

CONCEPTUALIZING GOVERNANCE IN THE EUROPEAN UNION

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Abstract

The article aims to conceptualize the governance model adopted and adoptable by the EU. Since the 1992 Maastricht Treaty the EU has institutionalized a highly differentiated system of governance. As that differentiation has been challenged by the post-2008 multiple crises, several proposals have been advanced to deal with those challenges. Starting from the White Paper on the Future of Europe, delivered by the European Commission in March 2017, this article discusses its three main options, Europe *à la carte*, Europe as a federal state and a multispeed Europe. The article then discusses the alternative perspective of the federal union, derived from a re-interpretation of the literature on comparative federalism. Federal union is the empirical solution to the paradox of promoting a sovereign union of sovereign states. It is the experience of comparative federalism that the EU should consider in thinking of its future governance.

Key words

European Union, differentiated governance, Europe *à la carte*, federal state, federal union.

Introduction

How can European Union (EU) governance be conceptualized? Are there alternative concepts of governance which can be adopted by the post-crisis EU? The article will discuss these questions with a focus on the relations between governance and legitimacy. Literature on governance is a growing industry, particularly in the field of EU studies (Borzal 2016; Sabel and Zeitlin 2012; Piattoni 2010; Hooghe and Marks 2001; Pierre 2000). That literature has contributed powerfully to our understanding of how a multilevel and complex system, such as the EU, functions. Whereas mainstream political science literature conceptualizes governance as the institutional capacity of government (Fukuyama 2014), the mainstream EU literature sees governance as the conceptual alternative to government, as an anti-hierarchical form of allocating authoritative values, as an open process for negotiating means and ends of the policies at stake. It is the process of deliberation and decision, rather than the structure or the institutional form where that process takes place, which EU governance scholars mainly consider. Hierarchy is a shadow rather than a precise institutional form. According to Borzal (2016: 12), “The EU’s governance has evolved over time developing different varieties of inter- and trans-governmental negotiation and regulatory competition in the shadow of supranational hierarchy”. A ‘processual’ approach to EU governance makes comparison with other multi-level systems uncertain or unlikely. This governance literature considers the EU as an *ad hoc* system, a *sui generis* organization, a sort of exceptional experiment of intergovernmental and transnational cooperation, with its *sui generis* criteria of democratic legitimacy. Whereas in democratic systems legitimacy derives from the interplay between the representativeness of the decision-makers and their accountability to the citizens affected by their decisions, for those scholars this is not necessarily true for the EU.

This article adopts a different perspective on EU governance. It conceptualizes governance as the interactions between form and process through which decisions are made. Contrary to the concept of governance used in EU studies, this article considers that those interactions take place within and through institutional patterns with their own vertical logic. Contrary to the concept of government used in political science, this article considers that those decisions are affected also by the horizontal relations between political and institutional actors. It is a concept of ‘governmental governance’ that acknowledges the existence of horizontal interactions between a panoply of transnational, intergovernmental and supranational actors, affecting, but also affected by, vertical patterns of decision-making. In the EU, this governmental governance operates differently in different policy areas. EU governance thus consists in the differentiated intersection of decision-making regimes and policy issues, an intersection that defines different spaces for political action

and provides alternative modalities of legitimacy. Legitimacy depends on forms and not only on processes. Even in the EU, the legitimacy of the decision-making process derives from a combination (although differentiated) of the representation-accountability nexus. To use Schmidt's (2013) analytical framework, the analytical focus of this article will be on the 'throughput' institutional form, whose legitimacy, however, is influenced by the institutionalized patterns connecting throughput's decision-makers with the legitimacy of the 'input' process. The 'output' legitimacy of the decisions taken is inevitably dependent on those connections, not only on their intrinsic effectiveness.

This article is organized as follows. First, it identifies the basic structure of decision-making institutionalized within the EU, particularly after the 1992 Maastricht Treaty. That structure has been unable to acquire a coherent form. The result has been a highly differentiated organization. Governance and policy differentiation have come to intersect, institutionalizing diversified decision-making patterns. The post-2008 crises brought that differentiation to the fore, showing its resilience but also its contradictory implications for the governance of the EU. Those multiple crises opened up a debate on the future of the EU, also because its very existence has been called into question by nationalist and populist movements. Second, the article considers the proposal advanced by the Commission to deal with the incongruences of the differentiated governance regime, the "White Paper on the Future of Europe", submitted by the Commission President to the European Parliament (EP) on 1 March 2017. Although the White Paper discusses five governance scenarios, this article discusses only the three main ones, showing their intellectual sources but also their weaknesses in terms of legitimacy. Third, the article advances an alternative concept of governance, the federal union's model, derived from a critical reading of the literature on comparative federalism. Distinguishing between federations by disaggregation (federal states) and federations by aggregation (federal unions), the article conceptualizes the latter's model as multiple separation of power governance's system. Through a normative-deductive approach, the logic of the federal union's governance is thus applied to the EU, considered a case of aggregation of previously independent states, demographically asymmetric and with different national identities. The conclusion drives home the main argument, namely that the debate on the future governance of the EU would greatly benefit from concepts derived from the experience of comparative federalism.

