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# Self-determination in the constitutional future of the EU

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## SELF-DETERMINATION IN THE CONSTITUTIONAL FUTURE OF THE EU

MARK DAWSON & FLORIS DE WITTE\*

### INTRODUCTION

This article discusses the threat of authoritarian liberalism by looking at the constitutional future of the EU. It does not seek to assess how ‘bad’ authoritarian liberalism is, but how ‘real’ its emergence is. In a previous article, we have argued that in its response to the Euro-crisis, the Union risks destabilizing its commitment to the values of individual and collective self-determination, which are indispensable for its legitimacy (section 1).<sup>1</sup> In this article, we analyse three leading proposals for the re-design and deepening of the European Union that are currently being discussed, and analyse to what extent these proposals address the challenges raised by the specter of authoritarian liberalism, and to what extent they attempt to protect the values of political self-determination that serve to bolster the EU’s long-term legitimacy and stability.

The first proposal, which seems to find most support in Europe’s political elite, can best be described as a Europe based on *executive federalism*, whereby salient choices are made by the executives of (some of) the Member States, and enforced by a depoliticized Commission. This model’s strong pre-definition of the policies the Union should pursue, sidelining of representative institutions and inability to allow for political equality between states makes executive federalism largely a continuation of the de-stabilising reforms of the crisis years (section 2). The second option is one of *differentiated integration*, whereby the relationship between the Member States is to be rewritten, allowing for much further integration for the Euro-zone (section 3). While differentiated integration would seem to offer efficiency advantages, it fails to deal with the need for trade-offs between the substantive goals pursued by Euro-zone states and other EU members. The third and seemingly most ambitious proposal suggest that we should democratize the Union decision-making process. This third route can best be captured by the term ‘*political union light*’, as, despite its attempts to democratise the EU’s policy choices, its aim is not to create a true political union (one that asks its citizens how they want to live their lives) but rather an EU with sufficient legitimacy to force through (rather than debate) the apparently necessary economic restructuring and social retrenchment needed for the euro-zone to survive (section 4).

In keeping with the debate on authoritarian liberalism to which this special issue is devoted, what these proposals carry in common is a resolve to limit, to varying degrees, serious political questioning of the EU’s existing economic and political order. Their common presumption is that significant changes to the Union’s set-up are necessary in order for the Union to meet its objectives, or at least to solve the structural problems identified in their pursuit. At the same time, they do not envisage the EU’s

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<sup>1</sup> Mark Dawson & Floris de Witte, ‘Constitutional Balance in the EU after the Euro-crisis’, (2013) 76 *The Modern Law Review* 5, 817

objectives themselves as open to political scrutiny. In this sense, as Michael Wilkinson has observed, many of the proposals to reform the EU share authoritarian liberalism's concealment of any conflict between democratic self-determination and the functional necessities of the market. Democratic reform – where pursued – is forwarded as a means to embed, rather than contest, the EU's functional and economic goals. In order to side-step these pitfalls of authoritarian liberalism, it is argued, we must focus our attention on inverting this path-dependency: changes to the way in which the Union works should serve to *question* its future direction or objectives; not to set them in stone.<sup>2</sup> A true commitment to self-determination presupposes a normative, institutional and legal structure for the EU able to contest the EU's economic and political goals.

### 1. CONSTITUTIONAL BALANCE AND ITS DISINTEGRATION DURING THE EURO-CRISIS

In a previous article, we argued that the stability and legitimacy of the Union has been undermined by the Member States' responses to the Euro-crisis.<sup>3</sup> We argued, in general terms, that any defensible form of European integration must be able to forward the project of individual and collective self-determination. This centrality of self-determination forms the normative core of the idea of constitutional balance, which is further substantiated, within the Treaties, in three different domains. First, it finds expression in the *substantive* balance between what the EU can do and what Member States should do. As a consequence, the EU Treaties have often sought to insulate the capacity of citizens to decide on salient policy questions (such as redistributive policies) at the national level. The Union's responses to the Euro-crisis have undermined this idea of substantive balance by increasingly making in-roads in Member State autonomy in redistributive, fiscal and budgetary matters. This is most dramatically visible, of course, in the conditionality criteria that debtor states must accept in return for financial support.<sup>4</sup>

Second, the commitment to self-determination is expressed in *institutional* terms by linking the different interests represented by different European institutions – in order to ensure that the diverse views of citizens find expression in the decision making process. The response to the crisis has equally undermined the concept of *institutional balance*, by way of a power shift towards executive dominance. Agenda-setting has moved from the Commission to the European Council – with the former increasingly serving a monitoring role in ensuring compliance with the latter's decisions.<sup>5</sup> Finally, the idea of self-determination is expressed in *spatial* terms, by ensuring equality between Member States regardless of size, in order to protect the spaces for self-determination as they exist on the national level. The Union's response to the crisis has equally subverted this concept. Two of the most notable examples are the requirement that all Member States agree to Treaty amendments, which has been bypassed by way of the use of international law for the ESM and Fiscal Compact; and voting rights in the ESM, which reflects

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<sup>2</sup> See in depth, M. Dawson and F. De Witte, 'From balance to conflict: A New Constitution for Europe', (forthcoming, 2014).

