union being a “superstate” is quelled by the rights of action, consultation, recognition and secession (exercised by the United Kingdom through a referendum held on 23 June 2016) from the Union. The Lisbon Treaty also allows limited changes to the “perimeter” of the Union’s competences, while bearing in mind that the Treaty also sets the boundaries of action of the EU institutions. The “three pillars” structure came to be dissolved and communitarised, replaced by three powers of the Union categorised as exclusive, shared or supporting². Moreover, the EU policy competences have been reorganised rather than expanded, by having the TFEU enumerate any single competence exclusive of the Union, of the member states or shared with them. The most significant development is the change on justice and home affairs (JHA), which with Lisbon came to be governed by normal procedures instead of ad hoc intergovernmental mechanisms. On the field of decision making the Treaty of Lisbon made the codecision³ procedure as the standard legislative process, extended to new areas. QMV policy areas have been extended and is now due to be based on a double majority of 55% of the member states representing the 65% of the population

² As outlined in Title I of part I of the consolidated TFEU.

³ The procedure by which the Commission submits a legislative proposal to the European Parliament and to the Council, which have both to approve it. It is outlined in art.294 of the TFEU.

of the EU⁴. This provision was set as a compromise to increase the political weight of bigger, more populated, member states. Unanimity has been retained for sensible areas such as tax harmonisation, CFSP, criminal matters, social security, citizenship and financial provisions. The European Parliament received new powers, of which the most important are control over the budget and treaty changes, and the possibility to veto the appointment of the President of the Commission; additionally, the number of MEPs has been finally capped at 751⁵ (including the President of the EP). The European Council came to be formalised as a full-fledged institution, implying a major influence of the member states over EU politics. Coming to the Commission, it gained an expanded role in the area of freedom, security and justice, and thanks to the communitarisation of the pillar structure, the High Representative of the Union for Foreign Affairs and Security policy became also vice-president of the Commission and Chair of the Foreign Affairs Council. Another important feature of Lisbon is the legal status given to Charter of Fundamental Rights, which is thus part of the *acquis communautaire*, and as such it has to be accepted and respected by all applicant states as a condition of membership. Lastly experiment provided by the Treaty is the so called “European Citizens’ Initiative” (ECI), mechanism which enables one million citizens of the EU, nationals of at least one quarter of the member states, can call the Commission to propose a legal act in an area of its competence⁶. The EU emerging from the Lisbon process is a flexible and differentiated organisation, which, in a comparative perspective, can resemble a prototype of a federal union, by which “flexibility is recognized and practiced within the boundaries of the constitutional distinction between shared rule and self-rule” (Elazar 1987). However, in the case of federal states and federal unions, flexibility, as stated before, the border is outlined by the distinction between shared rule and self-rule, thus were flexibility not managed adequately, the very existence of the federal order would crumble (Fabbrini 2015, p.30). Such process is guaranteed by constitutional documents, which are still lacking

⁴ A QMV “blocking minority” can be formed only by at least 4 member states representing the 35% of the EU population.

⁵ 785 MEPs in 2007, 736 MEPs in 2009 and finally today’s 751 MEPs: Lisbon reduced the number of maximum MEPs from 99 to 96 and increased the number of minimum MEPs from 5 to 6.

⁶ “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.” - Art. 11.4 of the consolidated TFEU.

in the European Union case, thus leaving the EU in condition of potential constitutional and constitutive chaos when it comes to draw the line between shared rule and self-rule, enforcing its hybrid nature. The initial phase of ratification of the Treaty seemed promising, with many parliaments voting in favour, as it was tailored to be politically acceptable more or less in all of the member states. The removal of all the constitutional and symbolic elements of the CT allowed the Treaty to be deemed as sufficiently distant from its predecessor, this feeling was reinforced by the political confirmation that there were no transfer of sovereignty requiring a popular vote, message well welcomed by countries such as Denmark and the Netherlands, which held the ratification procedure within their parliaments. Out of all the member states, only Ireland found itself obliged to hold a referendum: on a turnout of 53.1%, a majority of the 53.2% voted against the ratification. In general, there was a lack of knowledge and understanding of the text of the Lisbon Treaty and a large indifference, which encouraged abstention. Moreover, the text of the treaty was perceived as excessively complex, and far from the lives of ordinary citizens. However, some elements of the Treaty did surface during the debate: it was considered a threat to the Irish ban on abortion due to the implementation of the Charter of Fundamental Rights. Irish representation risked being downsized as the number of Commissioners was to be set at two thirds of the number of the member states. Lastly the Lisbon Treaty was perceived as a threat to the Irish neutrality, due to the commitments into building a common security and foreign policy (Church and Phinnemore 2010). Despite the Irish rejection inflicted a blow to Lisbon's momentum, the process of ratification did not stop. 23 member states had completed the ratification process by December 2008, making it clear that the Treaty was not dead, and that a compromise could be still reached. During the European Council in December 2008, an agreement with Ireland was reached, and all of its concerns soothed: first of all, the number of the Commissioners was kept at one per member state, allowing Ireland to retain its Commissioner. Secondly, the European Council committed to give three legal guarantees to Dublin: first, that Lisbon would not have altered EU competences on taxation, thus safeguarding the Irish taxation regime. Secondly, that nothing in the Treaty would have affected the principle of Irish neutrality. Lastly the guarantee that the Lisbon Treaty, its provisions on justice and home affairs and the Charter of Fundamental Rights would not have affect the Irish Constitution's provisions on the

right to life, education and family. On the 2nd of October 2009 a second referendum was held, finally accepting the Lisbon Treaty.

What came out from the debate over the Constitutional Treaty and the Treaty of Lisbon led to the fact that there is no European “superstate”, rather that the European Union is a body dependant on its member states and based on its founding treaties, therefore is natural that any attempt to amend them is bound to bring controversy, compromises and wearing political processes. From this fact, it can be drawn out that the Treaties are fated to be amended in the near future, either out of necessities arising from the changing times or to escape the institutional deadlock given by the actual hybrid nature of the Treaties. Moreover, the Lisbon Treaty proved to be a new starting point rather than an institutional arrival: nonetheless it is a seamless work-in-progress, a constitutional process, and as the CT experience showed, the non-ratification of a treaty does not necessarily reduce the likelihood of future reforms. Aiming at a “ever closer union”, the EU has developed over time, safe for the security side, which has been covered by the NATO umbrella. Free trade and movement, market competition, antitrust and economic and monetary harmonisation have steadily increased their importance among the competences of the Union. Over time new necessities arose, such as cooperation on security and foreign policy, or improvement of the Economic and Monetary Union, which, on a first moment, were included in the governance of the Union through hybrid decision-making regimes, result of thorough compromises. From Maastricht to Lisbon, the EU came to develop an ever more differentiated political system (Leuffen, Rittberger and Schimmelfennig 2013), in order to gain consensus from the member states, and proceed on the path of European integration. This allowed the EU to adopt different policy and decision-making regimes on both the vertical and horizontal level (Fabbrini 2015, 32). That flexibility reorganised and finally institutionalised with Lisbon is both EU’s success and shortcoming. On one hand it guaranteed the prosecution of the European project, as it made it possible to go forward, in spite of everything. But as the historical experience of the European Union made it clear, an excess of concessions and compromises may let the process of integration go forward, but at the price of an ever growing differentiation among the member states, which may thus become a reason for the states to ask for more guarantees in any reform phase, unable to renounce to their acquired prerogatives. For instance, one of the strongest elements of huge flexibility envisaged by the Treaties,

at first sight merely procedural, is article 50.1 of the Treaty on the European Union: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” Which we got to know as anything but formal, since the Brexit referendum of 2016 showed.

I.V The Lisbon Treaty and the supranational nature of the Union

The Lisbon Treaty brought order within the complexity of the European institutions, establishing new legal sources for the Union, which are a consolidated version of the previous treaties: the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights, elaborated with the Nice Treaty of 2001 (now part of the communitarian *acquis*). Lisbon abolished the three-pillar structure and diluted it into the Treaties and recognise two decision-making regimes: intergovernmental and supranational. Lisbon managed to overcome the previous institutional framework, but also established the principle of *integration through law* (Fabbrini 2015, 34). Article 288 of the TFEU established that the legal activity of the Union has to be based on regulations (binding and applicable in all member states), directives (binding the member states with the obligation to transpose them into national law), decisions, recommendations and opinions⁷. As stated before, policy-management within the EU framework is complex, due to the different levels of government and governance established by the Lisbon Treaty. For instance, when it comes to single market policies, the Treaties make them a clear competence of the Union, thus managed by a supranational system of government, which firmly distinguishes the executive branch of the Union from its legislative counterpart. As stated in article 289 of the TFEU the actors of the legislative procedure, the legislative branch in this case, consists of a lower chamber representing the European electorate, the European Parliament and a higher chamber representing the member states, the Council; they jointly adopt, amend and work on the proposals of the Commission. Both the Parliament and the Council being actors in the law-making process gives legitimacy to the whole process, since this way it manages to encompass both European (Commission and EP) and national (Council) actors. Although the

⁷ As per art. 288 TFEU: Regulations and Directives are binding and applicable all member states, Decisions are binding only upon those to whom they are directed, while Recommendations and Opinions have no binding force at all.

Commission retains the right of legislative initiative, it does not mean that it unilaterally drafts piece of legislature which subsequently arrive on the desks of the Council and the EP. The Commission consults the Committees of Permanent Representatives of the member states (COREPER) which represent the single countries in the Council (Kreppel 2006), private stakeholders and the parliamentary committees which may be interested or involved in the piece of legislation at hand. Despite the Lisbon Treaty and the codecision procedure allow the European Parliament to work as a national parliament, in the EU parties are not able to coordinate the voting behaviour of their ministers and MEPs (Mühlböck 2013, 583-4), on the other hand the coordination seems to be on the national level, thus MEPs and government representatives of the same country are likely to vote in the same way. Article 15 of the TEU institutionalises the European Council, which has been the political motor force behind the process of European integration. The TEU, with Lisbon, also disposes that the European Council is chaired by a president elected by a qualified majority for a two and half years term. Furthermore, it has been expressively stated that the European Council is not part of the legislative branch, thus ending its ambiguous co-existence with the Council of the European Union, as in the past were considered the same institution (Hayes-Renshaw and Wallace 2006; Naurin and Wallace 2008). This change allowed the European Council to be the political arm of the executive, with the authority to set the agenda, while it made so that the Commission would become the bureaucratic arm of the executive, endowed with the task to formalise the political agenda of the European Council into concrete proposals (Kreppel 2006, 267). However, it must be bore in mind that Lisbon formalised a longstanding process, which already existed and that, for years, helped in setting the political agenda of the Union. Nevertheless, the institutional architecture outlined by Lisbon affected the traditional distinction between supranationalism (represented by the Commission) and intergovernmentalism (represented by the Council), hybridising the system even more (De Scoutheete 2011). Introducing a permanent president in the European Council, escaping the logic of the six-month rotation typical of the Council, made it a core institution of the Union despite it does not hold and legislative power. Finally, Lisbon Treaty established a framework dominated by a bicameral legislative branch and a bicephalous executive branch. The governmental model of the supranational EU, of hybrid nature, has been considered as a trade-off between effectiveness and legitimacy

(Curtin 2009). Hardly it could be affirmed the opposite, since the system that came to be in the post-Lisbon order is one which is supranational, but interdependent with the order of the single member states. Both the Council and the European Council are expressions of the governments of the member states, their institutional and political output and effectiveness strongly depends on the outcomes of temporarily different electoral competitions. The European Parliament depends on elections organised in national constituencies every five years, at last the president of the Commission is nominated by the European Council, but has to receive the approval of the Parliament, likewise, the Commissioners are nominated by the European Council and they have to be approved by the EP. In order for the system to be effective, the Lisbon Treaty provided the tools and the incentives for the European Council and the Commission to cooperate, while to make it legitimate, it provided the codecision mechanism giving a prominent role to both the Council and the European Parliament, under the supervision of the European Court of Justice. It should be reminded that another way in which the system is able to produce an effective and legitimised policy output is through the so called or “trilogues”, which are not to be confused with the “formal trilogue meetings”⁸. Formalised in 2007 with a Joint Declaration⁹ of the European Parliament, the Commission and the Council, the trilogue is an informal type of tripartite meeting between these three institutions, aimed at fast-tracking legislature. However, given its “informal” nature, any agreement reached in an informal trilogue needs to be approved through the formal procedures of each of the three institutions. During the 2009-2014 legislative term, with the full enforcement of the codecision procedure, a steep increase in the use of the trilogue has been recorded, seen as proof of its effectiveness in fast-tracking the legislation procedure (Schütze 2015, 45). The informal trilogue practice on one hand allowed the Commission, the European Parliament and the Council to better work altogether on the legislation, and to make each of them better heard by the others (notably as regards the Parliament). Yet, they

⁸ The Formal Trilogue Meeting, shortened as trilogue is the meeting of the Conciliation Committee, which takes place if the Council does not agree with the amendments proposed by the European Parliament at the second reading. These meetings are formalised by the article 294 of the TFEU, while informal trilogues are recognised only at “joint declaration” level and are not regulated by primary legislation.

⁹ 2007/C 145/02: “Joint Declaration on Practical Arrangements for the Codecision procedure (Article 251 of the EC Treaty)”.

are an informal practice, still not formalised by the Treaties, and lack of transparency, but they can prove to be a useful trait-d'union between the EU legislative process' need for legitimacy and the need for effectiveness. As it will be stressed in the following chapter, to make steps in the process of European integration, it is important to forge a common feeling of "European" identity. Despite being easier said than done, more work on the responsiveness of the institutions, especially in terms of constituencies and cross-country representation, for instance by enhancing the way in which citizens can be heard by the institutions, can bring some results in terms of "identity building" (Blondel 1998).

I.VI The Commission

In the following parts and chapters of this work, the institutional framework of other federative unions will be outlined. For the sake of the argument, to stimulate a debate over the process of European integration, further reform of the EU, the nature of the main decision and policymaking institutions, such as the Commission, the Council of the European Union and the European Parliament, has to be further explored and developed. The Commission is one of the institutions of the "supranational" side of the European Union, and dates back to the High Authority of the ECSC. As such, it holds executive power and constitutes a separate, autonomous, body from the Council of Ministers. Like any executive, the Commission is made up of a political wing, composed by the Commissioners and their staff, and an administrative, bureaucratic wing, the "Services" organised in Directorates-General (DGs). The Commission has a wide scope of functions within the EU, from policy drafting and initiation to monitoring of its implementation, management of European policies and programmes, and – in general – guardian of the Treaties. To put it bluntly, the Commission drafts legislation and chooses the ideas can become policy proposals, yet it is worth reminding that this is subject to the longstanding practice of consulting other institutional actors in order to enhance the quality of the drafting, its responsiveness and legitimacy. As regards the Common Foreign and Security Policy and Justice Cooperation in Criminal Matters, the Commission does not retain an exclusive agenda-setting role, however, executive tasks in those two policy competences have gradually been transferred to the services of the Commission. Lastly, the role of the Commission as external representative of the Union has become more and more important as time

passed by. For instance, the Commission served as the main negotiator for the Union in trade and cooperation negotiations within bodies such as the World Trade Organisation (Egeberg 2010). The Commission has both a political and an administrative dimension: the former is reunited in the “College of Commissioners” which is a sort of “Cabinet” of the Commission, the latter within the Directorates-General of the Union. The College consists of all the Commissioners and the president of the Commission. It usually reaches decisions unanimously, but it may happen, rarely, that a voting may take place, in that case an absolute majority is required to reach a decision and each component carries one single vote, president included. Decisions tend to be taken unanimously since the College operates on the basis of the principle of collegiality, namely that all Commissioners are collectively responsible for the decisions taken. Despite its collegial nature, the College displayed a tendency in which the president began to operate more and more as a *primus super pares* rather than a *primus inter pares* (Kurpas, Grøn and Kaczyński 2008). Commissioners’ portfolios involve oversight of a Commission department or Directorate-General. National governments must agree on a Commission Presidency before appointing Commissioners, in order to let him work and build its own Commission. The *Spitzenkandidat* informal process allowed the member states to better coordinate and accept a common Presidency nominee. With the *Spitzenkandidat* European parties informally appoint (usually through primary elections) their own candidate for the Commission Presidency so that the candidate of the most voted party during the European elections is also nominated as President of the Commission by the European Council. Jean-Claude Juncker of the European People’s Party has been the first *Spitzenkandidat* President of the Commission. Over time, the President’s role and influence over the College has grown: for instance, since the Amsterdam Treaty, the President is able to reject Commissioner candidates nominated by member governments, it also retains the final say in the allocation of the portfolios and their redistribution, since the President is able to reshuffle the entire College during its five-year term. When taking into account the *modus operandi* behind the behaviour of the Commissioners, their nationality can prove to be more than a crucial background factor to take into consideration (Egeberg 2010). Indeed, despite Commissioners are expected to act independently, national governments, lobbyists and stakeholders tend to contact their national Commissioner as a consolidated practice. Accordingly,

Commissioners may engage their compatriots and be part of national networks within the Permanent Representations in Brussels, in this regard, the Commissioner's cabinets have often been portrayed as national enclaves. In truth this has been entirely true until the Prodi Commission, since which at least three different nationalities should be represented in each cabinet, and half of the staff of the cabinet should come from within the Commission's services. Moreover, the head or the deputy head of a cabinet should be of a different nationality from that of the Commissioner (Egeberg 2010). Cabinets are the private secretariat offices of the Commissioners and help the Commissioner to get a hold of the necessary tools to prosecute its agenda while ensuring coordination with other Cabinets, thus other Commissioners. Moreover, they also serve as *trait-d'union* with actors and institutions keen to influence the Commission. Lastly, they not only assist Commissioners in their daily work, but also serve as a sort of liaison office between them and their respective governments through the Permanent Representations (Egeberg 2010). However, Commissioners are surely not to be considered agents of their national governments, they indeed have multiple and conflicting political role expectations imposed upon them: on one hand they are expected to show a certain degree of allegiance towards their country of origin, on the other to be agents of the Commission and act defending the interests of the Union, and again they are expected to push their own agenda within their portfolio (Egeberg 2006). The strengthening of the Commission has been balanced by a growing influence of the European Parliament over it. As a matter of fact, the EP is able to dismiss the entire College through a vote of no confidence or motion of censure¹⁰, yet since it requires a two-thirds majority, is a provision meant to be used by a large consensus as extrema ratio. In conclusion, the Commission is often portrayed as a hybrid executive due to its administrative and political nature, or as the bureaucratic arm of the bicephalous executive of the Union. Nevertheless, the Commission should probably be compared to a national executive, as it is headed by politicians responsible for various administrative services (portfolios) and is able to draft policy proposals and monitor their implementation (Egeberg 2010). On the other hand, its executive function is

¹⁰ There has been provision for a motion of censure/vote of no confidence against the Commission ever since the Treaty of Rome. Now it can be found within article 17.8 TEU and article 234 TFEU.

shared with the European Council, which exercises, as stressed before, a role of political addressing, as a way in between a Prime Minister and a chief of state.

I.VII The Lisbon Treaty and the intergovernmental Union

As stated in the previous chapters, the Lisbon Treaty inherited the institutional compromises which came before it, including the supranational and intergovernmental decision-making mechanisms. If the supranational decision-making regime is based on the idea that integration should proceed through *legislative acts*, the intergovernmental regime is based on the idea that integration should proceed through *consensual policy coordination* between national governments (Fabbrini 2015, 45). Despite Lisbon managed to dissolve and overcome the three-pillar structure, it does not mean that the boundary between supranationalism and intergovernmentalism has been fixed once for all. Indeed, it has been stressed how the lack of a constitutional source of law and rules made the border between self-rule and shared-rule more and more faint through time and through the evolution of the Union's institutions. Moreover, there is room for a gradual transformation and communitarisation of the policies of the Union, as the gradual erosion of the intergovernmental nature of the Justice and Home Affairs showed. If for what concerns certain policy domains the Lisbon Treaty celebrated the institutionalisation of the supranational decision-making regime, it is also true that for other policy domains, such as the Common Foreign and Security Policy or the Economic and Monetary Union the Lisbon Treaty entrenched the intergovernmental method, by confirming the principle that integration should *not* proceed through legislative acts, binding for all the subjects involved. The intergovernmental decision and policymaking regime has been characterised as the alternative model of European, namely an alternative system of governance (Tsebelis and Garrett 2001) that acts also as a system of government, where there is no distinction between executive and legislative functions and institutions or between national institutions and intergovernmental institutions (Fabbrini 2015, 42). Allerkamp (2009, 14) characterised the model as one in which the policy entrepreneurship comes from some national capitals and is elaborated within the European Council, the Council of Ministers is of paramount importance in harmonising the cooperation among member states, the Commission holds a marginal role (compared with the supranational decision-making regime), altogether with the European Parliament,

which is ruled out of the decision-making process as the European Court of Justice. Moreover, this model of decision-making involves a distinct circle of key national policy-makers and politicians and special arrangements for managing cooperation. Nevertheless, despite the process being opaque to national parliaments and citizens, it is able to deliver effective policies based upon joint efforts of cooperation. As regards the role of the European Parliament and the Court of Justice, article 24.1 of the Treaty on the European Union, concerning CFSP, expressly states: « [...] *The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. [...] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty [...]* »; moreover, decisions in the CFSP field are implemented through actions (TEU, article 25, b, i) and positions (TEU, article 25, b, ii). Therefore, not only the European Parliament is excluded from the decision-making process in the intergovernmental framework, but even the role of the ECJ is pushed to the margins, unless foreign policy decisions were to infringe upon fundamental principles and rights promoted by the EU. Not only the European Council and the Council enjoy a privileged role in this process, but Lisbon recognises a special status to the Foreign Affairs Council configuration (FAC). While it is well known that all Council configurations are chaired by the corresponding minister of the half-yearly rotating presidency, the FAC is the only Council configuration to be chaired permanently for five years by the High Representative of the Union for Foreign Affairs and Security Policy, which is also vice-president of the Commission¹¹. The High Representative was introduced with the Amsterdam Treaty in 1997, although the position coincided with which of the Secretariat-General of the Council and its portfolio was way more limited than today. The High Representative and the FAC are then supported by the Political and Security Committee (PSC) of the European External Action Service (EEAS) in their activity. The Lisbon Treaty, through the article 27.3 of the TEU established the EEAS, which is a distinct organisation, as a sort of Directorate-General, that works towards the implementation of the Union's

¹¹ TEU, article 18.