The post-Maastricht differentiated governance of the EU

The institutional organisation of the EU is the result of compromises and contingencies, not of an organic vision. While the EU was a necessary response to European states' rivalry, there was

never a discussion on the form that this response should take (at least until after the 1954 defeat of the European Defence Community project). Those institutional forms, either because they were the expression of incomplete contracts (Heritier 2007) or of interstate and inter-institutional compromises (Fabbrini 2015a), have solicited their own periodical redefinition. Incompleteness is inevitable when the institutional framework derives from trans-national, intergovernmental and inter-institutional bargains taking place in the context of scarce information. Both member states and Brussels-based institutions have different views on and interests in the integration process. Notwithstanding splits in opinion within each of the member states, it is plausible to argue that the latter have come to elaborate and pursue specific national perspectives or national polity-ideas (Jachtenfuchs 1995) on the aims of integration (Fabbrini 2015b). Notwithstanding divided opinions within Brussels-based institutions, their history, composition and role have contributed to institutionalizing in each of them predominant views on and interests in the aims of the integration process (Dinan 2006). This pluralism of member state visions and institutional interests has accompanied the structuring of a differentiated governance regime since the 1992 Maastricht Treaty.

In fact, with the historic turning-point represented by the 1992 Maastricht Treaty, a compromise was reached between the intergovernmental vision which had to manage the new policies added to the European agenda (such as foreign affairs, defence, security, justice and home affairs, as well as the economic policy of the Eurozone) and the supranational vision (which continued to govern the regulatory policies of the common market, becoming the single or internal market with the 1987 Single European Act). It can thus be said that the EU, since the Maastricht Treaty, has become differentiated at the level of the governance adopted to manage different policies. The regulatory policies of the single market are decided through a governance regime, usually termed the 'community or supranational method', in which the Commission has the monopoly of legislative initiative, the Council of ministers (subsequently just the Council) and the EP share co-decision making power over the proposals put forward by the Commission, and the European Council of heads of government and state acts as the court of last resort to resolve disputes which would otherwise risk hindering the integration process if left unsettled (Dehousse 2011). There is much more here than the shadow of supranational hierarchy. However, in the new policies which have become part of the EU agenda since Maastricht, the governance regime has taken a quite different form. In these policies, the decision-making process has been circumscribed to the two intergovernmental bodies of the Council and, above all, the European Council, with the Commission playing a technical role (a sort of secretariat) and the EP marginalised (it is 'informed' of the decisions taken by national heads of government, but without having any power of sanction

over those decisions) (Puetter 2014). There is much less here than the shadow of supranational hierarchy. While in the single market the integration process proceeds through legislative provisions, in the new policy areas it proceeds more through political decisions. This means that, in the former case, the European Court of Justice (ECJ) can verify the coherence of the laws approved with the Treaty's principles and dispositions while, in the latter case, its role as judicial supervisor is necessarily limited. This differentiation of governance regimes has led, in the case of the Economic and Monetary Union (EMU), to contradict Jean Monnet's presumed comment, namely that the supranational EU will be promoted by the crises and their solutions. Instead the euro crisis led to decisions that fostered the integration of the EMU without however supra-nationalizing it (Fabbrini and Puetter 2016).