<sup>3</sup> Dawson & De Witte n 1 *supra*, at 817-844.

<sup>4</sup> Dawson & De Witte n 1 *supra*, at 823-828.

<sup>5</sup> Dawson & De Witte, n 1 *supra*, at 828-836.

the Member States' respective financial contributions rather than their status as equal and sovereign political spaces.<sup>6</sup> Overall, we argued, these shifts significantly undermine the capacity of the EU to produce stable and legitimate norms – pushing it towards a model unable to reproduce the mechanisms of individual and political self-determination found at the national level.<sup>7</sup>

It might be argued that rebalancing of the EU was inevitable after the Euro-crisis. The transfer of powers to the Union level strongly suggests that the EU's institutional settlement and its division of decision-making power ought to be re-aligned. In the last few years, the first proposals outlining a new constitutional balance for the post-emergency Europe have begun to emerge. In this article, we aim to use our conceptual framework to scrutinise these proposals. How can the EU alter its functional and normative ambitions yet still maintain some semblance of the overarching structural principles that it carried prior to the crisis? And to what extent are principles of self-determination reflected in the current academic and institutional debate?

## **2. PROPOSAL I: EXECUTIVE FEDERALISM**

The first proposal for the future of Europe – executive federalism – carries the most support from the existing EU institutions. At the same time, its de-politicised definition of the goals the EU integration project should pursue, as well as its restriction of policy-making to a closed circle of executive actors, places it in clear conflict with any notion of the EU as a project aimed at realizing political self-determination.

The report of the '4 Presidents' issued by the heads of the main institutions in December 2012 gives a good indication of how a model of executive federalism could emerge in the coming decade.<sup>8</sup> The very authorship of the report gives a clear indication of who should be the central actors under this model. The report is authored by the Presidents of the European Council, the Euro-group, the Commission and the ECB. Their vision is to develop a 'genuine economic and monetary Union' guided by the need to establish sound and balanced management of public finances.

Substantively, the three guiding reforms demanded are the need to create a common system of fiscal surveillance to monitor national budgets, a common mechanism for the supervision and resolution of EU banks, and finally independent EU fiscal capacity, able to limit financial contagion either of sovereign debt (eg through the funding provided via the European Stability Mechanism) or of private debt (held by failing euro-zone banks).<sup>9</sup>

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<sup>6</sup> Dawson & De Witte, n 1 *supra*, at 836-842.

<sup>7</sup> See, among others, Michael Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', (2013) 14 *German Law Journal*, 527.

<sup>8</sup> 'Towards a Genuine Economic and Monetary Union', Report of the 4 Presidents, 5 December 2012. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/134069.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf).

<sup>9</sup> See timetable of the 4 Presidents' Report, n 8 *supra*, at 18.

Institutionally, these mechanisms follow the model of a triad executive (following the authorship of the report). Along the first track, the Commission is the dominant actor. The Commission's ability to interfere unencumbered into national budgetary processes is strengthened by a number of aspects of the new coordination regime, from the creation of a 'reversed qualified majority' voting rule under the excessive deficit (EDP) and macro-economic imbalances (MIP) procedures (insulating its recommendations from veto) to its heightened ability to recommend alterations to national budgets prior to their entry into force under the 'two pack'.<sup>10</sup>

On the second, banking track, the central actor is the ECB. Under the Single Supervisory Mechanism Regulation, the ECB (and national banking authorities) are to have direct authority, with the assistance of a new European Banking Authority, to directly supervise and implement a common rule book for all euro-zone banks with assets of over 30 billion.<sup>11</sup> On the third, fiscal capacity track, the central executive is national governments under the euro-group, ECOFIN and European Council. In the ESM governing board, only national governments may vote, with the Commission and ECB present as non-voting members.<sup>12</sup>