foreign policy (Carta 2012): « *In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.* » Envisaged as a “foreign minister” within the Constitutional Treaty, the High Representative has been considered to be one of the main innovations introduced by the Lisbon Treaty in order to increase the supranational dimension of the Common Foreign and Security Policy as much as possible (Allen 2012). It is in fact true that the HR covers an ambiguous role as both vice-president of the Commission and permanent chair of the Foreign Affairs Council, and it is its dual nature which constitutes a *trait-d’union* between the supranational nature of the Union, represented by the Commission and the intergovernmental interests protected by the Foreign Affairs Council (Fabbrini 2015, 44). Notwithstanding the Lisbon settlement, the hybrid figure of the High Representative did not solve a core issue of the external relations of the Union: it is still not clear which is the institutional figure that should speak on behalf of the European Union in international relations. For the moment the role is exercised not by a single actor, but by a plurality of actors, depending on the occasion: from the president of the Commission, to the president of the European Council, the High Representative or the Trade Commissioner. Just as the intergovernmental decision-making regime, the CFSP of the Union offers policy outputs based on special and situational arrangements, or as it has been defined by Wallace and Wallace (2007) an expression of intensive “trans-governmentalism”: meaning a model which expresses an intergovernmental logic on one hand, while fostering a process of interdependence between national civil servants and ministers at the Union level. This hybrid intergovernmental and “trans-governmental” regime holds not only for the Common Foreign and Security Policy but also governs the economic policy of the Union, within the European Monetary Union framework (Heipertz and Verdun 2010). The Lisbon Treaty inherited the EMU from Maastricht, thus maintaining the centralisation of monetary policy, controlled by

the European Central Bank, and the decentralisation of economic policy, meaning that financial, fiscal and budgetary policies remain under the control of national governments which have to cooperate within the intergovernmental institutions of the Union. The principle of coordination of the economic policies among the member states of the Union is stipulated by article 5.1 of the TFEU: « *The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.* » and by article 119.1 of the TFEU: « [...] *the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives [...]* ». The Treaty on the Functioning of the European Union also takes care to determine the guidelines of the economic policy which has to be adopted by the member states in the Council. As stressed by article 119 of the TFEU, the guiding principles of the economic activities of the union are open market economy, free competition, sound public finances and a sustainable balance of payments. Moreover, article 119 outlines the objective of the economic and monetary policy of the union, stressed also in the article 2 of the charter of the European Central Bank: price stability. The activities mentioned in these articles, economic and financial policies are controlled and carried out by the Council in its ECOFIN formation, which retains the monopoly over the economic policy, and acts based on reports and recommendations of the European Commission. Further guidelines over the economic policy of the Union are set in article 126 of the TFEU, which – by following the neoliberal economic paradigm – advocates for contained government deficits and clarifies the need to keep in check the ratio of government deficit to gross domestic product (under the 3% threshold) and of national debt to gross domestic product (under a 60% threshold). It should be noted, however, that the structure of the EMU has been dictated more than necessity than by the neo-liberal ideology. The instrumental role of the economic rules on competition and state aid has been shown by the fact that “*EU competition rules take the place of WTO-authorized countervailing duties to offset the damage caused by export subsidies to the industries of importing nations. It is the combination of rigid market access rules with flexible safeguards that has permitted multilateral trade integration to proceed so far without any domestic policy harmonization*” (Majone 2014, 159). Most importantly, though, is the provision of article 126.14 of the TFEU, which states that: « [...] *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 [...] » to implement the economic strategies and guidelines established by the ECOFIN. On one hand the Council is required to vote following the special legislative procedure either by unanimity or qualified majority voting, depending on the issue, to enact economic policy outputs, based on the inputs of the European Commission and after having consulted the EP and the ECB. While the Council is not bound to follow the position of the European Parliament, it is almost self-evident that the opinion of its “policymaking” partner, the ECB is accepted, on the contrary, with the utmost consideration. Another relevant player in terms of economic policies is the Economic and Financial Committee (EFC), defined by the article 134 of the TFEU. The EFC is an advisory body to the ECOFIN, the composition of which is set by article 134.2 of the TFEU: « [...] *The Member States, the Commission and the European Central Bank shall each appoint no more than two members of the Committee.* » It is the task of the EFC to support the ECOFIN by supervising the economic and financial conditions of the member states, and by providing the framework for the dialogue between the ECOFIN Council and the European Central Bank. The respect of balance rules outlined by article 126 of the TFEU represents the formalisation within the Lisbon Treaty of the post-Maastricht Stability and Growth Pact (SGP), as it is set as a priority the respect of reference values and thresholds¹². The monitoring procedures established by the SGP have seen an increased role of the Commission on one hand, but still intertwined dependant on the positions of the Council, as, following the provisions of article 121.2 of the TFEU the Commission gives its recommendations to the Council, but the formulation of the guidelines of the economic policies of the member states and the Union is up to it alone. This element is clarified also by article 126 of the TFEU which confers to the Commission a monitoring role over the budgetary situations of the member states, in order to verify their compliance with the parameters of the Treaty. Yet, despite the Commission holding the authority to address an opinion¹³ to the member state which is exceeding the set parameters of the Treaty and thus being able to raise its concerns

¹² Defined in the Maastricht Treaty (Article 104.2 of the TEC) and now transferred within the Protocol No. 12 of the Lisbon Treaty's Annex.

¹³ TFEU, article 126.5.

to the Council, it is the Council alone the sole body able to adopt recommendations¹⁴ towards a member state or, were the concerned party uncompliant, to apply punitive¹⁵ measures. Sure, sanctions issued by the Commission are considered to be approved by the Council unless it votes by qualified majority voting to rejects them¹⁶, leaving to the Council a relevant veto power. Actually, there is a sort of interdependence between the Council and the Commission within the EDP mechanism. Indeed, the Commission is able to initiate an excessive budget deficit procedure against a member state, by providing the Council with their recommendations, which hold consultative but significant value, given the authoritativeness of the Commission, however is up to the ECOFIN Council to decide to proceed or not following the Commission's proposal. Not only intergovernmentalism is sealed as the principal decision-making mechanism within the economic and fiscal policy realm of the Union, but, given the interrelation between Council and Commission, is also based on voluntary coordination, especially for euro-area member states, whose main deliberations take place in the Eurogroup, an informal meeting constituted by the economic and financial ministers of the Eurozone (EZ) member states¹⁷ (Fabbrini 2015, 47). The informal meeting outlined by the Protocol No. 14 of the Lisbon Treaty's annex does not involve at all the European Parliament, which is excluded from this "informal governance" approach to policymaking (Puetter 2006). Moreover, given the informal nature of the Eurogroup, not only the European Parliament is ruled out as potential actor, but the same goes for the European Court of Justice, since the true independent arbiter when it comes to the common currency is the European Central Bank, which is expected to take part in the meetings of the Eurogroup¹⁸.

Notwithstanding the opt-outs from the EMU of the United Kingdom and Denmark, the Lisbon Treaty at the article 3.4 of the TEU outlines the economic and monetary union not as an option but as a requirement for EU membership, making it part of the *acquis communautaire* to comply with in order to gain accession to the Union.

¹⁴ TFEU, article 126.7.

¹⁵ TFEU, article 126.11.

¹⁶ As noted in the Council Regulation (EC) No. 1467/97.

¹⁷ Protocol No. 14, articles 1-2, Lisbon's Treaty Annex: « *The Ministers of the Member States whose currency is the euro shall meet informally [...] » chaired by a president elected: « for two and half years by a majority of those Member States » with the technical support of the Commission.*

¹⁸ Protocol No. 14, article 1.

The long-term result of this provision is to encourage a more harmonised economic area, yet, the price paid to achieve this result is the institutionalisation of diverging economic and monetary interests within the Lisbon Treaty, assuming that member states would take part in the European integration process through voluntary coordination. Indeed, within the Economic and Monetary Union there is a coexistence between euro-area member states and those member states which are committed to meet the Eurozone macroeconomic criteria, but not yet fulfilling them. Within the single market area, the EMU finds itself coexisting with the member states who opted-out from the euro (Fabbrini 2015, 49). In short, following the same pattern of the Common Foreign and Security Policy, when the Union began to deal with policies related to the sovereignty of the member states, the choice has been to promote a process of integration based on intergovernmental voluntary coordination, rather than supranationalism, not only as choice of the member states, but as necessity, as it was the compromise needed to take further steps towards an “ever closer Union”, formalised by the Lisbon Treaty. In this two chapters it has been analysed how the management of policies linked to the internal market has been made a supranational competence, by establishing a system of government characterised by the cooperation of four institutions which are all part of the decision-making process (the Commission-European Council dual executive branch and the Council-European Parliament bicameral legislative branch). On the other hand, for policies which were part of the second and third pillar, or more simply sensitive to national sovereignty, such as foreign policy or economic and fiscal policy, the Lisbon Treaty opted for an intergovernmental decision-making regime, where power is pooled in the European Council and in the Council of the European Union, representing the governments of the member states, which act through a principle of voluntary coordination, with a blurred distinction between legislative and executive functions, which are not distinguished at all. Since in the latter case the power is exercised by the member states, this system of governance prevents intrusions from the ECJ and the European Parliament, which is only informed of the decisions taken without any real influence over them. The intergovernmental Union has become predominant over the supranational Union (Fabbrini, *Which European Union? Europe After the Euro Crisis* 2015, 62), especially given the role of the European Council, institutionalised by the Lisbon Treaty, that, despite not having legislative power, gathers the leaders of the

member states' governments, which are able to exert their influence within the Council. If as regards the foreign policy the CFSP intergovernmental dimension has been slightly eroded in favour of an increasing role of the supranational regime, using the High Representative as a bridge between the two, in terms of agenda setting within the Economic and Monetary Union, the European Council maintained, if not strengthened a dominant position, thus reinforcing the institutional deadlock between intergovernmental and supranational Union (Fabbrini 2015, 63).

I.VIII The formal solution to the EU's lack legitimacy problem: The European Parliament

This part is going to analyse the European Parliament (EP) and its role within the institutional architecture of the European Union. While not as prominent as the Commission or the Council, the Lisbon Treaty and the *Spitzenkandidat* practice gave it an increasing spotlight over the years. Understanding how the European Parliament has been successful in gaining more and more powers while being less successful in imposing itself as an institution representing the peoples of Europe is the key to grasp the limits of the current state of the European Union. According to the Copenhagen criteria, no country can become a member state of the European Union without being a "true representative democracy". The Copenhagen criteria have been laid down at the European Council of Copenhagen in June 1993: « *Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union*¹⁹. » The issue of the lack of legitimacy of the Union largely lies within the role of the European Parliament, up to the point, as Majone (2014, 179) noted, that if the EU were a state it could not become a member of the Union. Yet, despite being room for improvement, it should be stressed that since the mid 1980s, the European Parliament has undergone more substantial changes than any other major body of the European Union. What is now the European Parliament

¹⁹ Presidency Conclusion of the Copenhagen European Council of 21-22/06/1993, point 7.

was the Common Assembly of the European Coal and Steel Community (ECSC) in 1952, envisaged by the founding fathers of the European integration as an institution of control and scrutiny, together with the European Court of Justice, not of decision-making (Neunreither 2000, 133), therefore the Assembly was given limited responsibilities, mainly the possibility to discuss policies and scrutinise their implementation and dismiss the High Authority (today's Commission) for gross mismanagement. The issue is that it could issue opinions over new policies, but the other institutions were not obliged to provide answers, furthermore the members of the Assembly were appointed from the national parliaments of the member states, and not directly elected by European voters. The first Common Assembly consisted of 78 nominated MPs from the six member states of the ECSC, progressively increasing on par with the enlargement of the Community, until today's 751 MEPs. The Rome Treaty was the first to call for the Assembly to become a directly elected institution, a true and proper parliament, which happened only in 1979, as the idea of a stronger European Parliament able to argue for greater competences, out of the control of the member states was perceived with animosity by the ruling elites (Scully 2010). These hunches proved to be real, as by the mid 1990s the European Parliament became one of the central institutions of the Union, losing its marginality. The first relevant power which was bestowed on the EP was control over the budget, in the 1970s, role enhanced from the 1980s onwards, with the approval of the Parliament needed for increases in many areas of spending of the Union, altogether with control over multi-year financial frameworks, seven-years frameworks regulating the budget of the Union approved years ahead by the Council and the Parliament. If on the budgetary control the EP managed to greatly increase its role, the same cannot be said as regards a complete oversight over the executive branch of the Union (European Council and Commission) or national sensible issues such as foreign affairs. Nevertheless, Maastricht and Amsterdam Treaties gave to the EP a veto power over both the president-designate of the Commission and its entire Commission, which has been exerted during the formation of the Barroso Commission in 2004, which saw the veto of the European Parliament over the nomination of the prospective Commissioner on Justice, Freedom and Security, Rocco Buttiglione. Since the Single European Act, the Parliament managed to be part of a cooperation procedure, which allowed the EP to propose amendments or issue a veto on piece of legislation, that could be overturned

through unanimity in the Council. Moreover, the SEA also gave the EP the power to veto associations agreements and the accession of new member states to the Union, but it was with the Maastricht Treaty before and with the Lisbon Treaty in the end that the European Parliament was made part of the codecision procedure, now the standard legislative procedure. However, if in terms of formal powers, the European Parliament still lags behind national parliaments, in terms of political influence the EP uses its powers to a greater extent than in national legislatures. Indeed, national MPs are mostly bound by loyalty to their parties to support or oppose a government, which is normally expression of solid coalition or majority. In the EU, with Commissions based on large compromises and coalitions (p.e. between Populists, Social Democrats and Liberals) there is no clear administration to support or oppose, nor a loyalty to the European parties, rather than to the national parties of provenance of the MEPs.

Going back to the topic of legitimacy, one of the main issues of the Union has been the lack of a directly elected parliament until 1979, since then the powers of the European Parliament have been expanded treaty after treaty, since as stated by Schackleton (2012, 145) “governments have found it extremely difficult to resist an increase in the role of the EP, because they have not easily been able to formulate an alternative for addressing the “democratic deficit””, the alternative being expanding European competences only through strong popular support, which has not happened to decide critical issues arising during the course of the integration, from new Fiscal Compact (namely the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) to the European Stability Mechanism, to name a few, which lacked this sort of popular legitimacy since they also bypassed the EP as well as national parliaments (Majone 2014, 180). It is also worth to be noted that the growth of the European Parliament’s powers has not been matched by an increase of its role in the process of European integration, which has been mostly left to the national governments, on the idea that – in terms of legitimacy – there is no legitimacy issue since they are expression of the parliamentary majority of the member states. Moreover, when it comes to national elections, voters know that it is a process which will influence the formation of their new government, thus making them able to choose their new political administration, but it is not the case with the elections of the European Parliament. As a matter of fact, it has been mentioned in this work, the referenda held in France and in The Netherlands on the Constitutional Treaty in

May/June 2005 made it clear that there was some distance between the voters and the political elites, as they have not been able to neither convince their electors of the goodness of their proposal nor how it would have reduced the distance between the citizens and the Union. It has been argued that this distance between elites and citizens is a basic feature of a “stealth” approach to European integration, making it even hard how a directly elected parliament without any right of legislative initiative could correct this structural flaw (Majone 2009, 22-35). It should be noted, however, that in the case of the European Union, both the public discourse and the public actors are aware that the issue of the democratic deficit implies an equilibrium between effectiveness and legitimacy. An excess of legitimacy, through – for instance – European referenda, may create issues in terms of the effective ability of the system to provide reliable policy outputs, this has been understood by Martin Lipset (1963, 68) who noted how “a breakdown of effectiveness, repeatedly or for a long period, will endanger even a legitimate system’s stability”. Nevertheless, it has been pointed out that as long as the European Union is able to provide a reasonable level of benefits in terms of effectiveness, it is not necessary for it to meet the same legitimacy level of the member states (Shackleton 2012). This has been the case of the Eurozone debt crisis, which not only widened the distance between political elites and European citizens, but also discredited the ability of the Union to bring benefits to its members states (Majone 2014, 190). However, the Lisbon Treaty has undoubtedly given to the European Parliament the recognition as the popular chamber of the EU bicameral system, and integral part of the law-making system of the Union. Within the checks and balances of the European Union the Commission has always welcomed an increase in the role of the Parliament, as it implied a reduction of the ability of the Council to put in check the supranational institutions. Notwithstanding the monopoly of the right of initiative in the hands of the Commission, the EP, by eroding the legislative power of the Council, has reduced the negotiating role of the *Berlaymont* as it is now able to negotiate and cooperated on equal grounds with the Council. In terms of legitimacy the Parliament is still unable to initiate any kind of legislation on its own, but in terms of effectiveness the Commission now faces the threat of seeing its legislation, be it a regulation or a directive, vetoed if not accepted by the two chambers. It is up to the Commission to submit an initial draft of its legislation, but then its outcome lies entirely within the decisions of the MEPs and members of the

Council. Article 294.10 of the TFEU provides the possibility to set up a conciliation committee to resolve any disagreement between the European Parliament and the Council during the second reading of a piece of legislation. The conciliation committee represents another dowel into localising the process of law-making within the bicameral system of the Union, meaning that the Parliament has the potential to increase its legitimacy through an ever-growing role of the MEPs by being able to polish pieces of legislation, thus by increasing its effectiveness and bargaining power vis-à-vis the Commission. This increased participation in the policymaking process and the ability to exert a veto on a designed Commission-to-be made the European Parliament a force to be reckoned with. If the Parliament has been able to claim an ever-growing range of competences and role within the *great game* of EU's politics, it has been thanks to the adoption of a process of constant rationalisation, which allows the EP to operate according to three criteria (Corbett, Jacobs and Shackleton 2005): (1) to hold each deliberation valid if supported by the majority of the votes expressed, unless there is a specific case which demands a quorum of participants to be respected; (2) the parliament is structured in a leadership structure based on one president, fourteen vice-presidents and several parliamentary groups and committees (3) around which the decision-making process is organised. Since 2009, each parliamentary committee has acquired a number of members among a minimum of twenty-four and a maximum of seventy-six. The composition of these committees reflects the parties' seats within the Parliament and are the very places within the negotiations between parties' positions and member states' interests takes place (Neuhold and Settembri 2009). Since an increase in effectiveness may render an institution able to deliver benefits and result, having the committees become the main deliberative structures of the EP (Bawler and Farrell 1995) means to increase the role of the MEPs and their ability to deliver results vis-à-vis the Council and the Commission once again. It is unlikely, however, that European parties may prove an useful tool to improve the effectiveness of the European Parliament in the near future, as they are mainly confederations of different national parties which tend to cooperate on issues mirroring national ones rather than European constitutive or "high political" issues (Bartolini 2008). As it has been stated at the beginning of this part, while the "parliamentary" component of the EP gained more and more powers through time, the same cannot be said for its "European" part, up to the point that "the European Parliament is a

parliament, but not a very European one” (Lord 2003, 31). During the elaboration of the Lisbon Treaty the debate over the role of the Parliament was hectic, yet a final settlement able to drag the EP out of its institutional limbo has not been reached, hence it should be reached in the near future and the debate reopened as soon as possible. To deliver an effective European institution accountable to its citizens and able to counterbalance national-originated bodies such as the Council may prove a substantial step forward the forging of an ever more European identity. Nevertheless, given the amount of compromises on which the Union is based, it has been suggested (Hix 2008, 4) that the European Parliament should never be based on a Westminster model, rather on a consensus-oriented parliamentary system. Steps towards such a settlement have been taken with the article 17.7 of the TEU: « *Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure. [...]* ». This article offered an opportunity which has been seized in the European elections of 2014, in which European parties indicated their *Spitzenkandidaten* for the presidency of the Commission. Notwithstanding this provision allowing the European Parliament to influence the formation of a Commission and even sack it with a motion of no confidence, it stays an institutional framework left incomplete since the *Spitzenkandidaten* remains a custom, not a provision written within the treaties. It is not surprisingly then that it found the opposition of many political leaders within the European Council. During an informal session on the 23rd of February 2018, many European leaders rejected (Herszenhorn and De La Baume 2018) the *Spitzenkandidat* automatism, and its binding dimension to the European Council. As a matter of fact, many leaders of European countries, especially in Eastern Europe, in which the dominant parties are members of small political groups in the European Parliament (p.e. Liberals), raised some concerns over the fact that the *Spitzenkandidat* eliminates from consideration anyone who is not a member of the major political parties (p.e. European People’s Party or Party of European Socialists). This holds some truth as at

the eve of 2019's European elections, out of 28 members of the European Council, nine are members of the European People's Party (EPP), five of the Party of European Socialists (PES) and eight of the Alliance of Liberals and Democrats for Europe (ALDE), yet it founds itself in the position to never obtain an eligible *Spitzenkandidat* as ALDE is a very popular group mainly in small North European or Baltic countries, hence it has virtually no chance of winning enough seats to overtake the EPP, at best it may surpass the PES. Leaving the *Spitzenkandidat* issue aside, the Parliament did not manage to increase its "European" scope; epitomised by the fact that even if the EP is the European institution which enlarged its role more than any other, the right of legislative initiative remains monopoly of the Commission (Fabbrini 2015, 168).

I.IX Final remarks

The following chapters of this work will show how the confederal framework of another composite union, Switzerland, managed to evolve and overcome its differences. Examples and potential best practices for the European Union will be drawn out from the Swiss experience. Nonetheless, for the sake of developing a debate over a responsible and effective reform of the European institutions, other proposals in the direction of a parliamentary union will be outlined below. Most of them dated back to 2013, yet they managed to frame an issue: that a responsible overhaul of the European parliament may be able to aid the formation of an European *demos* and thus fill the critical juncture created by the recent climate of political dissatisfaction and detachment from the process of European integration. The Spinelli Group altogether with the Bertelsmann Stiftung (2013) have proposed a pool of reforms (i.e. Proposal) towards a further Parliamentary Lisbon Treaty, since it has been considered too ambiguous, they would take the form of a "Fundamental Law of the European Union" treaty. The Proposal recognises and enhances a *de facto* situation, that the European Parliament and the Council form the bicameral legislature of the Union while the Commission forms the executive. Thus, the main suggestion has been to formally recognise the parliamentary structure of the Union, and whilst the Proposals also maintains the Commission's monopoly of the right of initiative, it suggests to render the EP and the Council able to submit any appropriate proposal to the Commission to trigger its drafting. Moreover, the Proposal suggested to bring back the European Council to be the General Affairs Council (GAC) formation of the Council.