The differentiated governance regime has come into being because of the different nature of the policies and the different perception of their political relevance for the member states. The new policies have traditionally been matters close to the heart of national sovereignty (Genschel and Jachtenfuchs 2014). Once these policies were Europeanised, national governments, not only the larger ones, sought to control their decision-making process. These policies are key in political terms, with inevitable impacts on the electoral fortunes of incumbent governments. For this reason, national governments want to control the decision-making process of those policies, especially during crises when the latter have clear distributive effects at the national level. The success or failure of migration policy, or the handling of the banking crisis, or security and internal order policy are destined to influence the electoral fortune of serving national leaders. Indeed, the Commission's proposal of September 2016 to reassign the allocations of political refugees to the various member states of the EU using objective criteria, was openly challenged by various national governments for precisely domestic political considerations. Immigration particularly has become the issue that decides a national election (Krastev 2017). Much less internally divisive are the regulatory policies of the single market. Market policies impact mainly on private actors, while the new policies impact mainly on public actors (Genschel and Jachtenfuchs 2017). The Commission's decision of 30 August 2016 to order Apple to pay 13 billion euro to the Irish government, an amount equivalent to the taxes which it would have paid since 2003 if it had not benefitted from an improper tax regime (with the European regulation on competition), is an example of this. It affected a private multinational company, not a national government (indeed the Irish government is a beneficiary of the decision although it opposed it, fearing that it would reduce the country's fiscal attractiveness). Thus, the divisions between member states have emerged in the new policies, those managed within and through the intergovernmental institutions (the European Council in particular), not in the regulatory policies of the single market. It should be added that those

divisions have frequently been overcome through the unilateral action of the leaders of the strongest member states (Fabbrini 2016).

Using the flexibility mechanisms of the Lisbon Treaty (Closa 2015), the EU has become an internally differentiated organisation. That differentiation consists of different structures of governance to manage different European policies. Those structures of governance have different degrees of ‘governmentality’ for managing and deciding the different policy issues. Those different combinations of governance and government provide different answers to the democratic legitimacy needs of the decision-making process. The governance structure for single market policies derives its legitimacy from the indirect legitimacy of the Council and the direct legitimacy of the EP, with the Commission’s role legitimized exclusively by Treaty provisions. The increasing expansion of the EP’s competences has in fact been justified by the necessity to increase the legitimacy of the supranational governance regime. However, the co-decisional role of the EP has expanded in policy areas that have little domestic political relevance. Instead, in the policies of significant domestic political relevance, where the governance structure relies mostly on the negotiation among national governmental leaders, prepared by the work of the national permanent representatives, within and outside the intergovernmental institutions, democratic legitimacy has necessarily indirect source. National leaders and ministers are legitimized, in participating in the intergovernmental decision-making process, by their individual accountability to their own national parliament. Here the logic of fusion of different levels of government (identified very early by Wessels, among many contributions see his 1997) reached its climax. However, Brussels’ intergovernmental institutions operate as collegial bodies and not as a sum of individual leaders and ministers. Since it is unlikely that national parliaments, as single distinct legislatures, could check the action of the European Council as a collegial executive or the Council when it performs executive functions, it logically follows that intergovernmental decision-making takes place in a vacuum of supranational legitimacy (for a different view, see Bellamy and Kroger 2017).

Post-crisis governance options

The differentiated governance of the EU has made evident its lack of completeness during the multiple crises of the second decade of the 21st century. For this reason, several attempts have been made by the EU authorities to try to reduce that incompleteness, from the Four Presidents’ Report of June 2012 on “Towards a Genuine Economic and Monetary Union” to the Five Presidents’ Report of June 2015 on “Completing Europe’s Economic and Monetary Union”. Interestingly, these Reports go into detail with specific policy regimes (economic union, financial

union, fiscal union) to be implemented, but remain vague on the democratic legitimacy of EMU governance (which gives the title to their last thin chapter). The “White Paper on the Future of Europe”, which Commission President Jean-Claude Juncker presented to the EP on 1 March 2017, enlarged the prospective, identifying five plausible scenarios on the governance of the post-crisis EU, but also here the governance’s legitimacy issue remains under-theorized.

In the White Paper, five scenarios are imagined for the future governance of Europe. The first scenario envisioned is that of “carrying on” the current differentiated system, through a policy of muddling-through to adapt to the crises. The second scenario, that of “nothing but the single market”, cancels at a stroke what happened after Maastricht, advancing the hypothesis of going back to the 1987 Single European Act. The third scenario is that of letting “those who want more do more” (giving rise to coalitions of the willing to pursue specific programs through forms of enhanced and structured cooperation), according to a view which has become termed a multispeed Europe. The fourth scenario is “doing less more efficiently” and the fifth scenario is that of “doing much more together”. The five scenarios offer different options for dealing with the differentiation of the EU. Indeed, three basic options can be derived from the first, the third and the fifth scenario. The first option expresses the view of those who argue that it is necessary to make the best of the differentiation of the EU, that differentiation should be left to its fate; the third, the view of those who argue that differentiation is necessary for escaping from the continuous deadlock in the decision-making process; the fifth, the view of those who instead argue that differentiation should be overcome through the formation of a state-like organization. For the first option, what matters is getting the EU machine to work, generating some public goods where possible, adapting the integration process to the needs (or electoral schedules) of one or another country. Differentiated governance can expand according to needs and conditions. One might argue that this option has its source in James Buchanan’s theory of organizations operating under conditions of internal complexity and external divergent pressures (Buchanan 1965). As Giandomenico Majone (2014) has observed, the EU has become too complex an organization because integration has gone too far. In this context, differentiation allows the EU to answer specific requests through a variable combination of states interested in participating in specific policies for satisfying those requests. Buchanan’s theory of club of clubs might offer a scientific basis for managing the necessarily growing internal differentiation of the EU. As Majone argues (2014:17), the “economic theory of clubs may be used to provide a robust conceptual basis for the analysis of integration *à la carte* and of other forms of functional integration”. From a governance perspective, the EU *à la carte* would consist of transient combinations of clusters of states dealing with specific problems, technically supported by the Commission but fully autonomous in their reciprocal negotiation, with the ECJ