Dis-enfranchisement of other branches of government is apparent along all three tracks.<sup>13</sup> The European Parliament has no role under the ESM Treaty and cannot of course interfere with the decisions of the Central Bank. The Directive setting up the Single Supervisory Mechanism creates no powers or duties for the EP bar the traditional ability of that institution to be informed of the activities of EU agencies. Finally, the regime for economic coordination gives no concrete powers for the EP to co-adopt recommendations under new coordination procedures.<sup>14</sup>

The rationale for executive control running through these proposals is, on its face, clear. Only executives and governments carry the competence, speed, credibility and legitimacy to mandate and direct significant EU intervention in core state powers such as fiscal policy. To channel such measures through the Union's traditional legislative procedures would constitute a delegation of power to bodies (such as the EP) which lack the levels of public trust required to distribute significant public resources and interfere in sensitive areas of national policy.

The ways in which such a model contravenes principles of self-determination are myriad. To begin at a substantive level, self-determination implies that salient political questions are decided in forums politically accountable to citizens. Traditionally, this was achieved by a separation of national and EU goals, with EU policy explicitly cordoned off from sensitive policy issues. A more modern conception

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<sup>10</sup> See eg Regulation 473/2013/EU of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans, OJ L 140, Art 6-7.

<sup>11</sup> Council Regulation 1024/2013/EU of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63.

<sup>12</sup> Treaty establishing the European Stability Mechanism, Art 5(3).

<sup>13</sup> See C. Fasone, 'European Economic Governance and Parliamentary Representation: What Place for the European Parliament?', (2014) 20 *European Law Journal* 2.

<sup>14</sup> See also European Parliament (EP) Resolution 'Employment and social aspects of the role and operations of the Troika', P7\_TA\_PROV (2014) 0240 of the 13<sup>th</sup> March, which "deplores the fact that Parliament has been completely marginalized in all phases of the [economic adjustment] programmes".

would imply balancing substantive priorities not through the separation, but the open contestation of EU policy. The ability of EU policy to achieve individual and political self-determination is secured this way not through the defence of national sovereignty but through the ability of both individuals and states to pursue their goals in a common European political process.

By contrast, executive federalism's focus on budgetary stability implies a strong functional pre-definition of the goals of substantive reform and institutional innovation.<sup>15</sup> Under the MIP and EIP procedures – as well as the Fiscal Compact - national economies are coordinated with a particular overarching and defined goal in mind – ensuring sound and sustainable public finances. The formulation of European budgetary policy contained in Art. 119(3) TFEU – that national budgets should adhere to the guiding principles of 'stable prices, sound public finances and monetary conditions and a sustainable balance of payments' - is thus continually repeated in the legislation establishing a regime of EU fiscal surveillance.<sup>16</sup> Austerity and fiscal discipline – and in the case of states receiving financial assistance, severe downward pressure on the social state - are forwarded as the only achievable means of delivering sound budgets in spite of significant academic and public disagreement on how a sustainable EMU can be achieved.

In keeping with the model of authoritarian liberalism, law is often used in this context to repress political conflict. Examples of this include the Fiscal Compact's demand on states to place balanced budget rules in national rules of a 'permanent, preferably constitutional' character, as well as the delegation of decision-making authority to actors such as the ECB whose actions are intentionally insulated from political challenge. From the perspective of self-determination, executive federalism seems to restrict rather than open-up the channels through which the substantive goals of integration can be contested.

The challenges executive federalism poses at an institutional level are equally pressing. As already discussed, while both the 6 and 2 packs were passed with the consent of the European Parliament, they mandate a decision-making process in which the parliamentary estate is given highly circumscribed rights. Such an exclusion of the parliamentary branch carries close affinities with what Alexander Somek has described as 'authoritarian constitutionalism'; a form of constitutionalism which 'accepts structures of governance that contain most of the features of constitutional democracy with the noteworthy exception of (parliamentary) democracy itself'.<sup>17</sup>

In terms of the spatial dimension, executive federalism fares little better. Political self-determination also implies some conception of political equality: in the past this has been defined by the need to avoid hegemony of larger over small Member States. Executive federalism seems simply to introduce a further vital dividing line in EU policy-making: between states with and without a positive fiscal condition. While states retain their formal equality, the level of sovereignty to which a state is entitled is increasingly conditional, post-crisis, upon their fiscal health.

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<sup>15</sup> See A. Somek, 'What is Political Union?', (2013) 14 *German Law Journal* 5, 576.

<sup>16</sup> See eg indents (1) of Regulations 1176/2011 and 1177/2011.