Furthermore, the Proposal seeks to enhance the role of the Parliament in the nomination and formation of the European Commission, by strengthening its veto and no confidence power over the formation of a Commission or over an existing one. Lastly, among the other suggestions made, the Proposal takes another European federation as model: Germany, allowing a negotiation between executive and legislative to define the budgetary policy to take place. Nevertheless, such a proposal does not seem to take into account the most recent tendencies in the process of European integration. While on one hand the Proposal recognises the need to overcome the institutional limbo affecting the framework outlined by the Lisbon Treaty, it does not take into account that one of the great “winners” of the process of European integration is that very European Council that it would aim to downsize. It seems unrealistic to envisage a further reform of the Treaties without taking in consideration the heightened political role of the European Council. The result would be having the heads of state and government of the member states to behave like the *Ministerpräsident* (minister-president) of the German *Länder*. It would seem that in this case the Proposal would have confused federal unions, like the EU, and federal states, like Germany (Fabbrini, *Which European Union? Europe After the Euro Crisis 2015*, 176), where in the former the single states create and maintain the Union, while in the latter federal states emerge from the disaggregation of a previously unitary state (federalism by aggregation vs. federalism by disaggregation). It also seems unlikely that the Council, a key institution and stakeholder in terms of European integration, may willingly renounce to its prerogatives to become something similar to a German Bundesrat. As a matter of fact, were the role of the EP increased over the Council in terms of defining the executive of the Union, it would paradoxically reduce its “European” scope, meaning that small member states such as Malta would matter even less, compared to member states such as Germany or France, during the formation of a Commission. Lastly if the Commission has been envisaged as an independent institution, guardian of the Treaties, an excessive dependence over the Parliament, for instance having its formation based more on majority rather than consensus, how could this legitimate it within member states’ governments not in tune with the coalition which supports the Commission? (Fabbrini 2015, 177). Once again, increasing the “parliamentary” scope of the Union does not necessarily imply a widening of its “European” nature. Finally, the Union is lacking those institutional and structural

conditions which allowed other federal systems to take place: the differences among member states in terms of culture, languages and demography are too wide and too deep to not be taken into consideration when considering some prospects of reform for the EU. In this chapter it has been examined the institutional path that brought us the European Union as we know it today, with its shortcomings and setbacks. Nevertheless, the post-Lisbon Union is dramatically different from the one of the Single European Act or of Maastricht and is the result of a long series of compromises among the ever-growing audience of member states, bearing in mind that any new Treaty had to incorporate the previous compromises. This has been analysed within the two institutional frameworks and decision-making regimes of the Union: supranational and intergovernmental. The system which has been outlined by these two models of government and governance is a hybrid one, in which Commission, Council, European Council, European Parliament and European Court of Justice are the prime institutions. The intergovernmental regime, based on the principle of (European) integration through cooperation, has been focused in keeping the decision-making power over sensible competences such as foreign policy or budgetary policy in the hands of the member states, giving the main room for manoeuvre to the Council and to the European Council. On the contrary, the supranational regime, based upon the idea of (European) integration through legislation, established a synergy between a *de facto* legislative branch of the Union made up of the Council and European Parliament vis-à-vis the European Council and the European Commission, the two arms of the executive branch. The European Council, institutionalised by the Lisbon Treaty, is to set the political objectives of the Union, then it is up to the Commission to transform them into policies and concrete proposals. It has been argued that the Euro crisis of 2011 and the recent climate of economic dissatisfaction of the European citizens increased the demands for further reform of the Union, but which direction should be taken? The debate thus revolves around the ideas of effectiveness and legitimacy of the Union, elaborating from the assumptions of Martin Lipset (1963) it has been noted how an excess of legitimacy may paralyse the whole institutional system and make it ineffective and unable to deliver benefits to the citizens. On the contrary, as long as an effective European Union is able to provide a reasonable quantum of benefits, it will not prove necessary for it to meet the same legitimacy level of the member states (Shackleton 2012). Nevertheless, no provision of the Lisbon Treaty offered a

comprehensive answer to the question of how to promote effectiveness and legitimacy in a union of deeply differentiated states and citizens (Fabbrini, *Which European Union? Europe After the Euro Crisis 2015*, 184). The first cracks into the Union's architecture began to show during the crisis of the monetary union. If the price for the euro has been relinquishment of monetary policies, thus the applicability of anti-cyclical economic measures, it has not been matched up by an equal capacity of the EMU to offer some compensation for it. If that were not enough, the stricter regime of budgetary and economic control, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) or "Fiscal Compact" of 2012, reinforced the surveillance and coordination of economic policies, ensuring that all member states of the eurozone were to avoid excessive government deficits and to prevent or correct macroeconomic imbalances (Majone 2014, 198). What should be borne in mind, however, is that the balanced-budget rule laid out in the Fiscal Compact is considered so central that it has been set in permanent national law, in many cases at the constitutional level. Notwithstanding that the provision has been constitutionalised in many countries through parliamentary approval, this has drastically downsized role of national politics and of national parliaments (ibid.). The hyperbole of this process, resulting in a partial political atrophy within the Union, has been shown in the way the European rescue funds have worked during the euro crisis, shown by Scharpf (2011, 19), "*once an EMU member state has applied for the protection of the European rescue funds, its government will be operating under a form of "receivership"*". Prime example of "receivership" has been shown by the economic adjustment (bailout) programme for Ireland of 2010-13. On one hand Ireland has been given a three-year financial aid programme, in exchange of the establishment of austerity measures, the programme was guaranteed by the European Commission, the European Central Bank and the International Monetary Fund (IMF), colloquially known as "troika". As per required by the programme, in 2011 Ireland sent its budget plans for 2012 and 2013 to the Commission as part of the monitoring required by the bailout programme and prescribed by its Memorandum of Understanding. However, such material was then submitted to the financial committee of the German Parliament to be discussed and approved, as the German Constitutional Court (Bundesverfassungsgericht – BVerfG) requires that the Bundestag has to be aware of Germany's foreign financial commitments and spending derived from

international and EU's obligations (Majone 2014, 201). What happened is that in order to fulfil its constitutional obligations, the German Parliament had to be the one approving the budget of another sovereign member state of the Union (ibid.). Under these arrangements, the political costs of financial aid for debtor countries came to be extremely high (ibid.). It is not a surprise that by 2012 (and onwards) the distance between European citizens and institutions has drastically increased. It is well known, of course, that the responsibility for the debt crisis is not to be attributed to the Union alone or on some member states over others: it has been a series of collective mismanagements. Nevertheless, the widening distance between the EU and its citizens, the distrust towards the European institutions can represent an opportunity for reform and debate, thus a critical juncture to be filled. Since the Economic and Monetary Union counts as one of the most "technical" component of the Union, and given the large impact that monetary harmonisation is having on the members of the EU, its setbacks and the way these technicalities bypassed – for a while – political confrontations, the debate itself could begin by envisaging how such a system could be calibrated to better match the different "speeds" of the Union.

The Treaties actually provide the proper tools to tweak the Union by making it more flexible while preserving its institutional nature. As it has been recalled in earlier parts of this work, the Amsterdam Treaty of 1997 provided the possibility for some member states to set up closer elements of cooperation. Since the Lisbon Treaty inherited this provision, the possibility of enhanced cooperation on voluntary basis implied the acknowledgement of the growing differences and diverging interests within the Union, by providing a tool to redress the gap provided by these widening differences. The provisions for enhanced laid out in the Amsterdam Treaty, initially restricted in its scope, managed be more and more relaxed, as per example happened with the Treaty of Nice of 2001. Now detailed in article 20 of the TEU and articles 324-336 of the TFEU, enhanced cooperation was subject to a number of conditions for its usage: it must be aimed at furthering the objectives of the Union, protect its interests and reinforce its integration process²⁰; enhanced cooperation must not undermine the internal market or economic, social and territorial cohesion and it must not constitute a barrier to or discrimination in trade between member states, nor cause distortions

²⁰ TEU, article 20.

among them; in general enhanced cooperation must respect the Treaties, the institutional framework of the Union, take account of the *acquis communautaire*, must be open to all member states and involve a minimum of nine (one-third) of the member states. Moreover, enhanced cooperation is provided by the treaties as a last resort, after having determined that the same objectives cannot be attained within a reasonable period of time, furthermore it should be inclusive towards as many member states as possible. With the worsening of the Euro crisis and the growing diversity of EU membership, given by opt-outs and growing social and political differences among the member states, a process of differentiated integration and of multi-speed Europe should no longer be considered an option as it has been growingly considered a necessity (Majone 2014, 228). The idea of a multi-speed Europe or Union on “variable geometry” implies the common acceptance of a set of rules allowing to each member state to choose its level of commitment in certain policy realms. This is nothing but a proposal on how to further revise the “enhanced cooperation” as provided by the Treaties. Concrete examples of this “variable geometry” are the monetary union (with the British and Danish opt-outs) and the Schengen Agreement (with the British and Irish opt-outs), namely it is the acknowledgement that not all member states are willing to take part to all EU programmes in the same way, as they would rather do the same things but not necessarily at the same time and at the same pace (Majone 2014, 229). Nevertheless, the need for closer cooperation has been recognised by the Treaties concerning the monetary union, by article 136 of the TFEU, which allows the Council to take measures to strengthen coordination and surveillance of the budgetary discipline of the member states and to set out the economic policy guidelines for them. This potential has been further explored by Piris (2011, 39) who stated that the extensive use of the potential offered by articles 136 and 138 for the TFEU would allow a two-speed Europe to become a reality without the approval of any major reform. However, while on paper this can constitute a valid alternative to offer a relaunch of more effective economic European institutions, it is also true that the idea of a two-speed or multi-speed Europe does not account for the fact most governments supported the EMU not for the sake of the process of European integration, but looking for a political bargain (Majone 2014, 229). It is a relevant assumption when taking envisaging further and stronger harmonisation on budgetary rules, and as Piris pointed out (Piris 2011, 57): “*Would Germany, the Netherlands or Finland agree with Greece,*

Ireland or Portugal on a common list of social, fiscal, and economic (legally binding) measures to be taken? Would Germany accept common endeavours in the military domain, or in EU penal legislation? The thrust of the problem is here.” This should bore in mind when thinking about “more Europe” and “more integration”, as the problem is likely going to lie in the kind of “multi-speed” and closer integration sought on the moment. The adoption of the Fiscal Compact and of the Six-Pack regulations have proved, in the light of the above and of the current state of affairs of the Union, as another wasted opportunity. Indeed, the crisis of the eurozone held the potential to be an occasion to re-examine the political and economic foundations of the monetary union, even in light of the need to add the flexibility needed to allow a “multi-speed Europe” to work. Yet, European policymakers kept ignoring the risks of a *one-size-fits-all* monetary policy, finding more politically expendable and convenient to impute the crisis of the Eurozone to national policy failures (Scharpf 2012, 24). However, it does not mean that attempts of further cooperation should be abandoned, or that everything done until nowadays has been to no avail. On 19 February 2019, France and Germany signed a “*Franco-German Manifesto for a European industrial policy fit for the 21st Century*” which was part of many initiatives aimed at reducing the distances between the two countries and better coordinate their policies, like the previous Treaty on Franco-German Cooperation and Integration signed in Aachen on 22 January 2019. Both treaties lay down the blueprint for enhanced cooperation between the two countries in terms of industrial development, defence and foreign policy coordination: the project is to further enhance and integrate the Franco-German engine through political agreements open to whomever may be interested. While these do not constitute, in the short term, a major overhaul of the Treaties, they do however offer virtuous examples on how the actual institutional framework of the EU can be further enhanced, in the aforementioned cases especially in matters of security, foreign and industrial policy. Furthermore, these agreements were bolstered by the common need to increase the effectiveness of the Franco-German engine, reasonably seen by the political elites of Paris and Berlin as the only way out of the political and economic uncertainty which the EU is undergoing right now. In conclusion, Europe has undeniably grown as a continent and as a political Union of states, as it was composed of states which competed in terms of economy and political development over the years, even before the Union was formed, it was about a continent of competing

polities, whose spirit of competition was adapted to diffuse their best practices (Jones 1987, 115). Yet, without checks, this spirit of competition gave rise to protectionist policies, to the closure of borders, the enforcement of cultural homogeneity, thus ending with war. The process of European integration that followed the end of World War II was the natural and welcomed reaction to the aberration to which nationalist ideologies have led. As the history of the Treaties outlined earlier has shown, it was expectable and realistic that the EC would evolve, sooner or later, into a politically integrated bloc, even into a pre-federative bloc. However, this hypothesis was viable before the current European Union of twenty-eight states, each with its different demographic, political, social and economic endowments. A union of different states in different stages of socio-economic development (p.e. Western Europe vs. former Soviet Europe), with different political and geopolitical priorities and interests. Giandomenico Majone (Majone 2009, 204-11) already pointed out that a common mistake of political leaders of the past Europe has been to assume that the development from a union of states to something more, a sort of “supranational” union or even federation, featuring similar functions to a nation state, would have happened with ease and would have given place to a more effective political system. On the contrary, modern history and the current political events taught that European unity has always been found in the valorisation of diversity, through a virtuous mix of competition and cooperation (Majone 2014, 321). Any future overhaul of the Union needs to account for this background instead of pursuing a path aimed at “harmonising” these differences, and that is the intuition that, in another political context, has led to the institutional evolution of the Swiss Confederation.

II - Switzerland

II.I The Confederation: History and development.

The history of European integration, as it has been outlined in the previous chapter, is full of compromises, setbacks, but also achievements. The European Union is a young political entity, which is based upon the common will of its member states to cooperate, develop and grow together. Certain phases of the European integration process did not fully take into account neither the socio-economic and political differences of the member states nor the necessity to hold a minimum of legitimacy, be it through national parliaments or the European Parliament, before imposing binding and potentially pervasive rules on a plethora of member states. For instance, the Fiscal Compact has been approved and implemented within its signatory parties with due respect to the Union and its institutions, however its implications, among the others its pro-cyclical nature in a context of economic crisis and recession, not only made it socially hard pill to swallow, but it contributed to the detachment of the poorer strata of the population from the institutions. Nevertheless, the Union holds the potential, both in its institutional framework and political elites, to make it back, overcome its institutional deadlock and resume to deliver results and benefits to its citizens. In order to do so, it is opinion of the author that the experience of the Swiss Confederation can prove useful to show how a union of states, divided per culture, language and society managed to overcome its differences and shift from a lesser union, a confederation, to an “ever closer union”, which is the actual and present institutional framework of Switzerland. The official Swiss national rhetoric date the roots of the Confederation back in 1291, year in which the cantons of Uri, Schwyz and Unterwalden signed the so called “Federal Charter of 1291”, followed by an oath taken in the Rütli in 1307, a meadow above the lake Uri, which marked the birth of the first Swiss Confederation. This oath, named Rütli Schwur (or Rütli oath), established a defensive pact against the oppressing imperial administration of the Holy Roman Empire (Gerotto 2011). Albeit it would be a mistake to describe it as an ex ante constitutional treaty, the Rütli oath, constituted indeed the premise of what has later become known as the Swiss Confederation. The three communities and Lucerne then signed another agreement in 1332, over time more and more communities joined the community either by signing an agreement with all the previous members of the Confederation or with some of them. Zurich joined in 1351, Bern in 1353, Basel in 1501, and so on and so forth

(Nitszke 2014). In 1499 the Swiss Confederation, this small alliance of communities, was able to defeat the Emperor Maximilian I in Dornbach, causing him to recognise the independence of the alliance. Few years later, the alliance was defeated by the French army in the Battle of Marignano in 1515, ending their expansive aspirations, in 1525 the Confederation declared neutrality. Over the years, Switzerland remained a union of towns and municipalities, regrouped in cantons, but there was no centralised body, only a Diet (the *Tagsatzung*) which met every year, in July, and required unanimity to reach any kind of decision. This process of “confederation building” proceeded until 1798, year of the French revolution, unabated. As a matter of fact, France conquered the Swiss Confederation and imposed a new, modern, constitution, which recognised Switzerland (or as it was called at the time, the Helvetian Republic) as a unitary and indivisible State, abolishing boundaries between cantons (Nitszke 2014). Almost out of the blue a loose union of cantons and municipalities, held together by a common will and necessity to defend from external influences, found itself with a new constitutional order and new principles, such as centralism, which was revolutionary for the Swiss culture of the time. This new order lasted few years, as it was guaranteed by the Napoleonic army, in 1802 a civil war broke out and in 1803 Napoleon was obliged to enact a new constitution, called Act of Mediation (*Mediationsakte*), which restored federal order in Switzerland (Nitszke 2014). The Diet of the Confederation was restored, as it was large part of the status quo. However, the union outlined by the Act of Mediation was not clear, it was a way in between a union of States (*Staatenbund*) and a federal State (*Bundesstaat*) (Weber 1980, 52). The dilemma was solved by the Congress of Vienna, which prompted the Swiss to adopt a new constitution, which was enacted and adopted in 1815. It is important to keep in mind two peculiar periods of Swiss history, in comparison with the European experience: the first one is the period between 1815-1848, namely the last confederal phase, in which the Confederation reach its peak in terms of institutional maturity; the second one is the post-1848 period, the modern federal phase (Church and Dardanelli 2005, 164). The confederal phase lends many suggestive comparative suggestions with the current state of the European Union, while the federal phase of Switzerland may suggest what might happen if the EU were to become a true federal State.

The new Swiss constitution of 1815 or contract of federation (*Bundesvertrag*), resembled an intergovernmental treaty than a constitution. The act itself was a

multilateral agreement which ensured common aid in order to ensure freedom and independence from any external threat. The “Constitution” of 1815 displayed some influences brought by the brief French hegemonic period, among them the equal status between all cantons and territories. The Confederation became a union of 21 cantons, coming together in order to – according to Art. 1 of the Constitution of 1815 “defend their freedom and independence from any foreign attack as well as preserving internal order and peace” (Kölz 1992-6, 193). The same article 1 recognised the sovereignty of cantonal constitutions which, however, had to conform to the principles of the treaty. In practice the cantons were independent and sovereign states, but *de facto*, their sovereignty began to be intertwined with the confederal system. This implied a relationship between the cantonal constitution and the Swiss constitution not dissimilar to the relationship between the constitutions of the member States and the EU treaty (Church and Dardanelli, *The Dynamic of Confederalism and Federalism: Comparing Switzerland and the EU* 2005, 165). However, the Diet did not have the power to fully enforce its decisions on a canton, as it was not even a parliament, since its members were appointed by cantonal authorities and voted following the indications of their respective local governments (Czeszejko-Sochacki 2000, 9). Nonetheless, each canton held one single vote in the Diet, regardless of their population, thus establishing a condition of equal footing among all of them. The Diet kept its role as decisional body, which could declare war or sign treaties with other countries, acts which needed a three-fourths majority, all other decisions needed absolute majority (Nitszke 2014). The Diet normally met in the capital of the “managing” canton, which was chosen on a rotating biennial basis between Zurich, Bern and Lucerne, which also hosted the confederal administration, in a way in which the public administration of the European Union is mainly based in Brussels. The article 4 of the constitution established a multi-defence guarantee, since there was no confederal army, and it was up to the cantons to offer their military contingents. A significant element of rupture in comparison with the past was responsibility to conduct external trade policy and signing commercial treaties endowed on the Confederation, resembling the Common Commercial Policy of the European Union established by the Treaty of Rome of 1957. The Confederation also had the power to set a common external tariff, which was the only independent source of income for the confederative budget, which relied mostly on cantonal contributions (Church and Dardanelli 2005, 166), resembling the European Union

Customs Union (EUCU) established by the Treaty of Rome. Moreover, the cantons were not allowed to conclude alliances between them or agreements with foreign nations which were deemed in conflict with the Constitution or with the rights of other cantons. Lastly, there was no confederal citizenship, therefore the citizens of each cantons were legally “foreigners” when outside their own cantons, resembling the fact that citizenship, in the European Union, is still domain of the member States, even if – in the EU case – being a citizen of a member State allows to enjoy the same rights in all countries of the Union. The rise of the liberal movements in Europe in the 1830s did not exclude Switzerland, in which the Catholic cantons fostered conservatism, while Protestant cantons were liberal and demanded major reforms of the constitution. These “progressive” cantons adopted new constitutions, granting more equality and citizen participation. As it happened within the European integration process, Swiss integration was mainly driven by the necessity to deal with international competition, manifested by the liberal movement, which asked an unified economic space: in fact even if the Confederation could make use of a common external tariff, cross-cantonal trade was subject to tariff and duties (Church and Dardanelli 2005, 167). To go in the direction envisaged by the rich, bourgeois elites of the Protestant cantons further reform of the constitution was needed, and the reform movement quickly spread from a cantonal to a confederal level. However, any proposal was blocked by conservative, Catholic cantons, which feared an increase in the powers of the central government (Linder 1994, 27-8). Indeed, the Catholic cantons saw the process as a threat to religious freedom, not by change in the late 1840s several disputes exacerbated the clash between liberals and conservatives, being the one concerning the presence of religious orders in the Catholic cantons one of them. On the other hand, the Protestants not only sought a strengthening of the central government, but a democratisation of social and political relations (Nitszke 2014). This deadlock between Catholics and Protestant resulted in into having the seven Catholic cantons signing a separatist treaty (*Sonderbund*) in 1845. Interpreting it as an attempt of secession, the radical cantons asked the dissolution of the *Sonderbund* in July 1847, altogether with the enactment centralising reforms. A month-long civil war between Catholics and Protestants followed, won by the liberal forces of the Protestant cantons (Remak 1993). As a consequence of the victory of the liberals, the *Sonderbund* was dissolved and the Catholic cantons came back in the Confederation, yet, it was evident that the existing

system had to change. Two projects were on the table of the Protestants at the time: building a centralised and unitary State, using their majority to approve its design or trying to rebuild the Confederation, those loose connections between cantons and municipalities into a real federal structure. The latter option prevailed. In 1848 the new constitutional project was presented to the cantons: on one hand it assumed the creation of a central government which had to limit the sovereign rights of the cantons, but on the other it recognised the cultural and ethnical diversity among cantons as a value to be preserved (Nitszke 2014). In June 1848 the new constitution found the approval of the Diet, then it was ratified by popular referendums in the cantons and finally, on the 12th of September 1848, the Diet finally adopted it. The cantons who lost the civil war voted against the constitution until the end, but ultimately accepted the outcome and took part in the first federal elections of the new system (Church and Dardanelli 2005, 168).