intervening only to resolve potentially destructive disputes. In the *club governance* model, the EP would be the main institutional loser. The economic theory of clubs is disinterested in the question of the democratic legitimacy of the EU's governance. In a Europe *à la carte*, legitimacy comes indirectly from the results of the decisions taken. It is a species of output legitimacy, aptly conceptualized by Scharpf (2009). For Majone a club of clubs will be mainly judged by the quality of the services provided, rather than by the democratic nature of its governance regime. However, it would be highly questionable, for the EU, to accommodate its internal differentiation disregarding the need for its legitimacy.

The second option aims to overcome EU differentiation through a centralized and politically homogeneous organization, with features resembling a state-like polity. As argued in the White Paper fifth scenario, “cooperation between all Member States goes further than ever before *in all domains*” (italics added). Each of the 27 member states should relinquish an increasing share of their sovereignty, transferring it to the institutions in Brussels (the centre). One might argue that this option has its source in Dani Rodrik's trilemma (2011: Ch. 10), according to which “democracy, national sovereignty and global economic integration are mutually incompatible: we can combine any two of the three, but never have all three simultaneously and in full” (Rodrik, *The inescapable trilemma of the world economy*, Weblog, June 27, 2007). A higher level of one of them requires a lower level of the others – it is a zero-sum exercise. Deeper European integration implies less national sovereignty and weaker democratic control at the national level. Rodrik's approach seems to be reflected also in the speech given by the French President Emmanuel Macron on September 26, 2017 at the Sorbonne, when he said that we need “*la refondation d'une Europe souveraine, unie et démocratique*”. Rodrik's paradigm underestimates, however, the differing power of the states involved in the process of integration. The management of the euro crisis, for instance, increased rather than reduced the national sovereignty and power of domestic democratic institutions in the creditor states (in Germany, the *Bundestag* and the Federal Constitutional Court or *Bundesverfassungsgericht*), while the opposite happened in the debtor member states (Matthijs 2017). Moreover, the crisis led to a process of decision-making centralization in the European Council and ECOFIN Council that created hierarchical relations between creditor and debtor member states (Fabbrini F. 2016). The solution of Rodrik's trilemma implies decision-making centralization as in state organizations, blurring the distinction between national and European levels of government.

From a legitimacy perspective, this scenario may have either intergovernmental (*state governance A*) or supranational (*state governance B*) features. For *state governance A*, the

combination of centralization without democratization, taking place within the EMU, is not a problem if national leaders and ministers remain accountable to their domestic legislatures. For them, legitimacy is a by-product of the existence of national democracies and not of the functioning of a supranational democracy. *State governance A* underestimates, however, that the Brussels-based intergovernmental institutions take decisions in their collegiality, while their members can respond only individually to their legislature. For *state governance B*, instead, the transferring of sovereignty to the Brussels' level should be accompanied by the strengthening of the EP, the institution representing European citizens. To be fully legitimized, the EU should adopt the governance model of a parliamentary federal state, i.e. a state functioning on the basis of competition among European-level political parties which seek to win control of the Commission (as the sole European government) through the electoral participation of citizens. The *spitzenkandidaten* strategy, pursued by the main European-level political parties in the EP elections of 2014, is an example of the attempt to move the EU in a parliamentary direction (Christiansen 2016). That strategy assumes the EU as mainly a union of citizens rather than of states (or at least it assumes the former to be more important than the latter). A full-scale parliamentary state would have to reabsorb its member states internally and transform them, for instance, into *Laender* as in the German experience represented in the *Bundesrat* or into Provinces as in Canada mostly represented in the informal Conference of the First Ministers, but leaving untouched the exclusive role of the lower chamber (the EP) in giving or withdrawing political confidence to/from the Commission. *State governance B* underestimates, however, the implications for parliamentary governance of representing citizens of demographically asymmetric states with different national identities. A union with these systemic features, as the EU is, cannot squeeze its representation patterns into solely the left-vs-right axis (as in parliamentary systems). The EU's legitimacy should come not only from the citizens, but also from the states (as political subjects).