<sup>17</sup> A. Somek, 'Austrian Constitutional Doctrine 1933 to 1938', in C. Joerges and N. Sing-Ghaleigh (eds) *Darker Legacies of Law in Europe* (Hart, 2003), at 362.

While, before the crisis, states with excessive government deficits could already be subject to additional obligations and penalties, the executive federalism model takes this imbalance much further, introducing a significant fragmentation of obligations. The revised EDP, for example, establishes different obligations depending on whether states carry a deficit within their 'Medium Term Budgetary Objective' (MBTO). For states outwith this target, not only are particular policy courses ruled out (eg to reduce revenues through cuts in taxation without corresponding spending reductions)<sup>18</sup>, but a new regime of budgetary and economic partnership co-agreed by the Council and Commission is established (an obligation inapplicable to other states).<sup>19</sup> When combined with the even more prescriptive interventions applicable to states currently receiving Troika funding, revised economic governance procedures create a regime of layered obligations with heightened levels of intervention depending on a state's ability to meet fiscal targets.

If self-determination implies a level of political equality between citizens regardless of their state of citizenship, this layering creates an asymmetry between those states whose fiscal performance insulates them from budgetary scrutiny and those whose budgetary, and hence political, autonomy is limited by their insolvency. Executive federalism's model of an ever-more harmonized economic policy, combined with a closed circle of decisive policy actors, seems in tension with a constitution for the EU able to tie the direction of EU policy-making to the desires of Europe's citizenry.

### **3. PROPOSAL II: DIFFERENTIATED INTEGRATION**

A second possibility - designed to foster not uniformity but differentiation in the EU's legal and political order – ought to be considered as a further alternative. While this model seems to offer a way-out of the dilemma of building a more advanced EU project in the face of significant domestic opposition, in doing so, it may in fact re-enforce the tendencies of de-politicisation, executive control and political inequality apparent in the first proposal.

While 'differentiated integration' does not appear in the literature as a single approach, the common core of the idea is expressed by Giandomenico Majone through his conception of EU integration as a project which is turning from a 'collective' to a 'club' good.<sup>20</sup> The collective good of integration is embodied by Jean Monnet's original ideal of an ever closer Union among the peoples of Europe. Integration could deliver significant collective goals – of peace, freedom and prosperity – only if Member States were willing to agree to a permanent but limited surrender of their sovereignty across a limited number of fields. That surrender was justified so long as all members of the club were able to benefit equally from the collective goods thereby produced, and to trust the common institutions needed to enforce collective decisions.

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<sup>18</sup> Art. 5(1)(c) of Regulation 1466/97 amended on the strengthening and surveillance of budgetary positions.

<sup>19</sup> See Art. 5 of the Treaty on Stability, Coordination and Governance.

<sup>20</sup> G. Majone, 'Rethinking European Integration after the debt crisis', (2012) *UCL European Institute Working Papers* 3.

For Majone, the crisis challenges both of these assumptions. The very adoption of the euro – with some states ‘in’ and others ‘out’ - implies significant disagreement about the range of collective goods the EU should deliver.<sup>21</sup> At the same time, the move of the euro zone towards elements of re-distributive politics also questions the assumption that all will benefit equally from EU policies. Finally, the institutional hegemon – the European Commission – lacks the level of trust, authority and respect required to enforce collective decisions on Member States in the fiscal field.

Integration – in the euro-zone at least – should thus, according to Majone, be conceived of as a ‘club’ good. Rather than being open to all, club goods are available only to those who contribute to, and share the costs of, their realization.<sup>22</sup> Clearly this implies a quite different model of integration, with states participating in EU integration not on the basis of an open-ended commitment to trans-national cooperation but to achieve concrete goals in particular domains. These goals themselves – and not the institutions formed to deliver them – will therefore determine the speed and nature of integration.

In practice, two different routes to ‘club governance’ present themselves: one based on a ‘two-speed’ Europe and the other ‘multi-speed’.<sup>23</sup> The two-speed approach implies a division between a core of (most likely euro-zone) states who wish to move forward with the integration process in a number of areas, and a periphery which resists such sovereignty transfers.<sup>24</sup> The ‘multi-speed’ model suggests a more fragmented approach. Assuming that even euro-zone states may have different policy preferences, multi-speed integration implies concentric and overlapping circles of integration. While some Member States may converge around economic coordination, other states may agree to sovereignty transfer on defence cooperation, environmental protection or a host of other areas.