II.II Federalism in Switzerland after 1848

The Constitution of 1848 represented a compromise between the vision of the liberals and the instances of the *Sonderbund* cantons. A federal state was set up; however, cantons retained a large degree of autonomy in many areas of policymaking, in fact the constitution stated the competences of the federation, then left autonomy to the cantons according to the “residual powers” principles, stated in article 3 of the constitution. The shift from confederation to federation gave rise to some ambiguities. To begin with, the official name of the new constitution was *The Federal Constitution of the Swiss Confederation (Bundesverfassung der Schweizerischen Eidgenossenschaft)*. Featuring both “federal” and “confederation” in its name, the document may give rise to some doubts, since in terms of definitions “a ‘confederation’ is a system of sovereign states based on an international treaty, whereas a ‘federation’ refers to a state where there is a division of powers between the federal and member unit levels” (Linder 1994, 21). However, the confederative nature of the system was kept in due respect with the historical experience of Switzerland and should be considered as a synonym of the term “federal” in the context laid out by the Swiss constitution (Czeszejko-Sochacki 2000, 19). Moreover, on one hand the constitution of 1848, in the preamble, referred explicitly to the *sovereignty of the Swiss nation*, while the first article cited as the constituent body of the new State “*the peoples of the*

twenty-two sovereign cantons”. Nevertheless, the biggest innovations and elements of rupture with the past were in terms of policymaking and competences, particularly in terms of management of economy and citizenship. While there was no single Swiss federal army, no federal taxation, the constitution gave birth to a single economic space and to a monetary union, followed by a single currency, managed by federal authorities, moreover the inter-cantonal trade was unified, the common trade policy was confirmed. In terms of citizenry, a Swiss citizenship was created, enabling every citizen to exercise its own right throughout all Switzerland regardless of their canton of origin (Church and Dardanelli 2005, 168). Furthermore, the new constitution was based on some solutions set out in the American Constitution of 1787 (Jorio 1997, p.139-160). While the only confederal institution allowed under the Constitution of 1815 was the Diet, the Constitution of 1848 introduced an institutional framework partially based on the US system: a bicameral parliament, the Federal Assembly, a seven-member executive, the Federal Council and a Federal Tribunal. The main features of the Federal Constitution of 1848 became the basis for the Constitution of 1874 and, later on, of the Constitution of 1999 (Czeszejko-Sochacki 2000, 11). The Federal Assembly was made up of two chambers: a directly elected lower chamber, the National Council, which represented the nation-State of Switzerland and an upper chamber of canton representatives, the Council of States, in which each canton was represented by two members, regardless of their population, resembling the Senate of the United States. More importantly, as a factor securing the autonomy of the cantons, any increase of the policymaking competences of the central government was possible only through a constitutional review, which required the majority of the people and of the cantons in order to pass (Church and Dardanelli 2005, 169). The Constitution of 1848 represented a solid reference for the new constitutions which followed, as a matter of fact, even if it was the first “federal” constitution of Switzerland, it kept a very decentralised model of federation, making Switzerland the most decentralised federation of the time, concept still applicable nowadays. However, since the settlement of 1848 represented a compromise between conservatives and liberals it was evident that it could not last long without reform, especially in terms of harmonisation between cantons. The first reform in this direction has been approved in 1874, through a further centralisation of matters of defence, private-law, transport and environment, leaving the institutional structure almost unchanged, except for the Federal Tribunal, which was made stronger

and more independent. Another relevant addition brought by the reform of 1874 was the optional referendum for ordinary legislation: 30.000 citizens could – via referendum – put into question, and even repeal, any ordinary law passed by the Federal Assembly, the system was then enlarged to constitutional reviews in 1891, establishing the pillars of direct democracy for which Switzerland is nowadays well-known worldwide. Direct democracy became the strongest countercheck to any political institution of the Swiss Confederation, constraining the growing centralising tendencies displayed by the political elites, and defending the sovereignty of the cantons (Church and Dardanelli 2005, 169).

II.III Dissecting Swiss federalism

Over one century the Constitution of 1874 was amended more than one hundred times, and this process saw a further centralisation of the welfare and legal system. However, if this process of centralisation may lead to consider modern Switzerland as a federation among many, this is not the case. As a matter of fact, the Swiss centralisation process was largely confined in legislation, as policy implementation has been left to cantons and communes (Church and Dardanelli 2005, 170). The result is that albeit Switzerland holds the features typical of a federation, it remains *de facto* the most decentralised federal system known (McKay 2001, 142). In comparison with the European Union it may be taken in consideration the case of EU Directives, in which the legislative activity is in the hands of the European institutions (Commission, Council and Parliament), then its implementation is up to the member States as stated in article 288 of the Treaty on the Functioning of the European Union: *“To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.”* The Swiss centralisation process has been driven by three main forces: first the desire to ease economic activity and increase the wealth and prosperity of the more productive Protestant cantons, secondly the necessity to grant more equality to the citizens in terms of rights, bringing

a common Swiss citizenship and the building of a complex and common welfare state. As in the case of the European Union, economic prosperity, equal rights and welfare have been among the strongest driving forces behind the EU integration process. It needs to be noted out that while the Swiss system came to be constituted by checks and counterchecks which allowed to balance the desires of political elites with the will of the local populations, thus establishing a system in which the principle of “local” government is always preferable to “distant”, establishing the principle of subsidiarity as the strongest driving force behind Swiss federalism (Church and Dardanelli 2005, 170), the same cannot be applied in the case of the European Union. In contrast with the Swiss, or more notably with the American Philadelphia convention of 1787 no debate around the constitutional rationale of the new European political order took place, leaving the European Integration process more and more ambiguous as time dragged on (Deudney 1995). In light of the above it is clear that the Swiss model found its harmony by endowing some decisional power from political elites to the cantonal populations, while in the modern European Union any major institutional reform requires the unanimity of the governments of all the member States.

As in the case of the Constitution of 1874, the Constitution of 1999 was the result of a complete revision of the previous text, almost as a sort of institutional “update”. The new text confirmed the sovereignty of the cantons, as stated in article 3: *“The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.”* Not only the new constitution confirms the sovereignty of the cantons, it also sets a clear division in terms of policy competences between federal State and federated entities, as stated initially in the article 3, which displays an application of the “residual powers” doctrine and then confirmed by article 47: *“The Confederation shall respect the autonomy of the Cantons. It shall leave the Cantons sufficient tasks of their own and respect their organisational autonomy. It shall leave the Cantons with sufficient sources of finance and contribute towards ensuring that they have the financial resources required to fulfil their tasks.”* Last but not least, the Constitution of 1999 draws another line apart from the one between federal State and cantons, the one with municipalities, as stated in article 50: *“The autonomy of the communes is guaranteed in accordance with cantonal law. The Confederation shall take account in its activities of the possible consequences for the communes. In doing so, it shall take account of*

the special position of the cities and urban areas as well as the mountain regions.” With that many levels of governments, with different checks and counterchecks, the Swiss system managed to combine federalism and democracy (Linder 1994, 74-5). Swiss federalism therefore is not a fixed or absolute process, but rather an evolving and dynamic process, result of a peculiar political culture which harmonises political institutions with local necessities, up to the point in which being a federalist, in Switzerland, implies being pro-cantons and pro-decentralisation in contrast with the European debate, in which the context is fully reversed (Church and Dardanelli 2005, 171) . Swiss federalism takes form from the concept of federalism by aggregation, in which many entities choose to unite as one federated entity and choose to live altogether based on their free will and desire to do so (from here the term *Willesnation*), and adapts on the principles of cooperation and participation, evolving into a form of cooperative federalism in which the division of competences between the federation and the cantons is functional rather than dualistic and “competitive”. The rule of thumb is that legislation is centrally produced and locally implemented, this practice of cooperation between different levels of government, named *Bundestreue* (Church and Dardanelli 2005, 172). Since the fear of a strong centralisation has always characterised the Swiss “federal” integration process, the aforementioned article 3 freezes and protects the centrality of the cantons in the system, obliging the resort to a referendum in order to increase the competences of the centre to the detriment of the periphery (Nitzske 2014, 25); and as stated by Wolf Linder this solution: “[...] describes federalism more as a non-centralisation system than a system of decentralisation [...].” (Linder 1994, 79), hence the system has always included as many actors as possible, where applicable.

That is why Swiss federalism has shown to be “participative”, as cantons can be part of many decision-making processes, as stated in article 45 of the constitution: “*In the cases specified by the Federal Constitution, the Cantons shall participate in the federal decision-making process, and in particular in the legislative process. The Confederation shall inform the Cantons of its intentions fully and in good time. It shall consult the Cantons where their interests are affected.*” Such participation is even extended to the realm of foreign policy, as stated in article 55: “*The Cantons shall be consulted on foreign policy decisions that affect their powers or their essential interests. The Confederation shall inform the Cantons fully and in good time and shall*

consult with them. The views of the Cantons are of particular importance if their powers are affected. In such cases, the Cantons shall participate in international negotiations in an appropriate manner.” All of these participative grants are then guaranteed through the tool of the consultation procedure, stated in article 147: « *The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties.* » A perk of the Swiss system is that consultations take place before the final parliamentary discussion and vote, giving to the cantonal opinion a relevant role in the decision-making process, keeping in mind that in the case the Federal Assembly were to disregard the opinion of federated entities, its decisions could be repealed through a referendum.

As stated before, the Constitution of 1999 outlines three actors in Swiss federalism: the federation, the cantons and the communes, all of them have specific tasks guaranteed by the constitution and tend to cooperate in Swiss the decision-making process (Church and Dardanelli 2005, 172). Among these actors, the most relevant are the cantons, which are the protagonists of the Swiss nation-building process and, despite the relevant centralisations which occurred over time, managed to retain a large degree of autonomy, especially in terms of taxation and policy implementation. Moreover, cantons are also part of the federal decision-making, not only via representation in the upper chamber of the Federal Assembly, but also through the consultation procedure on draft legislation, that – as already stated above – are crucial in the Swiss law-making process (Church 2004, 163-86). It is up to the constitution to regulate the division of competences among the three levels of government, as each level has to operate with respect of the prerogatives of the others and the whole system is organised hierarchically, with the federal constitution and laws prevailing on the cantonal laws. Moreover, as countercheck against the cantons, cantonal acts are subject to the judicial review of the Federal Tribunal, while federal acts are not and can be challenged only through referendum (Church and Dardanelli, *The Dynamic of Confederalism and Federalism: Comparing Switzerland and the EU* 2005, 174). However, the cooperative phenomenon between different levels of government is complex and distinct on both the horizontal and vertical level. On the horizontal level the system is characterised by many informal and non-constitutional meetings between cantonal authorities, on the vertical level it is based on constitutional

provisions, such as the consultation procedure provided by the article 147 of the constitution. Making the case of Switzerland, federalism is not a mere system of division of competences between levels of government: it is a harmonious, dynamic and lively process, shaped over time and based on voluntary cooperation. Conflicts occurred, but in due time the main actors had the opportunity to reconcile, at all levels, reinforcing the idea of a *Willesnation*, a nation based on the will to live altogether, despite any religious, ethnic, linguistic or cultural difference (Nitszke 2014, 26).

II.IV The institutions

At glance, the three levels of government are institutionally bound into a relation of interdependence, which has been resumed by Clive Church and Paolo Dardanelli as follows. In terms of constitutional amendments is up to the cantons to put the final word on them, as all constitutional reviews are subject to approval by a majority of cantons and of the people via referendum. We stated above, and it will be further developed later, that the Federal Assembly is divided in the Council of States, which represents the cantons and the National Council, which represents the Swiss population in general. However, in the case of the latter, members are directly elected on party lines, hence members of the National Council are more loyal to their party than to their canton, yet cantons hold up a certain degree of relevance as they serve as constituencies for the elections of the deputies to the National Council. In terms of political representation, cantons are not represented in the seven-member Federal Council, which however follows a customary formula that stipulates that the Council should include at least two non-German speakers, both Catholics and Protestants and councillors from different cantons. Moreover, in the decision and policymaking processes the cantons are represented both in the Council of States and in the pre-parliamentary consultations. In addition, according to article 141, eight cantons can trigger a referendum to challenge any federal law. In terms of policy implementation, the divide is evident: is up to the cantons and the communes, which tend to cooperate horizontally on many subjects (p.e. education). Lastly, in terms of judicial systems the organisation is of cantonal competence, albeit the legal codes are harmonised at the federal level. The Federal Tribunal ensures harmonised application of federal law and its execution in the cantons, however it is not a constitutional court, so it is not as powerful as the Supreme Court in the United States or the Court of Justice in the

European Union (Church and Dardanelli 2005, 175). The Swiss executive, the Federal Council, takes the form of a “Directorate”, elected by the Federal Assembly at the beginning of every legislature and in charge for a period of four years, coinciding with the term of the legislature itself. The chief of State is then elected every year by the Federal Assembly among the members of the Federal Council but retains the relevance of a *primus inter pares* rather than the one of a *princeps*. The Federal Assembly cannot revoke its confidence from the Federal Council, which, in exchange, cannot dissolve the Federal Assembly. The directorial form of government is not flexible, hence adapt to face shortcomings and situations of dire instability, like cases of high political fragmentation or social turmoil. However, the system managed to survive and steer the country over the years, as it is organic with the whole Swiss federal system: the countercheck represented by the people of the cantons, that can virtually veto any federal act through referendum imposed to carry on a consensual way to politics, hence the Federal Council is part of the Swiss participative federalism like the other federal and local institutions. Its composition is based on the customary “magic formula” which actually expects the Federal Council to be composed of two liberals, two socialists, two members of the Swiss People’s Party and one member of the Christian Democratic People’s Party. The Council is composed of all the major Swiss political parties, which are unable to hold an absolute majority in the Federal Assembly, and every year the Assembly elects the President of the Confederation and its deputy among the members the Federal Council on a customary rotation basis. According to the article 174 of the constitution The Federal Council: “*is the supreme governing and executive authority of the Confederation.*” hence the head of the federal administration. Even if the President of the Confederation is elected by the Federal Assembly, the duty of “chief of State” is exerted by the Council as a whole, while the President represents as international representative. The role of the Council is crucial in the preliminary legislation draft, as it interprets the consultation procedure between the cantons and the Federal Assembly.

The legislative branch of Switzerland is represented by its parliament, the Federal Assembly, which is outlined in the constitution as the “supreme authority” as per article 148: “*Subject to the rights of the People and the Cantons, the Federal Assembly is the supreme authority of the Confederation. The Federal Assembly comprises two chambers, the National Council and the Council of States; both*

chambers shall be of equal standing.” The Federal Assembly elects the Federal Council and the judges of the Federal Tribunal and has the duty to oversee them. Moreover, it approves international treaties and retains all powers that the constitution did not endow upon other federal authority. It is composed of two chambers, the National Council, made of 200 members, directly elected in cantonal constituencies and the Council of the States, composed by 46 members (2 per canton and 1 per demi-canton), which resembles the US Senate. It has been said that the Swiss system is considered participative and consensual, due to the huge degree of cooperation between different levels of government on horizontal and vertical level. In such a system, the fact that a certain decision is able to meet the required majority to be adopted is a necessary, but sufficient condition to ensure its correct application. The population, namely the electoral body are a strong veto player, able to challenge any piece of legislation and decision carried by the federal and cantonal institutions, therefore, in order for a certain act or decision to pass, the number of the people dissatisfied by it has to be minimised as much as possible. For this reason, the constitution on one hand and the customary practice on the other envisages the participation of as many actors as possible to the decision-making processes.

II.V Lessons for the European Union

Many are the elements that can be drawn out from the Swiss experience with regard to the European Union. First, a debate to conceptualise the nature of the political order of the EU and the role of citizens within it is needed, especially since the growing desire of the political elites of the member States to retain as much sovereignty as possible and the increase of Euroscepticism. Secondly, the Swiss model offers out some suggestions on a possible reorganisation of policy competences between the Union and the member States, in order to maximise the policymaking capacity of the system. Lastly, Switzerland sets an example as per how to improve the democratic quality of the Union, namely the responsiveness to the citizens in terms of accountability (Church and Dardanelli 2005, 177). As stated in the previous chapter, the institutional history of Switzerland can be divided in two phases for the sake of the comparison with the European integration process, and the one which approaches the most the current state of affairs of the EU is surely the confederal phase of 1815-48, this of course needs some conceptual stretching, as the form European Union should

be contextualised as a confederation, or, as a *pre-federation* (MacDougall 1977, 11). Clive Church and Paolo Dardanelli present a solid “confederal” comparison of the European Union in their “*The dynamics of confederalism and federalism: Comparing Switzerland and the EU*”. The comparison they propose is put on a binary, on a “dual basis”: first we find a comparison between the European Union, a modern “confederation” of States, with an historical confederation, the Switzerland of 1815-48, and then a comparison between the European Union and today’s Switzerland. The Swiss federative process was the result of a strong centralising trend, from a decentralised to a more centralised federation. This process can be explained by the economic areas and interrelations provided by federal states, which offer more efficient economic activity and policymaking institutions (Church and Dardanelli 2005, 178). One thing that needs to be accepted from the beginning, which often escapes the debates on the European integration, is that the transition from a confederal to a federal order may take a long period of time and may even go through a phase of civil war before stabilising. Turning the European Union into a federal state would imply going far beyond the current devolution of sovereignty, implying an explicit and voluntary devolution of sovereignty by the States. This, however, given the current political state of affairs, seems highly unlikely, and is rather more foreseeable imagining the EU to continue its slow but steady integration process, avoiding any disrupting step beyond. The vicissitude of the Constitutional Treaty, the way it has been put forward by the political elites of the member States, seem to confirm this interpretation. In the end it has been considered as an excessive step forward, considering the rejection it received through two referendums in France and in The Netherlands, and the Lisbon Treaty followed as a “moderate” compromise. Finally, a federal Swiss State was accepted because of the influences of the Helvetic Republic, which, even if it was an institutional failure, managed to create a more common identity among the Swiss people. Likewise, it seems clear that any deeper institutional evolution of the European Union should be followed by a common identity-building, or it would lose further legitimacy (Church and Dardanelli 2005, 179).

As per regard with the topic of the allocation of competences, the ground of differences between Switzerland and the European Union is wide. In fact, in terms of public law and constitutional elements, the competences of the EU are conferred by the States as a result of a long process of devolution, while in the case of Switzerland

both federal and cantonal competences are strictly defined by the constitution itself, from this statement we also find a confirm of the more confederal nature of the European Union, in contrast with how Switzerland managed to evolve into a more “mature” federal State. On the contrary, the supremacy of the Union law over national law mirrors the way in which federal law oversees cantonal law in the Swiss system. Moreover, the two systems are closer in the way monetary and fiscal policies are regulated: in fact, the former is managed at the central level and the latter is largely in the hands of the States and the cantons (Church and Dardanelli 2005, 180). These elements aside, the differences between the two systems arise, by reason of the fact that the European system can be traced back to a confederal system, while modern Switzerland took many steps ahead of that point, integrating many policymaking areas. However, from the way the Swiss constitution evolved from 1848 to 1874 and 1999 it can be suggested that, in view of a long-term integration, mechanisms for transferring competences and reorganising a system are more important than the initial distribution of competences and State of the art itself. As it has been previously stated, the success of a system such as the one the EU aspires to be, in the eyes of its political elites, is determined by the quality with which democracy works within that system; namely the issue of democracy and accountability, which also involves the way in which the central level and the peripheral level cooperate. As we already know, the Swiss system is based on cooperative federalism, whereby legislation is enacted at the central level and implemented locally, features already displayed – to a certain extent – by the European Union as well. However, this division of competences between centre and periphery carries the risk of blurring the system’s accountability towards its citizens, especially in the EU case, since it does not have the same countercheck as the one represented by direct democracy tools within the Swiss system. Furthermore, it is unlikely in the near future for a more “dualistic” system to be adopted by the European authorities given the desire of the member States to retain their competences by keeping the Union power at bay (Abromeit 2002) on one hand and to use the EU as a scapegoat for domestic failures on the other.

II.VI Final remarks: a Swiss way to the European Union?

In conclusion, the Swiss experience especially in its confederal phase, gave us an interesting example of confederal/federal integration, however such evolution entailed

a peculiar political culture and historical processes that strongly differ from those that the European Union experienced over the years. Moreover, the way in which Swiss federalism evolved today made it a less appealing model for the EU to look at. Nonetheless, in historical terms, the way in which the cantons chose to cooperate in the XIII century to defend their interests is similar to the way in which the European integration process was born in the 1950s. Caught among the hammer and the anvil, the US and the USSR, six countries of Western Europe paved the way towards the modern European Union, establishing the European Coal and Steel Community, the scope of cooperation expanded over the following years up until the Lisbon Treaty of 2007 (Nitszke 2014, 28). The matter of sovereignty and domain of the centre over the periphery dominates the European debate in the same way it became the friction factor between conservatives and liberals in the Swiss experience. EU member States are not disposed nor prepared to renounce to their sovereignty, as it is displayed by the surge of Eurosceptic movements across all of Europe, and the Lisbon Treaty does not allow major reforms without the consent of all the involved parties. This does not mean that the European integration is bound to end; rather the time is ripe to open that debate over the nature and future of Europe which has been avoided for far too long.

Over 60 years after the beginning of the process of European integration, the EU is facing increasing difficulties. One of the most evident issues when it comes down to the integration of European countries is their cumbersome history. The process of European integration is less than 100 years old, and it reasonably cannot override ages of history in the short-term. The history of Europe has been characterised by huge nations in conflict, divided by rivalries and deep cultural and linguistic differences. Surely not all the member States of the European Union are that old, however at least Portugal, Spain, the Netherlands, Austria, France and the United Kingdom have been global superpowers in the past, with other two countries, Denmark and Sweden being key actors in Europe's history; two younger countries, Germany and Italy quickly gained a first seat spot in the European exchequer during the XIX century (Blondel 1998). Each of the above-mentioned countries have been at least once at war with another, and all of them developed its own relationship between centre and periphery, it is not a surprise that even nowadays some of them continued to believe in their role vis-à-vis international politics. An example can be offered by France and the United Kingdom, which kept behaving as superpowers pointing out their role as single entities

rather than constituent States of a bigger union. Many European populations still consider their national cultural heritage, as per example their arts and philosophy as the main reference while looking for a community to identify with, since “local” feels closer and more concrete than “European”. Likewise, there are also existing tensions within the very member States of the European Union, as per example in Germany the *Länder* of Bavaria consider itself a “nation within the nation”, coexisting with the other federated entities in a sort of bittersweet relationship. Moreover, there is the case of Catalonia in Spain, which even nowadays hosts a major independentist movement, or the case of Italy in which the north and south of the country are divided by major economic and social differences. While in the Swiss experience domestic tensions within and among the cantons were settled by institutionalised secessions, thus with the creation of demi-cantons, in the case of European countries the attritions are still high and proved to be a challenging factor towards the construction of a common European identity, which it is unlikely to succeed without solving those domestic tensions first. One of the latest examples of these kind of tensions has been offered by the veto of Belgium on the CETA (Comprehensive Economic and Trade Agreement): the parliament of Wallonia, seeing the agreement as a threat to its farmers, vetoed the CETA through its constitutional prerogatives. A tension born and nurtured within a member State caused difficulties on the macro-European level. Cultural divides are fuelled by linguistic divides. The ECSC began with six founding members (Belgium, the Netherlands, France, Italy, Luxembourg and West Germany) and four languages (Dutch, French German and Italian). When the Community expanded to nine members (with the addition of Denmark, Ireland and the United Kingdom), the languages became six, then nine with twelve member States and eleven when the members became fifteen, and so on (Blondel 1998) until nowadays in which the official languages of the European Union have become twenty-four. While English took over as the *lingua franca* of the EU for the majority of all the member States, French has been stubbornly promoted by the French administration, and still does now, as is one of the three “procedural” languages of the European Union (altogether with German and English). The process of European integration has been steadily influenced by these divisions. As a consequence, many institutions of the Union are either weak or lacking legitimacy on the EU level, while are fairly stronger and legitimate when they are more intertwined with the member States. The differences between the Council

and the European Parliament are the concrete case. The Council, representing the member States, is on one hand a sort of upper chamber of the legislative branch of the EU, able to veto and countercheck the Commission's legislative production. Likewise, it also represents the governments of the member States, as a matter of fact is up to the Council to define and implement the common foreign and security policy and sign international agreements between the EU and other subjects. The fact that one of the strongest institutional players in the Union is so closely linked to the nation States rather than the European "community" as a whole is symptomatic of the cultural and linguistic divides that still vex the Union, up to the point that this may even be cause of a "democratic deficit" (Blondel 1998). Furthermore, the debate should not focus on whether the European Union will be able to shift towards a federal system or not; on the contrary it would prove more concrete if it were focused on where the decisions are taken and by whom, on the European level. The issue has also been raised by Joschka Fischer in a speech at the Humboldt University of Berlin the 12th May 2000, when he was Vice Chancellor of Germany. In his perspective the debate over the process of European integration should not focus on the process itself, but rather on whether the process of integration hitherto adopted is still suitable. It has been argued that in the case of the Union, when it comes to competences, it is possible to speak of "reverse" federalism, meaning that while in the case of federal States competences firmly intertwined with the concept of sovereignty such as foreign and defence policy are a competence of the federation, in the case of the EU they remain competence of the member states. At the moment, this "reverse" or confederal nature of the EU is prevailing: many decisions are taken on the national level then negotiated and weighted in the Council, through an institutionalised dialogue among member States. However, it is also true that political groups and parties on the European level are weak and often serve as organisational platforms to organise the European elections or to propose a common *Spitzenkandidat*. European parties mostly serve as "confederation" of parties rather than parties themselves. The MEP candidates are chosen by the national members of the EU party, and the electoral campaign is managed and done on the local level, rather than the European. Out of the five major EU institutions: the European Council, the Commission, the Council, the Parliament and the Court of Justice, it is the latter which has probably proved to be the most "communitarian" (Blondel 1998). Acting like a sort of "EU supreme court", the Court of Justice

expanded the scope of European law, by weakening and taming the prerogatives of the nation States. This notwithstanding, the fact that the only directly elected European institution is composed by “Members of the European Parliament” and depends on national mechanics in order to elect its members, is the confirm of the actual supremacy of the confederal logic and national dimension in the EU system. It follows naturally that if the dominant actors of the only elected “European” parliament will not prove able to organise and work in a properly EU way, it will be to the detriment of the European Union itself. This held true even more in the past, before the *Spitzenkandidat* (i.e. the practice according to which the leader of the most voted European party is proposed and considered as President of the EU Commission by the European Council) custom came into force (EU elections 2014), up to the point that in the past some authors suggested to consider the European elections as a sort of “midterm” elections used by the citizens to approve or punish the work of their own national governments rather than to have a say on how the European Union should develop (Reif 1985).