Both of these approaches present significant decision-making advantages. Removed of the need to establish policies that can win the support of a large proportion of 28 Member States, differentiated integration provides obvious efficiency gains.<sup>25</sup> The possibility of avoiding a complicated legislative process, replete with vetoes and in-transparent side-payments to recalcitrant Member States, may drive the desire to narrow down the number of actors involved in decision-making.<sup>26</sup> This may be particularly important in policy areas where rapid and changing regulatory interventions are needed.

From the perspective of self-determination, however, differentiated integration seems to violate core elements. To begin with self-determination at a substantive level, on its face differentiated integration seems to allow Member States the freedom to pursue through integration any policy goal of their own choosing. This may, however, be an illusory freedom. This refers to a common critique of ‘enhanced cooperation’ in the context of the existing Treaties<sup>27</sup> - the successful coordination of one particular ‘club

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<sup>21</sup> *ibid*, 7-12.

<sup>22</sup> *ibid*, 24.

<sup>23</sup> See M. Avbelij, ‘Differentiated Integration – Farewell to the EU 27?’ (2013) 14 *German Law Journal*.

<sup>24</sup> See eg the proposals developed in J.C. Piris, *The Future of Europe: Towards a 2-speed EU?* (Cambridge University Press, 2012), 106-120.

<sup>25</sup> See Piris, *ibid*, 143-148.

<sup>26</sup> G. Majone, *Rethinking the Union of Europe Post-Crisis* (CUP, 2014), 118-124.

<sup>27</sup> P. Craig, ‘Two-speed, Multi-speed and Europe’s Future’, (2012) 37 *European Law Review* 800, 809-810.

good’ might have constraining effects on other ‘clubs’. In this sense, achieving the goals of the ‘core’ might require altering the rules and policies of the periphery (or vice versa).

The heart of this point relates to the internal market. To use the ‘two-speed’ Europe example, a core claim of advocates of this approach is that further integration in the euro-zone can be achieved alongside the equal development of a robust internal market (that would remain a ‘collective good’, equally accessible by members and non-members of the euro-zone alike).<sup>28</sup> A practical example can illustrate the difficulties of sustaining this position. One such example is the Financial Transaction Tax (FTT), a measure led by 11 Member States seeking to tax ‘risky’ fiscal transactions.<sup>29</sup> Such a measure – designed to penalize market behavior deemed at the core of the financial crisis – is surely among the types of measures a ‘core Europe’ could pursue.

Clearly, however, such a measure has implications for the ability of the EU to deliver ‘collective goods’ (such as the internal market) as well.<sup>30</sup> This spill-over capacity was laid bare in a leaked opinion of the Council legal service, following the decision of the UK government to challenge the FTT directive before the Court of Justice.<sup>31</sup> Whereas transactions between participating states would be subject to a fixed set of rules, applicable rates of taxation in non-participating states would vary. Individuals entering into financial transactions with non-participating states would face considerable legal uncertainty as to the rate applicable and even over whether the duty to impose the tax would be implemented at all. By acting as an impediment to the free movement of capital<sup>32</sup>, efforts to realize the ‘club good’ of a more regulated market were likely to impinge on the ‘collective good’ of free trans-national movement. For this reason, the FTT did not, in the Council’s view, respect the EU Treaties.<sup>33</sup>

Looking beyond this example to other possible fields (banking, taxation etc.), the establishment of ever greater disparities between the ‘core’ and the ‘periphery’ is likely to clash with one of the internal market’s core goals: the elimination of disparities in national rules, likely to impede a Europe-wide economic area.<sup>34</sup> If self-determination implies that different ‘clubs’ should be able to realize policy goals of their own choosing, this principle is questioned by the significant externalities differentiated integration creates.

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<sup>28</sup> See eg the November 2011 speech of Nicholas Sarkozy quoted in ‘The Future of the EU: Two-speed Europe, or Two Europes?’, *The Economist* (10.11.2011), available at:

<http://www.economist.com/blogs/charlemagne/2011/11/future-eu>.

<sup>29</sup> Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax COM/2013/071 final.

<sup>30</sup> For a judgment in the context of the Schengen agreement laying bare these difficulties, see Case C-482/08, *UK v Council* [2010] ECR I-10413.

<sup>31</sup> See ‘Europe Financial Transaction Tax Hits Legal Wall’, *Financial Times* (10.09.13). Available at: <http://www.ft.com/intl/cms/s/0/b0a6c7a8-19fd-11e3-93e8-00144feab7de.html#axzz2qPyeZFBu>

<sup>32</sup> Opinion, *ibid*, at [40].

<sup>33</sup> NB: the point here is merely illustrative. The Court’s final opinion partially rejected this argument. See Case C-209/13, *UK v Council*, Judgment of 30 April 2014.

<sup>34</sup> The ‘multi-speed’ option seems little better on this point: see eg the difficulties of negotiating national opt-outs in the field of justice and home affairs in S. Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 2006), 55-63.

Finally, differentiated integration also presents problems in relation to other elements of self-determination. Institutionally, many of these problems have already been discussed elsewhere.<sup>35</sup> It is unclear, for example, how institutions should act and decide when objectives and tasks for the fulfillment of 'club goods' conflict with steps needed to safeguard the policies of the Union as a whole. A more pressing problem, however, may relate to spatial balance. From the perspective of self-determination, clubs can be normatively defended only if states are free and equal as regards their decisions either to enter into clubs or leave them. The experience of differentiated integration in the euro-zone questions this assumption. To take one example, to what extent were states like Portugal, Greece and Ireland free to reject participation in the Fiscal Compact as one example of a differentiated arrangement? Ratification of the Treaty was a condition for access to EU bail-out funding, effectively coercing these states into 'joining the club'.

Such a centrifugal effect could also occur at an informal level. The rush of even non-euro states to ratify the Fiscal Compact could be seen as their reaction to a fear that they would be excluded from future decision-making if they did not follow provisions negotiated by the smaller euro group. The 'spatial' danger here is that differentiated integration allows a core of larger or more prosperous states to create rules and decisions, which others must later apply and follow.<sup>36</sup> Here, the institutional and spatial dimensions inter-relate – the reluctance of states such as the UK and Poland for example, to allow for an official euro-group<sup>37</sup>, can easily be seen as reflecting a fear that such a group will end up voting en bloc in ECOFIN, thus turning the agenda of the 'club' into that of the Union as a whole. Inequalities of power between states – already a problem in the existing Union – could be exacerbated by a renewed focus on a 'core' (where such states are yet more predominant).

Substantively, institutionally and spatially, differentiated integration – like the model of executive federalism – seems to preclude the commitment of self-determination to a European political process in which different citizens and states have open and equal access to the political process.

#### **4. PROPOSAL III: POLITICAL UNION 'LIGHT'**

The third and seemingly most ambitious proposal suggest that we should democratize the Union institutions. The proponents of this approach do not challenge the 'fact' that economic and budgetary decisions must be centralized in response to the crisis, but submit that the process of economic decision-making in the EU should be democratized. While these proposals have much to commend them, they fall far short of a transnational space for self-determination. Reflecting authoritarian liberalism's concealment of democratic choice, democratic institutions are largely utilized under this model to better embed, rather than to contest, the existing substantive and economic order.

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<sup>35</sup> B. de Witte, 'Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty' (2012) *EUI Working Papers (Law)* 9 at 7.

<sup>36</sup> See C. Jensen and J. Slapin, 'Institutional Hokey-Pokey: The Politics of Multi-Speed Integration in Europe', (2012) *19 Journal of European Public Policy* 6, 799.

<sup>37</sup> See EU Observer, 'Poland Renews Attacks on Euro-zone-only Summits', (19.01.2012). Available at: <http://euobserver.com/economic/114945>.

The main proponents of this third option, such as Maduro<sup>38</sup> and Kumm,<sup>39</sup> develop their proposals from a similar starting point. They see two problems with the current set-up of the post-crisis EU. First, the divisive choices made in the economic governance of the EU can no longer be solely justified by reliance on the ‘outputs’ of financial and economic stability but must be supplemented with ‘input’ legitimacy.<sup>40</sup> Secondly, the increasing reliance on *national* actors to represent citizens’ desires in the economic governance of the Union creates significant democratic externalities.<sup>41</sup> In order to overcome these two problems, Europe requires political union at a level beyond the state.

For Maduro and Kumm, such a Union must begin with substantive answers to the current crisis. The crisis embodies the need to establish an ‘economic justice Union’<sup>42</sup> in which the costs and benefits of integration are equitably shared.<sup>43</sup> In order to guarantee this, Maduro and Kumm suggest three broad changes. First, the Union needs an increased budget, “raised from taxes or levies that burdens actors and transactions that are profiting financially from the internal market”.<sup>44</sup> Second, the Union’s resources should be used to secure the “domestic institutional reforms” needed to further integration objectives (eg increasing “academic mobility and internationalization of faculty and student bodies”).<sup>45</sup> Third, the Union needs “a strengthened political authority if it is to become a legitimate and accountable democratic authority”,<sup>46</sup> in particular since “under the Fiscal Compact, the Six-Pack and to some extent even the ESM, the Commission gains considerable powers to intervene in the budgetary processes of Member States”.<sup>47</sup> Like Maduro, Kumm argues that for new powers to “be exercised effectively and legitimately, the Commission must be able to rely on the kind of legitimacy that comes with direct link to the outcome of European elections”.<sup>48</sup> In short, these proposals suggest a new method for Union-wide redistribution – with identified contributors and recipients – to be administered by a Commission whose president is elected via the European Parliament.