As it has been previously stated, Switzerland faced the same difficulties that the EU is facing these days: many cantons disapproved the centralising process within the Swiss Confederation, and local frictions prevailed over a common feeling for many centuries; between the first confederal pact of 1291 and the French occupation of Switzerland the only thing that changed in the Confederation is the number of cantons being part of it. Both the EU and Switzerland, as we stressed before, derive from a process of integration aimed at reducing border frictions and avoid war: in the case of the EU the ECSC and its further evolutions indirectly avoided conflicts among the countries of Western Europe through economic cooperation, while in the case of Switzerland the cooperation began as a military defence against Austria and the European powers surrounding the small Confederation. It is still discussed among the scholars if the Union as we know it could have integrated in the same way it did without the context given by the Cold War (Blondel 1998). It has been stressed throughout all this text that the analogies between Switzerland and the EU are many and can provide some lessons to fuel a debate over the future order of the Union. These lessons cover two main fields: decision-making and responsiveness. Like in the Swiss case, the EU opted to follow a “consensual” formula where applicable, many processes are based on a consensus formula rather than a majority: for example many legislative

acts are passed in the European Parliament by looking for the largest favourable base as possible, in order to further legitimate the policy outputs of the EU. Likewise, even if over some subjects the Council of the European Union is able to vote through qualified majority voting (QMV), consensus is still sought, when it comes to decisions which have an impact over national interests, in order to legitimate those decisions and the processes that give them birth (Blondel 1998). Making a further step, in terms of identity, it has been observed that part of the success of the EU is given by its diversity, therefore it can be observed that the idea of a common European identity is able to work only by recognising its domestic differences, nurtured by the member States, which are also the source of the originality and strength of the EU (Blondel 1998), even in terms of economic competition. It has been made clear that in the actual state of the art the EU can institutionally – as it does according to the Treaty of Lisbon – through consensual practices, and following this direction the only foreseeable policymaking solution is the constitution of consultative groups composed of members coming from the Parliament, the Council and the Commission, developing the “trilogue” practice, institutionalised by the Treaty of Lisbon; in this direction making the process more transparent could improve its legitimacy. It is a consequence that the policymaking process of the EU is bound – for the moment – to be slow. As national frictions are strong and tending to rise, given that majoritarian systems are unlikely to be adopted throughout the institutional framework of the EU, consensus is a necessary evil (Blondel 1998). When it comes to the responsiveness of the Union, it is a *conditio sine qua non* in order to increase the legitimacy of the EU. Introducing the referendum among the European legislative tools could increase the participation of citizens to the politics of the Union and division within countries rather than different countries, giving the opportunity to serve as mediators to the European parties (Blondel 1998). Nevertheless, this research for legitimacy should never hinder the effectiveness of the institutions, whilst trying to ease the construction of an “European” electoral body. In conclusion, Switzerland proved as a major example showing how different communities, speaking different languages and living different cultures managed to live together, overcoming their own differences. The EU has to choose between an unlikely centralisation, based on the renounce of the member States over relevant portions of sovereignty and a confederative path able to respect the multiple identities and culture lying within a common political space. The latter seems the only feasible

choice in the near future: develop furtherly, with small but pondered steps, the Lisbon Treaty. It is the acknowledgement of the Swiss lesson: that unity can be achieved, but only in the long run, through dialogue and compromises. The EU was born in the middle of the XXI century, and it already reached a remarkable degree of unity, more than what political pessimism could suggest, but sure, it is not Switzerland. However, if such a geographically small “cosmos” was able to find a federal union after at least one hundred years, and one civil war, the same way the US did, maybe it is a lesson to take in consideration. The following chapter will cover the institutional and historical experience of Germany. Born as a geographic plethora of tribes, later united under the Holy Roman Empire, composed of many fiefs, divided by religion and political influences (the Hanseatic league, Prussia, Austria...) which form today’s European geopolitical Goliath, Germany is a force to be reckoned with. Understanding the process that led Berlin to become what is today means understanding another facet of Europe.

III - Germany

III.I From the Holy Roman Empire to Weimar: the historical path

Switzerland set a model for a confederative Europe, a union of states, of cantons, who managed to overcome its many differences and through a treacherous, yet virtuous, path found its place in the continent. A *Willesnation*, a union of “states” which share the common desire to stay together despite their differences in order to enjoy their freedom and make the best possible use of their differences. This is the Swiss Confederation today. Of course all that glitters is not gold, Switzerland does not come without problems and not without some skeletons in its cupboard, nonetheless it set an example of a union of communities divided by language, culture and religion, which passed through an institutional history and path that shares many similarities with the process of European integration. Lastly it has shown how a balanced chemistry between legitimacy and effectiveness of a political regime, able to recognise and give space to many differences not only managed to empower a concept of common identity, but also an institutional framework based on the multi-level representation and role of all territorial bodies, from the smallest village to the richest canton. The German example is wedged on the same path, but through a different history. The modern German Federal Republic (GFR), born after the war as a federalism by disaggregation, namely a state composed of many federated entities born from a pre-unitary state, not only was a pivotal actor during the past phases of European integration, but still plays an active and primary role even nowadays, from the unification with German Democratic Republic (GDR) when it was considered the “sick man of Europe” to today’s condition of “unwilling” leadership. Understanding Germany means understanding many political processes that have led the European integration until today’s state of the art, thus understanding Europe. To begin with, even before World War II, Germany has always had a long history of federalism and confederalism extending far back in history (Ziblatt 2004). The previous chapter revolved around basic issues and questions over the origins of Switzerland, the identity of the Swiss people, how they did band, and so on and so forth. Likewise goes for Germany: what is Germany? Who are the Germans? Understanding the process that led Germany to be the socio-economic goliath of Europe might shed light on new elements that will inspire a debate over the future political order of the Union.

In the XVI century, the German states became divided more than others by religion, which with other divides, mainly political, led to the Thirty Years' War (1618-1648) between Protestants and Catholics, Germans and non-Germans, mostly, however, on German territory. After the end of the conflict, sealed with the Treaty of Westphalia of 1648, generally credited with having introduced the modern concept of state, those fiefdoms were more likely to identify themselves with their ruling dynasties or domains: Bavarians, Saxonians, Hanoverians, Württembergers, etc. It was not until the aftermath of the French revolution that the notion nation state caught on the notion of state. With the nation state, people who identified one another, on the basis of a common language, geography, cultural heritage, history, ethnicity and religion, now sought to band together and to form a state which could unite them all. The first instance of German union after the French revolution has been the German Confederation (Deutscher Bund) of 1815, which included thirty-nine states, among which the Archdukedom of Austria. It was a loose union of states of which the only purpose was to provide domestic and external security. The Confederation was then complemented by a customs union, the Zollverein, from which Austria came to be excluded due to its protectionist policies. Then, in 1867, after the Austro-Prussian war of 1866 ended, seeing Prussia as the uncontested dominus of Northern Germany, twenty-two German states joined the North German Confederation (Norddeutscher Bund), led and dominated by Prussia. After the Franco-Prussian war of 1870, the North German Confederation, with four independent states of Southern Germany, joined to form the German Empire (Deutsches Kaiserreich), the first historical instance of a unified German state in history. After the defeat of Germany in World War I, the former state was now divided and split, with many Germans living now in France, which left Germany, now the Weimar Republic, into a state of chaos and turmoil. It was this climate, altogether with a crippling economic crisis and inflation which led to the rise of radical nationalism, with Adolf Hitler and Nazi Germany, which sought and managed to launch a war to unite all Germans and establish their rule. After the end of World War II, Germany was now divided again, in four occupied areas, then in two blocs, West Germany and East Germany, under a political climate of extreme tensions, with the widespread certainty that the reunification of the two republics would have never happened. But then West Germany came to be part and founder of the European

Union, and then managed to reunite with Berlin, with the east, to finally become one of the pivotal actors behind the process of European integration.

The core, the forerunner of modern Germany was born as a consequence of the Treaty of Verdun in 843, following the death of Charlemagne. The “Holy Roman Empire” came to be divided in three parts: the West Frankish Kingdom, which would become the core of France, the Middle Kingdom, which would become the core of the Netherlands, Belgium, Luxembourg and other areas between France and Germany and the East Frankish Kingdom, which would become the restored Holy Roman Empire (HRE) and then the core of modern Germany. The emperor of the HRE was elected from the high nobility, and ruled through the princes, who in turn ruled through the lesser nobility. The emperor could rule directly only in his territorial base, there was no capital as it depended on the new elected emperor, the main purpose of which was to grant protection to the smaller territories from their powerful neighbours. After the investiture controversy of the XI-XII centuries, the Golden Bull of 1356 confirmed the principle of election of the emperor, as for a while the title of emperor has been hereditary. It was no surprise that this strong decentralisation displayed the weakness of the empire vis-à-vis Western Europe, which came to be known by the year 1300. The electoral system of the empire implied that large part of the imperial power depended on the agreement of the more important and greater princes of the empire (Schulze 2002). Therefore, due to the necessity of holding enough wealth and land to boast the title of emperor, the house of Habsburg of Austria came to be the only one to afford to wear the crown and to make effective use of it, granting themselves the perpetual election to the throne of the empire through a shrewd and cautious matrimonial policy. Thus, the policies of the Habsburgs and of the empire came to coincide. Yet, at the end of the XV century the empire found itself in a condition of seamless domestic conflict, as the imperial princes sought to expand their territories as much as they could. In 1500 the Imperial Diet (Reichstag), an assembly of princes of the empire, established the principle that it was up to states and not individuals to secure peace in the land (Gunlicks 2003, 12). Moreover, an Imperial Chamber Court (Reichskammergericht) was established, a sort of imperial tribunal to solve imperial disputes falling outside the jurisdiction of individual fiefdoms. Lastly and more importantly, the empire came to be divided into “imperial circles” (Reichkreise), administrative groupings whose main purposes were to grant peace and security,

organise a common defence, collect taxes and other administrative tasks. These circles were complemented by local assemblies (Kreistag) and became the forerunners of the federal elements which kept the imperial structure together until its end and characterised the political and institutional culture of the Germans (Neuhaus 1990, 38-48). Thus, in the XVI century the Holy Roman Empire came to be a feudal confederation organised in seven electoral principalities (who had the right to elect the emperor), twenty-five major secular principalities, ninety ecclesiastical principalities and many free cities and lesser fiefdoms. The system came to a crisis with the Reformation, which constituted the occasion for many princes to emancipate themselves from the imperial authority of Vienna, reflecting a progressive decline in power of the Catholic Church and likewise of the central imperial authority. The system collapsed with the Thirty Years War, which sealed the autonomy of the princes vis-à-vis the emperor, according to the famous principle *cuius regio eius religio* (en: *whose realm, his religion*, already “enforced” with the Peace of Augsburg of 1555). The Treaty of Westphalia of 1648 saw the rise of Prussia as a major actor within Europe, its rise altogether with the expansion of Austria led the Holy Roman Empire to be more of an administrative entity rather than a full-fledged “Empire”, given the degree of autonomy enjoyable by its princes. The period following 1648 thus became known as the era of absolutism, in which the notion of state came to be more and more affirmed, to the detriment of the central imperial administration. By 1740 the institutions of the empire came to be increasingly used to vent out differences between Austria and Prussia, leading the latter to form an alliance with smaller states such as Hanover, Saxony and others. The French revolution of 1789 disrupted this “balance of power”, just as it has been outlined in the Swiss case. Bonaparte created a group of enlarged German client states, dissolving the lesser political units and secularising the spiritual principalities: the states were big enough to be independent from Vienna, yet not so extended to face France. In 1806 sixteen German states withdrew from the empire and formed the Confederation of the Rhine (Rheinbund), the following year the member became thirty-nine, the Confederation was “protected” by Napoleon himself. Despite being a short-lived French protectorate, the *Rheinbund* had important consequences. First of all, it introduced reforms and territorial changes that promoted homogeneity of living conditions in different states, leading to the growth of a new middle class, thus leading to the birth of small, yet growing, national sentiment

(Gunlicks 2003, 18). With the defeat of Napoleon at Leipzig in 1813 the *Rheinbund* had ceased to exist, but the confederal structure of the union came back with the German Confederation (Deutscher Bund) in 1815, created by the Congress of Vienna, with the purpose to replace the previous Holy Roman Empire, to promote the trade and coordinate the security of the German-speaking countries. The Confederation, however, was a crystallisation of the status quo, the only organ responsible for common matters was the Frankfurt Diet (Bundestag), chaired by Austria, and there was no other body, no administrative head, no courts. The most relevant reforms and institutional evolutions indeed took place within Prussia and south German states, not within the framework of the Confederation, which was deadlocked. Prussia, the forerunner of modern Germany, was an absolutist state on paper, but it featured an important devolution of autonomy to its regions. While Austria, under the guise of the confederation, continued to promote hostility to democracy and liberalism, the Customs Union (Zollverein) was established in 1834, under the leadership of Prussia and without the membership of Austria. By 1848, with the liberal revolutions, it was clear that the only hegemony in the Confederation were Prussia and Austria, weakened by its hostility towards any idea of German unification. That is why in 1849 many German princes drafted the “Frankfurt Constitution”, a document aimed at establishing a stronger German Federation, the competences of which went from foreign affairs, war and peace, trade, currency, immigration to infrastructures, with an institutional framework not that different from the one of the United States. However, the Frankfurt Constitution was bound to fail as the king of Prussia, Friedrich Wilhelm IV, refused to be crowned head of this new state. As the Prussian king wanted a united German state but with more power concentrated in the hands of the monarch, he proposed another Constitution in 1850, to unite the states of Northern Germany into a league of princes, the so called “Erfurt Union”, which however failed due to the lack of popular support to the project, leaving the German Confederation as the sole body uniting the Germans for the time being. By the end of the 1850s representatives of German states gathered together to elaborate and adopt common laws in civil and criminal matters and took the opportunity once again to propose an ever-closer union of German states, which led to no concrete result whatsoever. Things started to change with the appointment of Otto von Bismarck as prime minister (then imperial chancellor) of Prussia in 1862. Tensions between Prussia and Austria increased until

1866, year of the Austro-Prussian conflict, won by Berlin. The Treaty of Prague, which sealed the end of the short-lived conflict, had as consequence the dissolution of the Confederation and the expansion of Prussian control over Northern Germany, with the establishment the North German Confederation (Norddeutscher Bund) in 1867, leaving three Germanies in Europe at the time: Northern, Southern (Baden Hesse-Darmstadt, Württemberg and Bavaria) and Austria. Prussia was the dominant state of the North German Confederation, as its king could appoint the executive of the union, while the princes were represented in the Federal Council (Bundesrat), the high “federal” chamber, while the people of the union were represented in the Assembly (Reichstag). Moreover, the new Federation managed to sign a customs treaty with the South German states in the same year, creating a unified economic area for all of Germany, except Austria, after the Franco-Prussian war of 1871, those states joined the Federation, to form the Second German Reich or German Empire (Kaiserreich) in January 1871; it was the first instance of a German unified state with Berlin as capital. The new-born German Reich could also be considered an enlarged Prussia, given the influence of the old state in the formation of the new empire. The constitution of the Second Reich was based on the constitution of the North German Confederation, in which the king of Prussia became the highest organ, the Kaiser, then the Bundestag and the Bundesrat were retained as the legislative branch of the Reich, the two of them, however, had no influence over the appointment or removal of the Chancellor. The individual states which formed the Reich lost their sovereignty, but retained considerable autonomy, as they were the “founding” entities of the new German state. The Kaiser managed to remain the absolute monarch of the Reich despite the rising tensions between Protestants and Catholics and coming from the growing working class due to the loyalty of the army the institutional hegemony enjoyed by Prussia within the decisional mechanisms of the Reich.

Nevertheless, the empire was based on a federal system, and has been well welcomed by the German princes. The architect of the empire, Bismarck, envisaged a system in which albeit the regional states lost their sovereignty, they maintained their pre-unification structure, including the head of state, the symbols, the local parliament, peculiar laws and so on and so forth. Harmonisation of weights and measures, laws, education, social policy et cetera proceed slowly but steadily. Furthermore, a characteristic of the Reich was that it included a plethora of political systems, as the

empire had its own political system while every region kept its own. Consequently, the empire had an authoritarian system based on male suffrage and a National Assembly with little power over the emperor and the executive, Prussia retained its Junker-centric system, while other states like Württemberg retained a more liberal and democratic system. The Reich's constitution made it so these political systems, incompatible on the outside, could coexist within a federal system. Furthermore, the constitution vested sovereignty not in the people but in the Bundesrat, in order to protect the role of the German ruling dynasties, which could also limit the Prussian power to change the constitution within the Bundesrat, as it was possible for any coalition of German states to create a vetoing coalition to any constitutional amendment, thus guaranteeing the institutional core-asset of the constitution. Many of the concessions that Bismarck made to the South German states influenced the modern federative asset of Germany, especially in Baden or Bavaria, which could even keep an army separated from the imperial one (Confino 2002, 74). Despite the resilience of the system, the Kaiser could not resist World War I, in the aftermath of which the old system found itself completely overthrown, followed by the Weimar Republic.

III.II From the Weimar Republic to the reunification of Germany

The federal system managed to hold, somehow. In 1919, the constitutional scholar Hugo Preuss proposed a constitutional draft laying out a decentralised unitary state, far from a federation, aiming at breaking up Prussia and its role within German politics; the draft was rejected (Gunlicks 2003, 29), as the federal nature of the system was deemed necessary. Therefore, the Weimar Constitution maintained a federal framework, providing for a parliamentary democracy with an executive dependent on the *Reichstag* and a directly elected head of state, the higher chamber was called *Reichsrat*, and was institutionally subjected to the decisions of the lower chamber. The states were now called *Länder*, and over the years went from twenty-five to seventeen in 1932. The new constitution drastically reduced the role of Prussia, as it put more equality between the Landers. Furthermore, the role of political parties came to be greatly enhanced by the fact that the *Reichstag* was elected by men and women by proportional representation, leading to relevant degrees of representations, but also to a fragmented multi-party system. The Chancellor was appointed and dismissed by the President of the Republic, which however had to consider the composition of the

parliament, given the dependence of the executive on the support of the legislative. In a nutshell the provisions of the Weimar Constitution were very similar to today's Fifth French Republic, with the difference that the political and party system was much more fragmented and chaotic, which fuelled a climate of political uncertainties, which ultimately led Adolf Hitler to form a government. The Hitler cabinet of 1933 began a strong process of centralisation of the administrative system, starting from the "coordination" (Gleichschaltung) of the *Landers*. This process entailed the dissolution of the *Reichsrat*, the transfer of the *Landers'* autonomy to the Reich's central administration, leading the *Landers* to become administrative districts. The Nazi agenda issued the dissolution of the *Land* parliaments and governments, which were now appointed by the central administration: the Nazi party managed to dismantle, at least for a while, the federal framework which was in Germany's political DNA. The end of World War II with the defeat of the Third Reich in 1945 drastically shook up, once again, Germany, which was now divided into four zones of occupation: American, British, French and Soviet. The military governments were the highest authorities within the occupied areas and decided whether to use the old *Länder* administrative structure or not. The occupied zone of the Western forces consisted of the pre-war *Landers* of Bavaria, Württemberg, Baden, Hesse-Darmstadt, Schaumburg-Lippe, Bremen and Hamburg. The Soviet Zone comprised the pre-war *Landers* of Mecklenburg-Strelitz, Mecklenburg-Schwerin, Anhalt, Thuringia, Saxony and the Prussian provinces of Brandenburg and Saxony. The Allies respected the federal tradition of Germany, and re-established the *Länder* structure in their occupied territories, however the initial administrative regions were not big enough for economic independence, thus they encouraged the prime ministers of the *Landers* to propose change for their boundaries in order to avoid having too small or too large administrative units. Finally, on 10 August 1948 a constitutional convention was called in order to draft a "Basic Law" (Grundgesetz) for the West German territories, which was approved on 23 May 1949, passed by ten of the eleven *Land* parliaments, with Bavaria being the only one contrary, which however chose to abide by the will of the majority. The *Landers* of the newly constituted West Germany were Hamburg, Schleswig-Holstein, Lower Saxony and North-Rhine Westphalia in the British area; Bremen, Hesse, Bavaria and Württemberg-Baden in the American area and Rhineland-Palatinate, Württemberg-Hohenzollern and Baden in the French area. The Saarland

was a special case, as the French turned it into an autonomous administrative unit, attempting to transform the area into a *de facto* protectorate. Nevertheless, due to the hostility of the locals to the project, the French accepted the sentiment of the majority of the people living there and returned Saarland as a *Land* to Germany on 1 January 1957. The main administrative issues were raised by the fact that some *Landers* needed to be reorganised due to their fragmented nature: it was natural, since they have been established within three distinct military-administrated areas. The *Landers* in question were Baden, Württemberg-Baden and Württemberg-Hohenzollern created from northern and southern Baden and northern and southern Württemberg. Article 118 of the Basic Law allowed the *Bundestag* to enact laws regulating those areas in the southwest, and did so in May 1951: the law allowed the creation of a combined states if approved by a majority of voters in three out of the four territories representing the majority of the area, said referendum was held on 9 December 1951, only South Baden voted contrary, but came to be overruled by the other territories. Thus, on 25 April 1952 the new *Land* of Baden-Württemberg was born. The area occupied by the Soviet Union has tells a whole different story. The Soviet occupation zone saw the brief re-establishment of five *Länder* roughly corresponding to Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia. Part of these areas were occupied by Allied troops, which withdrew as consequence of the Yalta agreement, to be replaced by Soviet troops. The territories east of the Oder-Neiße river, namely Pomerania, Silesia and the southern part of East Prussia, were given to Poland, while the northern half of East Prussia was annexed by the USSR. To the west of the Oder-Neiße river there were five historical *Länder*: Mecklenburg-Strelitz, Mecklenburg-Schwerin, Anhalt, Thuringia, Saxony. Year 1947 saw the dissolution of Prussia and the birth of the post-WWII East German *Landers*. It was during that year that many constitutions came to be enacted and voted, giving birth to new areas: Thuringia, the province of Brandenburg and Saxony became *Landers* without many drastic changes, the two Mecklenburgs and western Pomerania were merged into the Mecklenburg-Vorpommern, the province of Prussian Saxony and Anhalt were merged into Saxony-Anhalt, with the dissolution of Prussia. The political proxy and tool of control of the Soviet *Landers* was the Party of Socialist Unity (SED), which was born from a merger of the Communist Party of Germany (KPD) and the Social Democratic Party of Germany (SPD). It is important to bear in

mind that this merger had success only in the Soviet occupied Germany, in the areas occupied by the Allies the SPD members showed a fierce opposition to the merger. Lastly, in October 1949, in response to the West German Basic Law, an East German constitution, shaped by the SED, went into effect, creating the German Democratic Republic (GDR). On the other hand, the *Landers* received a different treatment, as their constitutions – based on the Weimar model – were largely ignored by the SED’s political elite, to be accurate, the entire concept of *Lander* and federation went against the kind of administration envisaged by the USSR, the one of a unitary state (Gunlicks 2003, 39). It is no surprise that in July 1952 the *Landers* came to be *de facto* dissolved, as their functions were transferred to newly-created administrative divisions, the fourteen regional districts (*Bezirk*).