When assessed from the perspective of the capacity for self-determination, the proposals by Maduro and Kumm are problematic in so far as they call for a democratization of the *Commission*, but not for a democratization of the *Union*. In substantive terms, such a Union does not allow citizens to be in charge of the question that is at the core of any political project: ‘in what kind of society do I want to live?’<sup>49</sup>

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<sup>38</sup> M. Poiares Maduro, ‘A New Governance for the European Union and the Euro: Democracy and Justice’, (2012) 11 *RSCAS Policy Papers*.

<sup>39</sup> M. Kumm, ‘What Kind of a Constitutional Crisis is Europe In and What Should Be Done About it?’, (2013) *WZB Discussion Paper SP IV*, 2013-801.

<sup>40</sup> F. Scharpf, ‘Political Legitimacy in a Non-optimal Currency Area’, in: O. Cramme & S. Hobolt (eds.), ‘Democratic Politics in a European Union under Stress’ (Oxford University Press, 2014), at 57.

<sup>41</sup> In particular, Maduro, n 38 *supra*, at 3. Kumm’s position is drawn out in M. Kumm, ‘Rebel without a Good Cause: Karlsruhe’s Misguided Attempts to Draw the CJEU into a Game of “Chicken” and What the CJEU Might do About it’ (2014) 15 *German Law Journal*. See also Scharpf, *ibid*.

<sup>42</sup> Kumm, n 39 *supra*, at 17.

<sup>43</sup> Maduro, n 38 *supra*, at 10.

<sup>44</sup> Kumm, n 39 *supra*, at 17; see Maduro, *supra*, at 17.

<sup>45</sup> Maduro, n 38 *supra*, at 18.

<sup>46</sup> Maduro, n 38 *supra*, at 18; Kumm, *supra*, at 19.

<sup>47</sup> Kumm, n 39 *supra*, at 19; Maduro, *supra*, at 18.

<sup>48</sup> Kumm, n 39 *supra*, at 19; Maduro, n 38 *supra*, at 18-19.

<sup>49</sup> Somek, n 15 *supra* at 561.

Under these proposals, the economic choices that appear ‘necessary’ are still made by the Member State executives and the ECB, whether through international agreements, Treaty revisions, voting in the EDP or MIP procedures, or monetary policy. Instead, it is the *enforcement* of such choices in the hands of the Commission, which is to be ‘democratised’. Institutionally, the most democratic institution in political union ‘light’, in other words, is entrusted with technical tasks in the field of economic governance (of implementing fiscal rules) but not with political tasks (ie of determining what ought to *constitute* the EU’s economic objectives). The purpose of democratization is not political choice ie allowing Europeans to change the conditions of government but political legitimacy ie to ensure the smooth enforcement of executive decisions and policies.<sup>50</sup>

In consequence, both proposals appear very functional in nature. Maduro perhaps puts it best: “whatever our view on the benefits and costs of constitutionalizing fiscal discipline, two things are clear in the current EU context: this discipline is a necessity, (..) but this discipline is also insufficient to address the current crisis”.<sup>51</sup> Tuori and Tuori have recently argued that this path-dependence – favouring austerity, supply-side reforms, labour flexibility and liberalization – is part of the macro-economic constitution introduced in the Treaties in 1992.<sup>52</sup> Echoing the model of authoritarian liberalism identified by Heller, the basic principles of the macro-economic constitution required divisive social and redistributive choices that were shielded from political contestation. In Tuori and Tuori’s narrative, it is the basic choices that underlay the structure of EMU – from the focus on price stability to the prohibition on monetary financing – that now cause rapid convergence around a liberal economic model. What now appears ‘without alternative’ is thus only so given the original *political* choice on how EMU ought to be structured. This sentiment has been echoed by many scholars.<sup>53</sup> A true political union would seem to demand much more ie a substantive and institutional framework whereby European citizens are able to contest the core principles that shape their lives.<sup>54</sup> As Bartolini has put it: “institutional democratization is, in principle, easy to achieve; but any institutional democratization without political structuring is potentially catastrophic, and political structures cannot be created without important advances in systems building.”<sup>55</sup>

Finally, the proposals by Maduro and Kumm do not explicitly broach the spatial question of political equality in Europe. Arguably, it does little to change the EU’s spatial balance for the better. If spatial balance is understood as equality between European citizens, as the indirect election of the Commission president would suggest, it fails for the reasons argued above: it does not allow citizens to control the

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<sup>50</sup> As Maduro writes, “bringing adjustment programs into the scope of EU policies and institutions would provide them with enhanced legitimacy and transparency”, n 38 *supra* at 12.

<sup>51</sup> Maduro, n 38 *supra* at 9.

<sup>52</sup> K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, (Cambridge University Press, 2014), chapter 2.

<sup>53</sup> A. Somek, ‘Europe: Political, not Cosmopolitan’ (2014) 20 *European Law Journal*, 150; C. Offe, ‘Europe Entrapped’, (2013) 19 *European Law Journal*, 595; J. White, ‘Emergency Europe’, (2013) *Political Studies*

<sup>54</sup> A. Somek, *ibid*, at 154.

<sup>55</sup> S. Bartolini, ‘Restructuring Europe’ (Oxford University Press, 2005), 408. See for an elaborated discussion: M. Dawson and F. De Witte, n 2 *supra*, forthcoming 2014.

substantive policy directions of the EU.<sup>56</sup> If spatial balance is understood as equality between the Member States, the proposals do not change much: it appears that the problem of hegemonic power within the European Council, as identified above, remains unchallenged. These problems make the option of ‘political union *light*’ unappealing from the perspective of the capacity of the citizen to engage in the process of polity construction. Not only is the citizen sidelined from deciding the type of life that she is allowed to live, but this very fact may be obscured by a façade of democratic institutions, electoral cycles and political choice.

## 5. RE-FRAMING SELF-DETERMINATION IN EUROPE

The three proposals mentioned above differ in their visions for the constitutional future of the EU. What they carry in common, however, is their founding premise: that ‘there is no alternative’ to significant further integration in fiscal, budgetary and social matters. While this observation may (or may not) be justified from an economic perspective, it fails to meet a basic demand of political self-determination – that government is conducted not just *for* but *by* the people ie that the goals of the political order are retrieved from the political process.

To this extent, these proposals offer significant continuity with elements of the original design of the Treaties. The notion, for example, that the Treaties should ‘set in stone’ particular EU objectives – of price stability, market access, no assumption of debt, and other goals – suggests a long-standing use of EU law to limit conflict over the EU’s substantive goals.<sup>57</sup> Certainly, there was a time where such a move may have been normatively justified. As illustrated by the concept with which this paper began – constitutional balance – the provision to the EU of defined tasks may be normatively justified where this ensures that political questions of high salience to citizens are deliberated and determined at the national level.

Just as Heller observed in his own time in relation to the then German state, however, the substantive ambitions of the contemporary European project are far greater. The shift of the EU into re-distributive policies problematizes significantly the idea that law should seek to suppress political conflicts over how those policies are designed. A true political Union would involve not suppressing but channeling and promoting meaningful conflict over the EU’s substantive goals<sup>58</sup>, from the very need for a euro area to the level at which particular powers in Europe should be exercised. A true political Union in this sense would involve an EU constitutional framework that does not simply channel political authority but questions and re-frames it.

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<sup>56</sup> See also the blog post of Joerges & Roedl: <http://www.verfassungsblog.de/election-member-european-parliament-president-commission-democratic-sense/#.U9tkqGPDssk>.

<sup>57</sup> J. Werner-Mueller, ‘Beyond Militant Democracy’, (2012) 73 *New Left Review*.

<sup>58</sup> D. Chalmers, ‘The European Redistributive State and a European Law of Struggle’, (2012) 18 *European Law Journal*, 672; M. Dani, ‘Rehabilitating Social Conflicts in European Public Law’, (2012) 18 *European Law Journal*, 623-4.

In a telling section of his piece, Heller underlines why Germany's establishment may have sought an authoritarian basis for an otherwise 'liberal' economic order. 'Of course', he argues, 'the German people would not tolerate for long this neoliberal state if it ruled in democratic forms.'<sup>59</sup> A 'liberal' state, seeking to dismantle social protections, could prosper only if protected from democratic scrutiny. The EU's placing of its economic governance behind a wall of legal protection, to be enforced by democratically unaccountable institutions, seems eerily reminiscent of this fear: that the existing substantive order could not survive democratic challenge. It may be time to find out.

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<sup>59</sup> H. Heller, 'Authoritarian Liberalism?', in this issue, 18.