Indeed, the law of 23 July 1952 did not formally abolish the *Landers*, but it transferred all of their political and administrative functions to the *Bezirks*, which were in their turn divided into sub-units: rural districts (*Landkreise*) and urban districts (*Stadtkreise*). The new system of the *Bezirks* and the *Kreises* was the vehicle to further propagate the influence of the SED, and thus of the communist regime, over the society, as the newly established administrative units were used as hosts for a tight network in which the party and the secret police, the *Stasi* (Ministerium für Staatssicherheit) kept a firm control over the population, which was increasingly encouraged to join the party: by the 1980s one out of five adults was a member of the SED (Fullbrook 2002). East Germany had to wait until the reunification with the West in 1990 to see the *Landers* make their comeback; to be more precise, it was these *Länder* that acceded to the Federal Republic of Germany. Interestingly enough, following the fall of the Berlin Wall on 9 November 1989, in the following month the East German government formed a commission with the task to consider the restoration of the five dissolved *Lander*: the commission found out that many citizens identified on the basis of their region of provenance, thus as Saxons or Mecklenburgians and not as East Germans (Gunlicks 2003, 42), thus it was clear that the restoration *Landers* could help recovering the legitimacy of the East German political system (Gunlicks, *Federalism and German Unification* 1992, 54). 1990 was an interesting year for German politics. As a consequence of the new policies adopted by the Gorbachev administration, namely the *glasnost* (transparency) and *perestroika* (restructuring), it was clear that both the PCUS in the USSR and the SED in the GDR were losing their Marxist-

Leninist roots: by the end of 1989 the SED saw its most zealous and communist-minded member expelled, and its name was changed into Party of the Democratic Socialism (PDS), as in 1990 as going to be held the first and last free parliamentary election of the German Democratic Republic. On 18 March 1990 those elections saw the return of the Social Democrats (SDP), and the victory of the Christian-Democratic Union (CDU) led by the East German CDU leader: Lothar de Maizière. On the 18th of May of the same year the “Treaty Establishing a Monetary, Economic and Social Union between the German Democratic Republic and the Federal Republic of Germany” was signed by representatives of the two German governments, marking the beginning of the merger between the two entities. The Treaty came into force on the 1st of July, establishing the West German Deutschemark as the new currency of the East German *Landers*, in exchange it was up to the West to economically support the transition of the East from planned economy to the open market. The final act was, however, the decision of the *Volkskammer* (Parliament of East Germany) on 23 August 1990 declaring the accession of the five *Landers* of the GDR to the German Federal Republic, extending to those territories the West German Basic Law, applying its article 23, which provided the *Beitrittserklärung* or East German declaration of accession. In conclusion of this process, the Reunification Treaty (Einigungsvertrag) between the two Germanies came to be signed 31 August 1990 and entered into force on 29 September 1990, following the provisions laid out by the international law: the following year other international provisions came to be ratified and thus Germany managed to finally be reunited once again. The newly reunified Federal Republic of Germany followed the institutional framework laid out in the Basic Law of the former West Germany. Today the state is composed by sixteen *Länder*, of which three are city states (Berlin, Hamburg and Bremen), there are then four large *Landers*: North-Rhine Westphalia, Bavaria, Baden-Württemberg, Lower Saxony; eight medium-sized *Landers*: Hesse, Saxony, Rhineland-Palatinate, Schleswig-Holstein, Brandenburg, Saxony-Anhalt, Thuringia, Mecklenburg-Vorpommern; and one small territorial state, the Saarland. The Basic Law and constitutional customs laid two principles: the first is that the *Länder* are bodies which execute federal laws on their own responsibility; the second is that there are three administrative divisions in Germany: federal, *Land* and local. The *Landers* exist as constituting parts of the federation and local governments exist as constituent parts of the *Landers*. Furthermore, the Basic Law

stipulates that each *Länder's* government must conform to principles of republic, democratic and social government: each *Länder* has its own constitution, its own government, managed by a cabinet led by the President of the *Länder* or *Ministerpräsident* (minister-president), this executive has to cooperate with a parliamentary legislative, the *Landtag* (State Diet), the local system tends to mirror the national one, thus is up to the *Landtag's* majority to express the *Länder's* president. The main federal bodies and entities include the Chancellor and his bureau, the ministers of the federation, the *Bundesbank* (central bank), the presidency of the federation, the *Bundestag* (low chamber, representing the German citizens), the *Bundesrat* (higher chamber, representing the *Landers*) and the Federal Constitutional Court (Bundesverfassungsgericht). The structure of the *Landers* and their relationship with the central government resembles the one of the Weimar Republic, as the *Landers* are represented in Federal Council (the Bismarckian *Bundesrat*) by delegates appointed by the *Länder* cabinets. Laws proposed by the governments are first presented to the *Bundesrat* before going to the *Bundestag*; as a rule of thumb, all laws require only the approval of the *Bundestag* to be adopted. The *Bundesrat* can apply a suspensive veto (Einspruch) and an absolute veto (Zustimmung). The absolute veto, as provided by the Basic Law, can be applied only on legislation which affects the *Landers*, thus their administration; for all other laws the *Bundesrat* can apply its suspensive veto, which can be overridden by a majority of 50%+1 member of the *Bundestag*; constitutional amendments require the support of the two-thirds of both houses. Finally, like in the case of the European Parliament and the Council of the European Union, the Basic Law provides for a “mediation committee” (article 77), entrusted to help the two chambers find a compromise over a specific piece of legislation, like the conciliation committee provided for in the article 294 of the TFEU. The federal nature of the Basic Law derived from the Potsdam Conference of 1945, in which the four powers occupying Germany advocated for a strongly decentralised state, in contrast with the ultra-centralised system adopted by the Nazi regime. It has been recalled many times that German federalism is part of a political culture that existed long before the birth of the German state. The institutional framework outlined by the Basic Law resembles somewhat the one of the European Union, as both the federation and the *Landers* are institutionally obliged to cooperate since the former retains many legislative competences, while administrative competences are left to the *Landers*;

more precisely, the majority of the legislative decisions are taken within Berlin, and is up to the *Landers* to follow them up by implementing them. The Basic Law enumerates the policy area which are strictly federal competence and through the principle of residual powers bestows to the *Landers* all of the competences which are not listed as exclusive of the federation. Articles 71, 73, 105 outline the exclusive competences of the federation, among which we find foreign policy, monetary policy, customs, defence and citizenship: the *Landers* can intervene only when they are allowed to do so by a federal law. As follows, the Basic Law also outlines a frame of concurrent legislation (articles 72, 74, 105) in fields subjects to this category, the *Landers* can adopt their own legislation until the central government deems necessary to enact a one-size-fits-all legislation, in that case the federal laws override the local ones. Among the fields of concurrent legislation, we find civil law, criminal law, prison system, judiciary, procedural law, commercial and labour law, the law relating to the residence and establishment of foreign nationals, concurrence law, etc. Article 75 lays out the framework competences or framework legislation, which work like the Directives in the European Union. Indeed, it is up to the federation to determine the principles and the results that this kind of legislation has to fulfil, then it is left to the *Landers* to adopt laws implementing and executing the principles outlined in the “frame law”. Among the fields of framework legislation, we find all the laws regulating the public sector, higher education, environment and matters relating to the civil registry. Article 30 outlines the principle of residual competence, namely that the *Landers* holds the exclusive competence over areas not expressly bestowed upon the federation by the Basic Law. Among the fields of the residual competence it can be worth noting public order, education and justice. In terms of administration and implementation of the legislation, article 83 of the Basic Law provides that the *Landers* retain the execution of federal (and, of course, “regional”) laws, unless explicitly provided by the Basic Law (p.e. federal administration at articles 86 and 87).

III.III German federalism, identity and Europeanisation.

To a certain degree, the German identity encompassed local identities in a way in which one could not exclude, but on the contrary, it could complement, the other; federalism was a viable way to safeguard regional and political identities altogether. Federalism was also the only vehicle to solve the tensions between local and national

identity in the empire, which for the first time created the narrative of one Germany and one German people, which were so far divided. This link between localness, nationhood under a political framework based on federalism has been reconducted to the idea of *Heimat* (roughly translatable as “homeland”). As it has been stressed within the previous chapter, identity is a relevant issue when building a community, be it a state or a union of states. The process of European integration created an economic union without a political union first, overlooking the issue of identity. Indeed, as it has been noted, the legitimacy of a system and the process of identity-building are not as important in the grip of a political system as the effective ability of the system to deliver benefits and results to its citizens. However, given the current state of things in Europe, perceived by many as a technocratic entity, after a round of European elections which made it clear that change is being demanded, looking into the elements that shaped the identity-building in two different polities such as Germany and Switzerland could provide some hints towards a more effective system. As Alon Confino stressed (2002), conservative and anti-modern reactionary political actors have unfairly appropriated the concept of *Heimat*, which Confino (1997) considered a sort of *trait-d’union* between traditions, identity and progress. Following the reasoning of the author, the *Heimat* idea allowed “localities and regions to emphasise their historical, natural and ethnographic uniqueness and, at the same time, by integrating them all, the *Heimat* idea was a common denominator of variety.” In sum, the *Heimat* as a leitmotiv was a common “feeling” of a common homeland, entailing an identity complementary to localities, instead of being all-embracing and substitutive. It must be noted, however, how federalism and *Heimat* were one independent from the other but reinforcing each other. Their function was to relieve the tensions between centre and periphery, somewhere and anywhere, localness and nationhood; in practical terms, *Heimat* promoted cooperative federalism. Germany in 1871 has been reunited from above, amid brief civil wars, and yet it managed to be greeted with enthusiasm; federalism was seen as a way to preserve diversities, unification came to be perceived as The German *reunification* of 1990 came from below, without any bloodshed, as a result of process of emancipation led by East Germans. However, it quickly turned into a bitter experience for many Germans, which deemed the process of reunification as an asymmetric process of colonisation: all adjustments, especially in terms of adaptation to higher costs of living had to be made by easterners (Confino 2002, 86).

The experience of the *Heimat* in imperial Germany and post-reunification Germany offers some food for thought for the experience of the European Union. One of the ever-growing social issues of Europe is the one concerning identity. The 2019's European elections have seen all of the political parties proposing a certain vision of Europe, all of which shared the same desire to modify the actual status quo; example of which has been the promotion of the "Europe of the regions" or "Europe of the territories". Looking at the current state of things in Europe, the relation between the member states and the European Union resembles the one between region and nation-state after 1871 in Germany, that is to say the component part of the whole. Both then and now some states fear that their identity would disappear, substituted by a one-size-fits-all common identity, concern which has been shared by a growing minority of the populations of the member states. The two German examples embody a message: identities are not created from one day to another, instead they are the result of a long and coherent process and yet they need a suitable institutional context to work. The German empire has been the result of a long process which sealed the role of Prussia as European superpower, it was about a flourishing country who further enhanced its status and allowed other states to be part of this process, harmonising different identities under a common "umbrella". On the contrary, the German reunification of 1990 was surely a peaceful process promoted from below, but expensive, and not without its setbacks. In a way analogue to the crisis of the Eurozone, German monetary policy was constrained in order to respect the harmonisation towards a euro-wide interest rate and fiscal policy was kept under control in order to comply with the requirements of the Stability and Growth Pact (SGP); anti-cyclical policies were not an option, and the reunification had its costs, as East Germany had to be put on par with West Germany (The Economist 1999). The short-lived, but traumatic experience of being "the sick man of Europe" shows that the *Heimat* and federalism, and a widespread and well-welcomed identity are not enough if the system to which such identity refers to is not able to provide benefits to its citizens. Given the high degree of synergy between federation and *Landers* required by the Basic Law German federalism has often been regarded to as "cooperative federalism", namely a system in which federal and territorial institutions cooperate to guarantee an uniformity of living conditions (provided for also by article 72 of the Basic Law). In fact, while many federal systems are based on territorial diversity, the German system was conceived

as system entrusted with the delivery of common standards of public policy and services. However, the cooperative dynamic of German federalism has slowly been eroded over the time, since the task of harmonising the living standards among the territories of the federation has been made more and more difficult since the integration of the former East German *Landers* (Jeffery 2002, 173). Uniformity of living conditions were almost given for granted in West Germany, as its *Landers* had a relatively high degree of socio-economic homogeneity and yet, the reunification inevitably widened the disparities between *Landers*. German cooperative federalism is a system based on the will and capacity of the *Landers* to coordinate and find compromises. Example of this continued research of compromises can be found in the mechanism of economic equalisation, as Germany rests on a system of financial equalisation regulating the allocation of resources between federation and *Länder*, in order to provide more resources to the poorer areas. The system has been deemed unfair by some *Landers*, Bavaria first of them all, as the sums of money flowing from the richer *Landers* to the poorer have multiplied since the unification. Inevitably, some net contributors *Länder* as Baden-Württemberg, Bavaria and Hessen brought an action against the German financial equalisation law before the Federal Constitutional Court, as they deemed it as unlawful, concern recognised by the Court, which, with an innovative ruling, declared the fiscal equalisation law unlawful in November 1999. As a consequence, the new fiscal equalisation system reduced the fiscal transfers from the *Landers* (horizontal level) and increased those from the federation (vertical level). Another not negligible variable which eroded Germany's cooperative federalism has been the process of European integration itself. Indeed the Europeanisation brought by the Treaties entailed a gradual erosion of powers of the member states, which – in the case of Germany – meant an erosion of the *Landers*' autonomy: since the competences lost by the *Länder* are both on the territorial and on the federal level, the resulting consequence is *de facto* centralisation of the system, since the federal system remains fundamentally unaltered (Börzel 2009, 53). In detail, the *Landers* have been affected by the transfer of federal, shared and exclusive competences altogether to the European level: European Regulations impact directly on the member states, thus downsizing the role of the *Bundesrat* in the policymaking and despite European Directives need to be legally implemented by the member states, their level of detail makes it so that there is little room for manoeuvre for the *Bundestag* and the *Bundesrat*. Moreover, if on one

hand the *Länder* is progressively reduced to a role of ratification and practical application of European policies, the central state, which also has lost some decision-making power, retained a relevant influence on the European policymaking process, as it is represented in the Council of the European Union. A further erosion of the cooperative dimension of German federalism is given by the fact that on the domestic level the loss of policy competences on the *Länder* side has always been balanced by a gain in terms of participation to the decision-making through the *Bundesrat*. In the end it was thanks to the *Landers* that the concept of “Europe of the Regions” could find its place within the institutional framework of the Union. In fact, the *Landers* advocated for more participation on the supranational level under the guise of advocating for a Europe more involved with the European regions, by promoting and strengthening their role as a “third level” of the European Union, in order to increase the efficiency and legitimacy of European policymaking (Teufel 1992). The strategy worked, as they were able to mobilise support for their claims from other regions of Europe, from the European Commission and the Parliament which were looking forward more occasions to bypass the national dimension of the Union (Börzel 2009, 69). The pressures of the *Landers* brought the German government to bring the principle of subsidiarity and the Committee of the Regions onto the Maastricht agenda. Lastly, they also obtained an amendment to the Basic Law, the so called “*Europa-Artikel*”, article 23, providing the approval of the *Bundesrat* over any transfer of regional and national competences to the EU and a majority of two-thirds in the *Bundestag* and *Bundesrat* to ratify any change to the EU Treaty or similar regulations. Among the other things the new constitutional provision allows the *Landers* to further cooperate with the central government (the *Bund*) in European Affairs, granting for example the *Bundesrat* the right to appeal to the ECJ on behalf of a *Länder* if an action of any European institutions is found affecting the regional competences, or the participation of a *Länder* minister in the Council negotiations with the German delegation when exclusive legislative competences of the *Landers* are at issue, moreover *Landers* could now participate in the working groups and committees of the Council and the Commission. The bargaining process between the *Landers*, the *Bund* and the European stakeholders shed light on an often neglected element of success of the European integration, the participation of the regions and territories: not only this increased the efficiency and the legitimacy of the European institutions, it helped –

wherever applicable – to keep in check the role of the nations *vis-à-vis* their territorial components. It is implied, however, that without some degree of harmonisation, an increased participation of the regions in the decision-making processes of the Union could only bring more chaos, which is the same conclusion reached by the *Landers* when they realised that the huge degree of heterogeneity of the European regions in terms of institutional autonomy impairs the efficiency of regional participation to the EU policymaking through a joint body of representation (Degen 1998). This is one of the main reasons the *Landers* did not really push forward the demand to increase the “third level” (the role of the regions) of the Union: it is clear that further integration in this sense would bring effectiveness only in the case all regions were to gain more institutional autonomy *vis-à-vis* their nation. In the end, the role of the *Landers* was more and more passive during the Amsterdam and Nice IGCs: the only issue they really pushed forward has been the clear delamination of the policy competences. Going back to the erosion of cooperative federalism, it has been redressed through the establishment of joint federation-*Länder* decision-making institutions concerning European policymaking. After all, the system managed to survive, despite the ongoing attempts of the *Länder* of Bavaria to change the system and reduce as much as possible the role of the regions in the German fiscal solidarity mechanism. All in all, the *Landers* managed to become the main implementers of European policies, it could also be said that Europeanisation reinforced the cooperative dynamic of German federalism (Goetz 1995) by leading to the establishment of new institutional arenas for debate and codecision over European policies. The *Bundesrat* became the main body designated to represent the *Landers* in European affairs to the detriment of the regional parliaments, sanctioned by the newly reformed article 23 of the Basic Law (Herdegen 1992). Notwithstanding that the price paid has been a loss of democratic legitimacy and accountability in the German federal system with the downsizing of the regional parliaments, both the *Bund* and the *Landers* gained policymaking effectiveness in European affairs (Benz 1998; Classen 1993), confirming once again the principle that loss of legitimacy can be considered as negligible in exchange of more-effective policy outputs. What has happened with the German *Landers* shows on one hand that a major involvement of the regions – as administrative level closer to the citizens – may not only increase the effectiveness of the system, but also its legitimacy, notwithstanding the downsizing in terms of regional parliamentary power that the *Landers* have

experienced. Indeed, a major involvement of the regions may not only increase the quality of the policy output at European level, but also reduce the hindrance that the national governments often constitute when bargaining new policies. All in all, as the German experience has thought, such a major overhaul would require the widespread of more autonomous local institutions in all the member states, in order to reduce the heterogeneity between regions and increase their ability to coordinate their efforts, which – as of now – still seems a hardly feasible aim.

III.IV Final Remarks: Germany as the cradle of European cooperative competition

In this chapter it has been stressed how much federalism is embedded in Germany's political culture and history. Altogether with Switzerland they shared some historical phases, a confederative period, the influences of the French revolution and nationalism and lastly an ever-closer union of states. German federalism survived over the ages thanks to its different guises: the Holy Roman Empire, the Hanseatic League, the Confederation of the Rhine, the German Confederation, so on and so forth. The only two centralistic parentheses have been Nazi Germany and the USSR driven German Democratic Republic. The Holy Roman Empire was characterised by a large plethora of German states with similar language and cultures but enormous religious divides, given that religion was a driving factor in the process of identity-setting of a state. The Empire recognised greater and lesser fiefdoms, free cities, bishopric and ecclesiastical princes. The result was a great community of states which shared a common allegiance towards the emperor in exchange of protection, just as many confederations (Switzerland is a primary example) managed to survive over the ages as they were focused on mutual protection. Religious conflicts aside, the empire featured a certain degree of cooperation among competing states, source of what the British historian Eric Jones defined as "The European Miracle" (1987, 117) *"This picture of a Europe which shared in salient respects a common culture, or series of overlapped lifestyles, and formed something of a single market demonstrates that political decentralization did not mean a fatal loss of economies of scale in production and distribution. The states system did not thwart the flow of capital and labour to the constituent states offering the highest marginal return. Princes and governments, with the characteristic short-run goals of politicians, often wished to staunch the flow but were largely unable*

to do so.” The states of Europe were surrounded by other potential competitors, thus establishing a political arena in which every state invested time and resources to best its competitors, as this perpetual objective of besting their own neighbours was a driving-factor in terms of innovation, whereas – for example in the far east – large empires, despite their neighbours could be more technologically advanced, had little incentive to innovate, as long as those neighbours did not prove threatening. The laws of some major German cities, during the HRE, were replicated in the new towns which were funded in Eastern Europe between the XII and the XIV centuries (Majone 2014, 269). For instance, the laws of major towns as Lubeck, Frankfurt or Munich were adopted by many other minor German towns. The most astonishing example has been the influence of the legal system of Magdeburg, which spread to over eighty new towns, up to the point that the influences of the *Magdeburger Recht* made it so that it became the basis of written law for Central and Eastern Europe (Berman 1983). Consequently, imitation and learning of best practices across all the continent ensured that despite all the possible cultural differences, English, French, German or Polish everyday rights, liberties and privileges did not differ that much from those of other communities in Europe (Majone, Rethinking the Union of Europe Post-Crisis: Has Integration Gone too Far? 2014, 268). The checks and balances of medieval Europe, mainly constituted by the Holy Roman Empire’s states, and thus by German states, were provided by this spirit of imitation and competition of different polities Napoleon once again shuffled the cards in play, in few military campaigns he drastically reduced the number of political actors within the German sphere of influence, secularising the ecclesiastical states and merging the smaller ones into medium-sized polities, big enough to be independent from Austria, not big enough to be threatening to France. As if it were not enough, Napoleon even put together those newly-formed German states into a confederation, the *Rheinbund*, which was *de facto* a French protectorate. This short yet meaningful experience fed those very German states with the first ideas of German nationalism and the seeds of legal and political harmonisation have been sown. Shortly after the European political arena changed again, Prussia became a primary actor and established its position as hegemon of North Germany. After 1871 the German Empire was born on the vestiges of federalism with Bismarck as architect. The system shifted from a confederative to a more centralised asset, yet through the *Heimat*, local and “Germanic” identities came to be complementary one to the other. After the end of

World War I the federal asset was considered irreplaceable, and was thus maintained. Only the Nazi regime was able to suppress the idea of a “federal Germany”, by depriving the *Landers* of their autonomy and replacing the old system with a new one, centralised and dependant on the political mechanics of the Nazi party. Finally, the end of the war sanctioned the end of the centralist system, as the Allied forces agreed on maintaining the federal asset of the *Landers*. When the German Federal Republic, West Germany, was established, the principle was of a unitary state fragmented in many *Landers* which served as a countercheck to the central power. Due to the totalitarian nature of the communist regime, however, things with East Germany went differently, as the *Landers* were swiftly replaced by politically (SED) dominated districts. Again, with the reunification of Germany the federal system imposed its hegemony in German politics once again. A driving factor for the evolution of federalism has been constituted by the European Union. The process of Europeanisation slowly deprived the *Landers* of many of their competences, without increasing the participation of the regions to European policymaking. This process triggered a series of institutional bargains between the peripheries (the *Landers*) and the centre (the *Bund*). The result was a success for the *Landers*, as a series of joint decision-making institutions between *Länder* and *Bund* level came to be established, allowing the *Länder* executives and the *Bundesrat* to enjoy an effective role in European policymaking and policy implementation. In this regard, the German experience not only taught the value and resourcefulness of a system of *cooperative competition*, but also how extensive institutional autonomy is able to stimulate a context in which the regions are able to interconnect with the Union either by circumventing the domestic dynamics entailed by national politics, and by bargaining for a more inclusive role within the policymaking process. *Who are the Germans?* The beginning question this time brings on another topic: *Who are the Europeans?* It is likely that as in the former case, only time and experience will tell. Nonetheless Germany and the Germans are cumbersome constructs, result of ages of history, conflict and cooperation, similar and yet different, firmly attached to their local identities and yet keen on accepting the *Heimat* construct, the idea that local and national, that the part and its whole are essentially intertwined by their own nature. The same goes for Europe, and the Union, a complex of states with different culture, languages, societies and economies. Nevertheless, the history of Germany, which is

the history of Europe, as well as the Swiss example called for the acknowledgement of the many differences as it is the roots for the success of confederal experiments. In order to achieve the goal of a perfected European integration, it has been suggested to reform the institutional assets of the member states in the direction of looser institutional autonomy. As the research question of this work wishes to inquire, “how can the EU build from this stalemate?” the stimulus and examples have already been provided, what is needed now is a radiography of the state of things in Europe in the light of the previous chapters, which will be provided in the next, final, part.

IV – Final Remarks

IV.I Quo vadis, EU?

Where is the European Union heading? How can it recover from its setbacks? The EU is the most ambitious political project in recent history, filling the critical juncture of the post-World War II order by enabling European states to cooperate and grow together. In the previous chapter, the virtuous process of cooperative competition has been described as one of the major driving forces behind Europe’s standing at the centre of the past world order. Economic regulation has been and still is one of the main competences of the European Union, altogether with the member states. As it has been stressed by Paul Stephan (2000), in the case of regulation, competition can exist in a cooperative framework allowing different regimes to coexist and encouraging potential subjects of regulation to choose which regulation regime they desire to follow. This phenomenon has been observed in the German history through the previous chapter, of which the *Magdeburger Recht* is a primary sample, but it has also been reported by others (Jones 1987) as the cornerstone of European prosperity. The process of European integration, during its course, has been blamed to have neglected this pivotal element of European history, the crowning of the success of the diversity over the homogeneity. In fact, the founders of the EU, during the integration process, have been heavily conditioned by the dynamics of the nation state up to the point that relevant part of the European Union has been based on statehood to the supranational level. Revealing of this behaviour has been the preference for policy harmonisation, imputed to be one of the major factors behind the crisis of the euro (Majone 2014, 269). Said harmonisation reached excessive levels of uniformity to

even challenge pre-existing federations like the United States or Canada (Breton 1996, 275-6). The philosophy of a top-down centralised harmonisation, which can be considered as a derivative of the principle of *integration through law* has been the cornerstone of the Single Market, under the understandable aim to avoid regulatory competition in order to prevent an excessive fragmentation in *bits and pieces* (Curtin 1993) of the system and thus unpredictable effects of competition. It is also more than understandable how such uniformity can be a key element of EU law, economic integration between different heavily regulated economies without any major constraint over them would have been impossible to attain, thus the need for harmonisation in economic and market policies (Majone 2009, 96-7). Both Switzerland and Germany are two nations in which much of the central regulation tended to be devolved to the cantons or the *Landers*, from certain taxes to certain provisions of the law, thus allowing to those regions to compete both in economic and in juridical terms, as they are allowed to give a choice to economic actors regarding where and how they can conduct business. Generally, this has been the case, to a certain extent, of the member states, which are allowed to “compete” by establishing different legal and taxations system, thus deciding how to manage their approach and attractiveness to economic actors. Positive integration – so to say, harmonisation – should not be deemed as an absolute evil, but rather as a powerful tool and as such to be used with caution. It is in fact undeniable that harmonisation in certain areas such as health, safety, environment and in other areas as well was needed in order to avoid “races to the bottom” and social dumping of the sort. Concerning the actual asset of the EU and some of its member states, federations and – more generally – decentralised assets are more capable of managing exogenous shocks than unitary assets as they can better respond to the different needs and preferences of their segments of population (Breton 1996, 247). Therefore, it is recommended to those who wish to debate over an overhaul of the EU through further harmonisation that the Union, instead of mimicking a quasi-federal state (with all the consequent tensions with the member states), should focus on monitoring the member states to ensure that the common rules that have been set at both the intergovernmental and supranational level are duly respected. All in all, the European Union is a way in between a centralised system and a confederation, mainly due to the compromises which have been accepted over the years to reach the current state of the things. Political power came to be fragmented, within the member states

(European Council and Council) and in the Commission. Therefore, a more functioning and effective Europe would need to see sorted out the sources of that very political power, rather than increasing their pervasiveness. On this matter, generally speaking, Sergio Fabbrini (2015) seems to have perfectly framed the issue “*The euro crisis has led the EU into a constitutional conundrum. The different perspectives on the EU have ended up contrasting, if not obstructing, each other. The EU cannot go back, but it cannot also go forward. Here resides the conundrum with which the euro crisis has suffocated the EU.*” (Fabbrini 2015, 285). The eurozone crisis shed light upon the inconsistencies of the current order of the Union, first among the others that there is no way out from this institutional deadlock if the economic union is not redressed by a mature political union. The current state of things is a given, taking into account that it is the result of many, probably too many, political compromises which led to a *disorganised-speed-Europe*, output of a sequence of legitimate political bargains which prioritised the interests of a state over others, and over the Union as a whole. Such a critical outcome cannot be anything different from an output of a process of integration partitioned under the principle of the *fait accompli* and political optimism, which often led to overlook technical and long-term consequences as long as short-term gains could be obtained (Majone 2014, 50-9). That is the kind of background which led us to the actual constitutional conundrum, and it can be the appropriated situation to call for a new political order in Europe. A positive, yet incomplete step has been the 1992 Maastricht Treaty, which officially gave a form the economic union, and established it within an institutional framework. However, it stressed again, like any Treaty since the Treaty of Rome, that the European Union could not be limited to be a purely economic organisations, entailing a political dimension. Nonetheless, the politics of the EMU, despite being part of the *acquis communautaire*, had to accept certain opt-outs before fully being enforced. The opt-outs of Denmark, the UK and Sweden from the euro are primary example of the growing differences and heterogeneities that the Union has cumulated over the time, which consequently made the institutional conundrum more and more tangled. On the other hand, it has been the price for a tool which has been illustrated in the EU chapter: enhanced cooperation, introduced with the Amsterdam Treaty in 1997 and further strengthened by the Lisbon Treaty (TEU, article 20 and TFEU, article 329). Enhanced cooperation has already been described as an interesting tool, it must be established

between a minimum of one-third of the member states (thus nine, at the moment) which are then allowed to cooperate without involving other member states (which are free to join that *avant-garde* of cooperating states) with the approval of the Commission, the Council and the European Parliament. In the end, enhanced cooperation has been the clause to satisfy the needs of those member states which were eager to engage further integration without seeking an IGC and a unanimous approval all the time such engagement was sought. On the other hand, the opt-outs represent literally the opposite, they represented that common feeling of some member states which wished to be part of the European integration process, but with a different pace and in a different way. Nevertheless, the enhanced cooperation tool, as distinct from other flexibility tools such as the opt-outs and ad hoc international arrangements has never been used that much, presumably because of the strict conditions imposed by the Treaties to make use of it. (Majone 2014, 228). Among all the opt-outs, however, the one of the euro has brought significant implications. What has happened is that the price for a long-term institutionalisation of the EMU has been a more divergent economic union despite its harmonisation being an objective of the treaties. One of the consequences, of which the eurozone crisis have been the trigger but not the root cause, has been a change of equilibrium within the Lisbon's institutional order, which was based on the balance between supranational and intergovernmental institutions. In fact the Lisbon Treaty officially recognised the European Council as that part of the "European" entrusted to define the aims of the integration process and the political objectives of the Union in terms of principles, but on the other hand it managed to erode the powers of the Commission (Curtin 2014, 7) becoming a new centre of EU politics (Puetter 2013). Moreover, the European Council extended its scope outside any possible check from the European Parliament: during the crisis important policies have been enacted either through intergovernmental treaties (e.g. SRF), which envisaged no place for the European Parliament. Taking the guise of the devil's advocate, it was difficult to imagine a role of the Parliament if those new organisations and treaties have been set up only by some member states (Heffter and Wessels 2013) as a sort of enhanced cooperation *sui generis*. Nevertheless, as previously outlined, such relevant provisions did not find neither the check of the EP nor the one of national parliaments, which is also the paradoxical nature of the intergovernmental nature of the Union: the power is within the hands of domestic governments, where the most

powerful in influencing the agenda are those with the least control of national parliaments. As stressed by Habermas (2012, 44) despite the political power is concentrated in the European Council and its decisions lack legal force, nevertheless those very decisions have far-reaching implications and consequences which lack legitimacy. Lastly, it has to bore in mind the role of the Fiscal Compact. Altogether with the European Semester, the Fiscal Compact increased the technical scope of the Commission, as supervising entity. As seen with the Irish example, financial aid to member states unable to comply with the strict rules of the TCSG was based on certain conditions which had to be accepted, thus reducing the decision-making autonomy of those very states; as extreme instance of this phenomenon, Ireland, as we recall, needed to have its budgetary law approved by a foreign parliament. The consequence is that this intergovernmental EMU, within the crisis, saw the maximum widening of the distances between some member states and the Union, and even between groups within each member state and the EU itself (Fligstein 2010). The ending result has been a reduction of autonomy for the less economically solid member states and an increase in mistrust of many citizens and political actors within the European institutions. All in all, the eurozone crisis has proven that the indirect legitimacy upon which the intergovernmental EU is based, is insufficient to justify coercive powers deriving from a technocratic and judicialized policy regime, instead of being the result of a devolution by the member states to the EU (Lord 2011).

IV.II Out of the conundrum.

Maastricht has institutionalized two unions, as it has been portrayed in the EU chapter: a supranational EU and an intergovernmental EU, later legitimized by the Lisbon Treaty. Both the unions have coexisted sharing the same objective, integration, but in different ways. In the case of intergovernmentalism integration is pursued through voluntary cooperation, namely the entire process of integration is conducted by the member states and directed by some of them, using the European Council and the Council as primary institutions to dialogue with the EU. This system, which found its legitimacy – so to say – in the results it could achieve, proved ineffective after the euro crisis: integration has been increased, as both the TCSG and the European semester show, but not in a fair and equal supranational direction, but rather into an even more intergovernmental direction, with a growing technical role for the Commission, which

was more and more deprived of its role as *guardian of the Treaties*. Supranational Europe is based on the principle to attain integration through legislation, but also through the creation of common identities, cross-national party coalitions (thus increasing the “European” scope of the European Parliament), and through the free cooperative competition between the member states. Germany has taught that there is still room for supranationalism without substituting national identities, but rather than using them as vehicles of growth and positive competition between member states. However, the supranational perspective has principally developed through the increasing role of the European Parliament in the processes of the Union, thus embracing a parliamentary direction. Nevertheless, the euro crisis has made quite evident that first of all the European Union is a union of different states, with so many different instances and needs impossible to be managed by a lone parliamentary supranational EU. All in all, the euro crisis has put an end to the precarious equilibrium of the Maastricht compromise, since from being based on the expectation that the supranational nature of the EU would have prevailed over the intergovernmental union it saw the realisation of the opposite, leaving the current asset of the Union unable either to take some steps back or to further integrate. Switzerland and Germany have been two pretexts to frame one of the main issues that has come to light after the euro crisis. Europe is facing two major issues: excessive centralisation in some key domains (even way more than in a federation) and a level of internal diversity in some domains which may lead to even more instability in the future (Majone 2014, 113).

Regarding the idea of Europe *à la carte*, it certainly looks more flexible and robust than a two-speed Europe, but it would imply giving up the goal of European integration altogether. It has already been noted out how the idea of a two-speed Europe despite being appealing, there are some doubts on whether the institutionalisation of an *avant-garde* distinct from the member states may be attainable or desirable (Majone 2014, 292-3). On the matter, neither would the institutionalisation of an EU based on clusters of policy circles, a *multi-speed Europe* prove an effective solution. Clearly it would help sorting out a fragmented European legal order, but it would leave untouched the intergovernmental union, that very intergovernmental EMU which failed to address the euro crisis effectively (Fabbrini 2015, 270). The most pragmatic solution, in a first phase, might be a major reform of the Treaties aimed at sorting out the institutional divergences in the internal market

which are *de facto* occurring. The major idea would be to institutionally outline the euro-area on one side and the regulatory frame of the single market on the other, the two institutions would remain within the European Union, but they would have different institutional assets and frameworks in order to not interfere the one with the other. The euro-union would be thus able to further pursue integration in the way it desires, while on the other hand a simplified Treaty would offer to all of the EU members the provisions to make use of the internal market. The institutions at the core of the supranational EU, Commission, Parliament, Council and European Council can be the bases around which organise the future framework of this new EU. The final aim would be to give to those states who recently joined the EU and have domestic reasons to refrain from further integration the way to take their time in enjoying the benefits of the Union and join the “political club” when the times are ripe. By digressing on the economic side of the euro crisis and its consequences, it has been noted that the institution of the ECB left a political vacuum in which the euro member states found themselves with a currency that they cannot fully control (Soros 2013). In the mentioned essay, Soros concludes that the finalisation of the banking union and the establishment of the Eurobonds would be structural reforms necessary to save debtor countries from predatory behaviours and to establish a climate of financial stability within the EMU, thus pursuing the idea of integration of cooperative competition supported by this work and, among the others, by Majone (2014, ch. 9-10). As stressed throughout all of this work, Europe and the EMU in peculiar need not only to increase their effectiveness but also their legitimacy, in order to do so the possibility of treaty reform is likely. Likewise, the recent results of the 2019 European Elections offered a European Parliament more fragmented than ever. Despite not being that fragmented to entail a political revolution, it made clear that the majority of the member states are advocating and requesting a change of pace, from those in which Eurosceptic parties came first (France, Italy and UK), but also in all of Europe member states. Taking into account this desire of reform, a confrontation on the matter seems unavoidable. The new intergovernmental treaties such as the Fiscal Compact showed on one hand that sorting out the order of the eurozone outside the perimeter of the Lisbon Treaty is possible, but not desirable, given their democratic deficiencies. Many think-tanks advanced the proposal of a euro-political union (among the others: CEPS 2014; Group Eiffel Europe 2014; Spinelli Group and Bertelsmann Stiftung 2013), as

well as scholars (Kelemen 2014; Somek 2013). However, their proposals entailed using the Fiscal Compact and the intergovernmental treaties as the bases for the future euro-political union. On the other hand, Sergio Fabbrini (2015) advanced the proposal of a *political compact*, to recompose the two realities of the supranational and intergovernmental union in a common direction. Without the institutionalisation of the decision-making structure of a union of states, in fact, there is no space for order or prosperity; the crisis of the intergovernmental union showed the eventual drift that could arise. Yet, it does not mean that the intergovernmental union should be dismantled, rather intergovernmental institutions (Council and European Council) should be put in the conditions to operate in concert with supranational institutions. Indeed, the supranational union and its institutions should guarantee the effectiveness and legitimacy of the intergovernmental outputs. On the matter, the idea of compound union, namely a system of checks and balances between intergovernmental and supranational institutions, both on the horizontal and vertical level. After all, institutional experience, as we saw in this work in Switzerland and Germany, but also as the United States teach, the principle of separation of powers is able to consolidate and strengthen federal unions. In Germany this resulted in a stronger participation of the *Landers* in the policymaking at European level and veto powers on the legislative margin for manoeuvre of the *Bund*. In Switzerland it has been translated into a constant check of the peoples and the cantons on the central administration. Were the European Parliament strengthened both in its European and parliamentary scope, the four political institutions of the Union could be the core of the new euro-political union. According to Fabbrini (2015) this would entail: a) recognising the role of the Euro-summit as the “European Council” of the euro-political union and maintaining its collegial nature; b) strengthening the coordination between the president of the Euro-summit and the president of the Commission, institutionalising a dual executive system; c) reinvigorating the special relationship between the Commission and the EP, but keeping the political element of the executive within the Euro-summit’s presidency; d) extending the role of the EP and the Council in the co-decision mechanism to all policy fields and increase their role as supervisor on the dual executive; e) granting to the ECJ the judicial review over all decisions taken by the euro-political union, as a Supreme Court; f) strengthening the vertical relationship between the centre and the member states. To these points, in the light of this work

and other suggestions, two additions would be recommended: a) render the MEPs more able to influence the policymaking process by enhancing the informal trilogue mechanism; b) establish a full-fledged banking union, with Eurobonds and the ECB-ESM as lender of last resort. This would allow to give to the euro legislative and political institutions the tools to address crippling economic crises within the euro member states. On the other hand, the internal market would be open to all those European states that have shown interests in it, with certain macroeconomic and microeconomic criteria to join. This would constitute an answer to the increasing divergences owed to enlargement to the east of the Union (Majone 2014). Nevertheless, as it should be expected, this solution may look good on paper, but it would require political will and leadership to succeed, qualities that seem to lack in the political spectrum of Europe nowadays, giving especially how Germany proved to be an *Hegemon wider Willen – unwilling hegemon* (Schoenberger 2012). In fact, while Germany proved to be a hegemonic power in Europe, due to the dimensions and solidity of its economy and its politics, on the other hand it refused bear the duties and burdens deriving from such a role. Moreover, it is also true that certain political elites may be hostile to the idea of reigniting a new European constitutional debate. Given that the pre-existent of a *demos* is the existential condition to develop a state and thus a democracy, the same goes for the Union. We stressed within the German chapter the idea of *Heimat* as polity-making. Once again, the suggestion is not to foster a single European *demos* but to recognise the different European *demoi*, with different languages, cultures etc. and connect them through transnational institutions, media and networks (Risse 2010). Switzerland, on the other hand, has built its identity and institutions from this suggestion, through a *political compact* after years of confederacy, after a short-lived nationalistic experience. As a compound union the Swiss constitution laid out the tools for further integration, by recognising the differences of its cantons and transforming them into its strength. This, again, would require the action of a political elite, starting by declaring the setbacks of European integration, which has been successful, yet not perfect, and the European peoples are well aware of it. Thus, a *political compact* like described above and in the case of Switzerland, is necessary as source of legitimacy of the new Union (Harbo 2007) and it should not be a mere Treaty, but something more encompassing (Pernice 2008-2009), consecrating the role of the member states as the guardians of the sovereignty of the

European *peoples*. As a rule of thumb, that *coalition of the willing* before starting the elaboration of this new Treaty, should agree on deciding by super-majority and not unanimity, given the consequences such a voting principle has always brought to European treaties, one of the very sources behind the current institutional deadlock of the Union. Until the Lisbon Treaty the not so unexpected paradox has been, as it has been noted, that one country alone could veto the entire process of approval of a new whole Treaty (e.g. France and the Netherlands for the CT, Ireland for the Lisbon Treaty). The joint decision trap (Scharpf 1988) has impeded the process of European integration for far too long. The same goes for the referendum. It has been stressed how useful they have been in the Swiss example, and is opinion of the author that they are indeed an useful tool to propose domestic participation and transnational political participation, however they should not jeopardise the stipulation of agreements (Hobolt 2009) or they would prove ineffective and, in the long run of their far-reaching implications, even source of illegitimacy. Moreover, a constitutional document needs some provisions to allow a feasible reforming process: compound unions are able to consolidate only when they are able to adapt to changes; a non-unanimous amendment procedure is in fact necessary to neutralise the tyranny of the majority and attrition between the existing member states (Fabbrini 2015). Finally, the euro-political union would need a *political compact*, namely a founding treaty with the authority of a constitution, while the single market a rather functional text, more practical than symbolic. This process is seen as the only pragmatic approach to the current institutional stalemate. The new institutional model deriving from these two treaties would finally address the issue of constitutionalising the euro and non-euro member states; secondly, it would recompose the fragmented supranational and intergovernmental unions, shattered by the crisis and the mistrusts of the citizens, the deriving entity would be able to neutralise the excesses of the intergovernmental union, avoiding any technocratic or hierarchic drift, while on the other countercheck supranationalism by defending the indisputable decision-making making role of the member states. Lastly, all members of Europe, from the euro-political union to the single market, and their polities should be connected as much as possible, in order to preserve the *compoundness* of the system.

Conclusion.

The times are ripe for reform, and alibis cannot hold up anymore in European political elites, in the opinion of the author it is not anymore a question of national interests, it would go against the national interests of the member states to further procrastinate a fair and square debate over the future of the union. The coexistence between these two flexible unions is surely an ambitious progress and given how the European Union is the most ambitious political project of the century, it is a non-negotiating principle. It is not plausible nor credible anymore that further integration will happen through spillovers or new directives or regulations, on the contrary, they could only increase the dimension of the current problems. More pessimistically, the German and Swiss example showed how such *political compacts* and institutional revolutions are the result of the acts of few, political leaders, representing masses; from their ability to be recognised as representatives of the people derives their legitimacy. Within this work, Switzerland has thought that as long as constitutions are able to be vehicles to drive and funnel change, they can be accepted by minorities and be the output of supermajorities. Moreover, compound unions are able to survive and strive only when they are based upon these prerequisites. The same goes for the United States which, like Switzerland, is a compound union which is not paralysed by the unanimity criterion to adapt its constitution to change. Finally, separation of powers both on the horizontal and vertical level, keeping a relatively weak centre, is the necessary condition to preserve the institutional importance of all the actors of the Union, the member states, the European Council, the Council, the Commission and the Parliament. The future of Europe is in the hand of those who will be able to preserve the spirit which led John Stuart Mill to describe the continent and its polities: *“What has made the European family of nations an improving, instead of a stationary portion of mankind? Not any superior excellence in them, which, when it exists, exists as the effect, not as the cause; but their remarkable diversity of character and culture. Individuals, classes, nations, have been extremely unlike one another: they have struck out a great variety of paths, each leading to something valuable; and although at every period those who travelled in different paths have been intolerant of one another, and each would have thought it an excellent thing if all the rest could have been compelled to travel his road, their attempts to thwart each other's development have rarely had any permanent success, and each has in time endured to receive the good which the*

others have offered. Europe is, in my judgment, wholly indebted to this plurality of paths for its progressive and many-sided development.” (Mill 1859, 136). And while it is not politically sure if such political elites will rise again, it is sure hope of who is writing for it to happen.

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Summary

The European integration project, which led to the European Union, has been the most ambitious political project of the last 100 years. After the end of World War II, the European Coal and Steel Community (ECSC) established by the Treaty of Paris in 1951 was a project aimed at rebuilding a disrupted Europe from the ruins of the conflict. Accordingly, the context imposed a redefinition of the relations between the main European States, first and foremost France and West Germany. This work will analyse and go through all the steps of the process of European integration until nowadays, taking in consideration the successes and setbacks of the Treaties finalised over the years. Secondly, the institutional, political and historical experiences of Switzerland and Germany will be seen. They both represent cases of former confederations or group of different states which chose to merge together in different forms and with different consequences. The Swiss example, in its confederative phase, holds many elements in common with the actual state of the art of the Union, and may offer some useful inputs to envisage a way out of the actual institutional stalemate of the EU. Despite Germany having a background characterised by a common language, the German states which founded the German Confederation before and then which became members of the German Empire were divided by cultural features and religious beliefs. The great success of the German unification has been the process of identity-construction represented by the *Heimat* (German for “homeland”), the idea that localities and regions could emphasise their historical, natural and ethnographic uniqueness, a common denominator, which allowed to the German states to perceive their common identity as complementary to their local one. Furthermore, Germany has been the stage of two global conflicts and one of the main theatres of the Cold War: the country had to wait until the 1990s to be reunited. The new institutional asset of Germany was characterised by a remarkable role of the federated entities, the *Landers*. The process of European integration, however, eroded their constitutional prerogatives, and new settlements to give to the regions a renewed role within the German policymaking mechanism had to be (and was indeed) found. Both examples showed how a long process of identity-building has been established in two different ways, either thanks to the Napoleonic influences (in the Swiss case) or thanks to the *Heimat* principle and German nationalism in its respective case. In both cases, the final result was the output of a long and anguished process, with its setbacks and peaks of tension.

Nevertheless, Switzerland overcame a civil war resulting from a coalition of cantons trying to break out of its institutional stalemate, while Germany had to face a cold war before finding a quantum of solace. All in all, they both showed how excessive intervention from central authorities to the detriment of regions or cantons without giving them a way to influence the process of policymaking and without a fair burden-sharing leads to the ultimate erosion of internal stability in federal orders. In conclusion, some elements from the works of Giandomenico Majone and Sergio Fabbrini will be taken as core-concepts, attempting to find a way out of the institutional stalemate in which the EU finds itself. The moral source of European integration resided in the need to avoid further wars and ideological divisions on the continent. The idea of a Community came from a Frenchman, the then Foreign Minister of the French Republic, Robert Schuman, who in May 1950 proposed a pooling of coal and steel resources, the crucial point of its declaration was “*The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe.*” The consequence of this project, the *Schuman Plan*, was the European Coal and Steel Community, the first European organisation which involved a relevant degree of devolution of sovereignty to a supranational authority. With the security of Europe provided by the US and NATO, European countries could focus on the process of integration and further establishment of common institutions. With time, the ECSC evolved, and other institutions were born by *piggybacking* the existing ones. The ECSC was, in the eyes of its institutional fathers, the opening phase of the process of European integration, the first step towards a deeper union. Some attempts towards a common management of European defence have been effectively made, with the European Defence Community and the French *Pleven Plan*. However, the project, which would have involved a re-armed role for the German army, failed by the hands of the French parliament in 1954, that could not envisage a revamp of the *Bundeswehr*. Nevertheless, the process of integration did not stop, as the two Rome Treaties of 1957 established the European Economic Community and the European Atomic Energy Community. The integration proceeded on both the economic and the energetic sides, in terms of security it was kept on hold and managed by NATO. Nevertheless, this was, to say, the first “compromise” which made the process of European integration less spontaneous, concealing the need for greater integration. The Treaty of Rome

officially inaugurated the process of merger of many European international relations into a single European polity. To do so, intergovernmental agreements were necessary, but insufficient, an external, supra-national constraint was necessary to make the structure effective: in the provisions of the Treaty of Rome, supranational institutions were considered as a guarantee to protect the entire EU from rivalries and instabilities coming from within the member States. As the organisation of the EEC ranged over an extremely wide range of policy areas, the provisions of the Treaty of Rome were far more complex than those of the ECSC. It has been made clear that it was intent of the Treaty to establish a common market, defined in the “four freedoms”: free movement of goods, persons, services and capital. Moreover, another objective of the Treaty was to lay down the conditions to harmonise national economic policies and develop common policies; the idea to create a more embedded community, something more than a common market was the political aim of the Treaty was manifest from the beginning. The EEC developed from the ECSC, establishing an institutional model that combined two different interests: the national interests, represented in the Council, intergovernmental and decision-making body, and the European interests, represented by the Commission and its monopoly of the right of initiative. Those executive bodies were faced by an Assembly, today known as European Parliament, which at the time held little power and was not even directly elected until 1979. The final major EEC institution was the European Court of Justice, which swiftly became – altogether with the Commission – the most committed institution to the European project. Last but not least, it is worth reminding that the European Court of Justice (ECJ) also became one of the main motion forces behind the integration of European integration beginning with two sentences: in 1962 *van Gend en Loos*, which established that European law has a direct effect on individuals and firms, and, in 1964, *Costa v. Enel*, which established the principle that European law is superior to national law. These two sentences allowed the Commission to define a better structured supra-national regulatory regime vis-à-vis the member States. The *Dassonville* (1974) and *Cassis de Dijon* (1978) rulings further reinforced the single market, by preventing member states from discriminating foreign goods produced in accordance with the standards of another member state. It could be said that the ECJ managed to put the process of European integration forward in areas in which the member states were too jealous of their prerogatives to give them up. In 1965 the Merger Treaty fused the ECSC, the

EURATOM and the EECS into the European Communities. As time went by, major changes in the structure of the Union could be witnessed only with the retirement of the French president Charles De Gaulle in 1969, as he was a fervent supporter of the idea of a “French” driven European integration, which inherently implied no relevant and spontaneous role for other member states or membership candidates, like the United Kingdom. Nevertheless, the Union managed to enlarge, with Denmark, Ireland and the United Kingdom in 1973; Greece in 1981, Portugal and Spain in 1986; Austria, Finland and Sweden in 1995; Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004; Bulgaria and Romania in 2007 and Croatia in 2013. Pivotal for the success of this process has been the establishment of the European Council in 1974, a political summit between European leaders, in which the very agenda of the European integration was set; for instance was thanks to the European Council that the leaders of the Union agreed to implement the direct election of the European Parliament. The next substantial institutional upgrade was the Single European Act of 1986, which set the establishment of a common market by 1992 as a priority. The SEA represented a change of paradigm, enhancing not only an harmonisation in the enforcement of the four freedoms, but a follow-up to the intense judicial activity of the ECJ, which, in the meanwhile, established the supremacy of EU law over national law and a progressive favour of an harmonised integration and promotion of the free movement of persons, goods, capitals and services. The SEA committed its members not only to establish a fully operative common market by 1992, but also to cooperate on the convergence of economic and monetary policies, and in terms of social policies. The use of qualified majority voting in the Council was extended, thus departing from the deadlock of the Luxembourg Compromise. A Court of First Instance to assist the ECJ was created, a formal reconnaissance of the European Council was given altogether with an extension of the decision-making role of the European Parliament. The EP was granted the power of reject EC enlargements and international agreements, its consent was required for all those pieces of legislation aimed at completing the single market, thus establishing the so called “cooperation procedure”. The procedure envisaged a cooperation between Council and EP, that began to act steadily more and more as a higher and lower chamber of a parliament. The powers of EP have increased steadily since the direct election of its members was implemented: as MEPs became directly elected, they

demanded more and more involvement in the EC policymaking, in order to deliver some results to their constituencies. The SEA gave form and consolidated the process of “Union-building” which began with the Rome Treaty, but needed a follow-up just few years later, with the end of the Cold War (conventionally set with the fall of the Berlin Wall in 1989 and dissolution of the Soviet Union in 1991), thus creating a new critical juncture. The end of the Cold War, among the other things, made possible the reunification of Germany, which prompted European national leaders to establish a tighter institutional framework in order to keep in check the reunited German Republic, the solution adopted was the Economic and Monetary Union (EMU): the surrender of the German Deutschemark was considered as a condition to make possible the reunification of Germany. Thus, the intergovernmental conference (IGC) held in Maastricht in 1991 was the beginning of a new chapter in the history of European integration, by bringing to light the Maastricht Treaty, which resulted in the Treaty on the European Union. The TEU saw a reinforcement of the supranational management of the Union, the “Community Method”, according to which is up to the European Commission alone to make legislative and policy proposals, since it is independent it is able to represent the Treaties while doing so and representing the Community in international negotiations. Then is up to the European Parliament and to the Council of Ministers to adopt legislative and budgetary acts, all under the supervision of the European Court of Justice. The TEU was designed to extend the scope of European integration, process furthered by the finalisation of the communities’ merger: the EEC, the ECSC and the EURATOM were finally reunited as a single entity, to be called “European Union”. Thus, the EU saw the institutionalisation of the community method, the EP was recognised as the popular branch of a bicameral, European, legislative. Even if the TEU recognised the supranational approach based on the cooperation between supranational and intergovernmental institutions, the new policy realms of the Union were to be kept under strict surveillance by the member states, thus outside the conventional institutional framework. The TEU in fact introduced different institutional regimes to deal with different policy realms, namely the three “pillars”. Single market policies, the ECSC Treaty, the Rome Treaty, the EURATOM and the EMU were all part of the first pillar. The second pillar consisted of the Common Foreign and Security Policy while the third pillar was names Justice and Home Affairs. These last two pillars consisted of intergovernmental cooperation in which the member

states had the last word on their respective policy areas, while the first was hinged within a supranational framework. This structure survived to many amendments until the Lisbon Treaty, which sorted out and revolutionised the governance of the Union. The most relevant innovation of the Maastricht Treaty was surely the introduction of the euro. The system was mainly a political compromise under an economic-technocratic guise, as for countries such as France the EMU was the opportunity to drop the existing exchange-rate system based on the Deutschemark, with a European-level currency managed by a president and the governors of the member states' central banks. Aside from the geostrategic rationale of the EMU in constraining the prowess of Germany within a European framework, there was also the issue of having its political rationale unacceptable for some EU member states (mainly the UK). The solution was the opt-out regime from the monetary union. The same solution was adopted in the case of Denmark, after the rejection of the Maastricht Treaty in a popular referendum in 1992, then accepted in 1993 thanks to the possibility to opt-out from the need to adopt the euro. The last was an economic compromise. As stressed before, it emerged from the need to balance German's request of a politically independent European Central Bank to manage monetary policy and the French urge to keep the control of economic policies under the check of national political institutions. Nevertheless, few years later, in 1997, the Amsterdam Treaty amended the pre-existent architecture of the Union, which was perceived as mild and incomplete, especially in view of an enlargement. JHA activities were shifted within the first pillar, making the third pillar more focused on police and judicial cooperation in criminal matters; moreover a tool for having some member states pursue enhanced cooperation was introduced and the distance between the EU and the citizens reduced to some extent: the social policy competences of the EU were increased, an employment policy chapter was introduced in the Treaties and competences over consumer and environmental production and transparency were reinforced. Last but not least some efforts towards a better coordination of the CFSP have been done, the "constructive abstention" in CFSP activities was introduced, so that members abstaining from CFSP initiatives voting would not block them as well as the figure of the High Representative for the Common Foreign and Security Policy, yet with a more limited portfolio compared to today's HR. The Treaty of Nice of 2000 was the attempt to complete what has been left undone by Amsterdam, by tuning the composition of the Commission,

capping the number of the MEPs, introducing the *suspension clause* and recognising the European Charter of Fundamental Rights. But the fundamental institutional watershed was represented by the debate which led to the Constitutional Treaty in 2004. The debate of the CT was able to work in a spirit of openness and transparency, yet it was unable to attract the focus of the media and remained anonymous and “distant” from the citizens of the Union: its final result was the Constitutional Treaty signed on October 29th 2004 in Rome. The document was mainly a supranational constitution divided in 4 parts, and represented a potential leap forward in terms of European integration more for the symbolism it adopted than for the provisions it entailed, as they were most likely a reorganisation of the existing norms. Nevertheless, the CT came to be rejected with two distinct referenda in France (53.3% against) and in the Netherlands (61.07% against). The rejection at hand of the two referenda halted the enthusiasm of the European integration process for a while, but not for too long, few years later, under the impetus and thanks to the initiative of the German Chancellor Angela Merkel the successor of the Constitutional Treaty became the new item in the agenda, the 2007 Lisbon Treaty. The Lisbon Treaty gave reorganised the structure of the pre-existent Treaties into the Treaty on the European Union and the Treaty on the Functioning of the European Union (the former Treaty Establishing the European Communities). The former is more symbolic, delineating principles and competences of the Union, while the latter is more practical, outlining the policy areas of the Union, the detailed functioning of its institutions and more generically by complementing the provisions laid out in the TEU. More importantly the QMV policy areas have been extended, based on a double majority of 55% of the member states representing the 65% of the population of the Union. The implementation of the Treaty was initially halted by Ireland due to some concerns over the Charter of Fundamental Rights, which was perceived as a threat to the Irish ban on abortion and principle of neutrality; lastly, Ireland feared to be underrepresented without having a commissioner per member state. These concerns found solace within the authorities of the member states, which agreed to amend the Lisbon Treaty to meet the necessities of Dublin, which later adopted the Treaty. What came out from the debate over the Constitutional Treaty and the Treaty of Lisbon led to the fact that there is no European “superstate”, rather that the European Union is a body dependant on its member states and based on its founding treaties, therefore is natural that any attempt to amend them is bound to bring controversy,

compromises and wearing political processes. From this fact, it can be drawn out that the Treaties are fated to be amended in the near future, either out of necessities arising from the changing times or to escape the institutional deadlock given by the actual hybrid nature of the Treaties. Moreover, the Lisbon Treaty proved to be a new starting point rather than an institutional arrival: nonetheless it is a seamless work-in-progress, a constitutional process, and as the CT experience showed, the non-ratification of a treaty does not necessarily reduce the likelihood of future reforms. Free trade and movement, market competition, antitrust and economic and monetary harmonisation have steadily increased their importance among the competences of the Union. Over time new necessities arose, such as cooperation on security and foreign policy, or improvement of the Economic and Monetary Union, which, on a first moment, were included in the governance of the Union through hybrid decision-making regimes, result of thorough compromises. From Maastricht to Lisbon, the EU came to develop an ever more differentiated political system, in order to gain consensus from the member states, and proceed on the path of European integration. This allowed the EU to adopt different policy and decision-making regimes on both the vertical and horizontal level. That flexibility reorganised and finally institutionalised with Lisbon is both EU's success and shortcoming. Despite the Lisbon Treaty having implemented great part of the provisions of the Constitutional Treaty, it also laid out the conditions for an institutional stalemate, giving a certain set of opt-outs and concessions which discouraged and still discourages many member states from engaging a reforming debate, as it would imply a further and ever closer integration to an higher level, meaning a reduction of the existing concessions. The Union resulting from Lisbon has two natures: a supranational and an intergovernmental, resulting from the dissolution of the three-pillar structure. If the supranational decision-making regime is based on the idea that integration should proceed through legislative acts, the intergovernmental regime is based on the idea that integration should proceed through *consensual policy coordination* between national governments. The intergovernmental model has been characterised as one in which the policy entrepreneurship comes from some national capitals and is elaborated within the European Council, the Council of Ministers is of paramount importance in harmonising the cooperation among member states, the Commission holds a marginal role (compared with the supranational decision-making regime), altogether with the European Parliament, which is ruled out of the decision-

making process as the European Court of Justice. Moreover, this model of decision-making involves a distinct circle of key national policy-makers and politicians and special arrangements for managing cooperation. Nevertheless, despite the process being opaque to national parliaments and citizens, it is able to deliver effective policies based upon joint efforts of cooperation. The coordination of different economic policies among member states of the EU and the CFSP remain the most significant elements of *intergovernmental Union*. member states' governments, which are able to exert their influence within the Council. If as regards the foreign policy the CFSP intergovernmental dimension has been slightly eroded in favour of an increasing role of the supranational regime, using the High Representative as a bridge between the two, in terms of agenda setting within the Economic and Monetary Union, the European Council maintained, if not strengthened a dominant position, thus reinforcing the institutional deadlock between intergovernmental and supranational Union. The Lisbon Treaty inherited the EMU from Maastricht, thus maintaining the centralisation of monetary policy, controlled by the European Central Bank, and the decentralisation of economic policy, meaning that financial, fiscal and budgetary policies remain under the control of national governments which have to cooperate within the intergovernmental institutions of the Union. The principle of coordination of the economic policies among the member states of the Union is stipulated by articles 5.1 and 119.1 of the TFEU. The Treaty also determines the guidelines and objectives of the economic policy which has to be adopted by the member states in the Council, which is also stressed in the article 2 of the charter of the European Central Bank: price stability. Out of technicalities, the TFEU also advocates for contained government deficits and clarifies the need to keep in check the ratio of government deficit and national debt to GDP. Moreover, given the relevance of the ECOFIN in the process of common economic policymaking, it should be stressed that the only partner of which the consultancy and opinion is taken in the utmost consideration is the ECB. In its job the ECOFIN is supported by the Economic and Financial Committee, which supervises the economic and financial conditions of the member states, altogether with the Commission which monitors over the budgetary situations of the member states in order to verify if they are compliant with the parameters laid out by the Treaties, and triggering a sanctioning mechanism with the Council, if necessary. Outlining the fundamental reasoning behind the role of the intergovernmental Council *vis-à-vis* the

Commission is essential to understand a key element of the conclusions of this work: that the intergovernmental Union mismanaged the eurozone crisis. The adoption of the Fiscal Compact at the hands of the intergovernmental Union increased the technical scope of the Commission, thus reducing the decision-making autonomy of those states unable to comply with the strict parameters laid out by the TCSG, the most stressed out example has been Ireland, which saw its budgetary law approved by the parliament of another member state of the Union. The consequence is that this intergovernmental EMU, within the crisis, saw the maximum widening of the distances between some member states and the Union, and even between groups within each member state and the EU itself. The ending result has been a reduction of autonomy for the less economically solid member states and an increase in mistrust of many citizens and political actors within the European institutions. All in all, the eurozone crisis has proven that the indirect legitimacy upon which the intergovernmental EU is based, is insufficient to justify coercive powers deriving from a technocratic and judicialized policy regime, instead of being the result of a devolution by the member states to the EU. Taking in consideration that this “two-Unions” nature compromised the appeal of the EU, and that the eurozone crisis finally put the intergovernmental and supranational Union out of joint, and as Giandomenico Majone pointed out, now Europe faces an excessive centralisation in some domains and a level of internal diversity in others which may lead to an escalating instability. On the matter, this work supports the idea of a *political compact* endorsed by Sergio Fabbrini, which would entail a system of checks and balances between intergovernmental and supranational institutions, both on the horizontal and vertical level. Envisaging a strengthening of the European dimension of the European Parliament, this new reorganisation of the EU implies a recognition of the euro-political Union, formed by those countries who seek to pursue further and closer political and economic integration, and those countries who seek to just make use of the internal market. Concerning the euro-political union, the *political compact* would entail: a) recognising the role of the Euro-summit as the “European Council” of the euro-political union and maintaining its collegial nature; b) strengthening the coordination between the president of the Euro-summit and the president of the Commission, institutionalising a dual executive system; c) reinvigorating the special relationship between the Commission and the EP, but keeping the political element of the executive within the Euro-summit’s

presidency; d) extending the role of the EP and the Council in the co-decision mechanism to all policy fields and increase their role as supervisor on the dual executive; e) granting to the ECJ the judicial review over all decisions taken by the euro-political union, as a Supreme Court; f) strengthening the vertical relationship between the centre and the member states. To those two points, the Swiss and German experiences outlined within this work lead to other two suggestions a) render the MEPs more able to influence the policymaking process by enhancing the informal trilogue mechanism; b) establish a full-fledged banking union, with Eurobonds and the ECB-ESM as lender of last resort. This would allow to give to the euro legislative and political institutions the tools to address crippling economic crises within the euro member states. As per regard with the internal market, it would be open to all those European states that have shown interest in it, thus it would constitute an answer to the increasing divergences owed to the enlargement to the east of the Union. All in all, the solution looks good on paper, but finds little ground for application. This goes, however, for every reforming attempt of the Union, from the most to the least relevant. The Union lacks hegemons or *coalitions of the willing* to shoulder the burden of political leadership, as particular interests are ultimately dominant in the short-term political landscape. However, the Union managed to overcome many deadlocked moments in its institutional experience: in this last case the any coalition willing to reform and give new impetus to the process of European integration should agree on deciding by super-majority and not unanimity, to avoid further and new opt-outs and compromises able to jeopardise the stability of the process. The new constitutional document would need to entail a provision allowing a feasible reforming process: compound unions are able to consolidate only when they are able to adapt to changes; a non-unanimous amendment procedure is necessary to neutralise the tyranny of the majority and attrition between the existing member states. In the end it is still up to the member states to allow some change to take place, but it also goes against their national interests to let the ongoing dissatisfaction with the Union proceed without brakes. The umpteenth demonstration of the growing distance between citizens and the Union has been the increasing growth of Eurosceptic instances throughout all of Europe, with the win of Brexit in the 2016 British referendum, the widespread slogan of all political parties to change the European order during the last European elections, and the slow but steady advancement of *souverainist* instances within the European member states.