Between the perspectives of *club governance* and *state governance A* and *B*, the option of a multispeed Europe can be derived from the White Paper's third scenario. Indeed, with the Rome Declaration signed on 25 March 2017 by all the 27 member states on occasion of the 60th anniversary of the Treaties of Rome, that option has become a kind of public philosophy of the EU. The Declaration states: "We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later." A few days earlier, at the end of the meeting of the leaders of the four largest post-Brexit member states (Germany, France, Italy and Spain) held in Versailles on 6 March 2017, the German chancellor stated that "a multispeed Europe is necessary; otherwise we are blocked," thus adding that "we must have the courage to accept that

some countries can move forward a little more quickly than others." This option assumes differentiation as a means (not an end as in the first option) for neutralizing the veto power of those member states opposing steps forward in the integration's process. However, in its 'processual' approach, this option leaves unanswered the question of the governance's form a multispeed Europe might take. Indeed, a multispeed Europe could go in opposite directions. It may end up by speeding up the differentiation of the EU, as desired by the supporters of Europe *à la carte*, or it may increase the centralization of policy making in the most integrated areas (such as the EMU), as envisioned by Europe *as a state*, or it could go both ways at the same time (high differentiation of the EU plus closer centralization of EMU). If multispeed Europe leaves undefined the form of the EU's future governance, and since the other two options are unsatisfactory, is it possible to conceptualize an alternative model of governance to deal with the challenges of democratic legitimacy in a union of states?

Bringing comparative federalism back in

The above theoretical challenge can be met through a critical re-interpretation of the experience of comparative federations (on the comparative federalism's literature, see Fossum and Jachtenfunchs 2017). Distinguishing between federations emerged from the disaggregation of previously unitary states (federal states) and federations emerged from the aggregation of previously independent (demographically asymmetric and nationally differentiated) states (federal unions), it is possible to identify the systemic features of the latter usable for conceptualizing the governance of an aggregation of states as the EU is.

Historians (Hendrickson 2003: xi) have considered the federal union as "a distinct species of the genus 'federative systems'", "a case of cooperative ventures among states" closer to the confederal rather than federal type. However, from an empirical perspective, the distinction between federation and confederation is too formalistic to be analytically useful, also because it omits the case of federations with confederal features. The US and Germany are both federations, but their legal nature does not explain how sovereign power is institutionally organized in each of them. The distinction, within the genus of federations, between federal state and federal union is thus much more promising, with the latter being a federation with confederal features because of its genetic formation. A federal union is a constitutionalized union of states historically formed through the aggregation of previously independent units with their citizens. Federal unions aggregate states displaying substantial differences in their demography and expressing historically-rooted diversity in their national identity (Fabbrini 2010). Empirically, in only two cases (the US and Switzerland)

has the aggregation ended up forming a successful constitutionally-based federal union. Their constitutions formalize a pact between the elites of states or cantons to divide sovereignty vertically between levels of government and horizontally between governmental institutions. Horizontally, federal unions institutionalize confederal features through the upper chamber, respectively the US Senate and the Swiss Council of States, where the states are recognized the same power of representation regardless of their population, a confederal feature that, in the case of the US, also affects the state electoral colleges for the indirect election of the president. Vertically, the states are separated from the centre through a delimitation of the latter's competences. Historically, in fact, federal unions are characterized by enumerated powers at the centre, whose governmental institutions are in their turn separated to prevent the centre's domination over the states. Indeed, since it was the states that started the process of aggregation, they could maintain local control over most public policies and could guarantee their confederal representation at the federal centre.

Multiple separation of powers has triggered horizontal political processes, without discarding the necessity to regulate them according to criteria of democratic legitimacy. The politicians involved in those policy-making processes represent, and account to, separate constituencies, operate through different temporal mandates, nevertheless are all entitled to contribute to the processes' outcomes. The governance structure of a federal union has thus had to solve a puzzle different from that of a federal state, i.e. unitary state that has passed through a process of territorial decentralization of a previously unitary state or state-like dominion characterized by vertical decision-making centralization (as it is the case, in Europe, of Germany, Austria, Belgium or of highly decentralized countries such as Spain and the UK; and, outside of Europe, of Australia and to a limited extent Canada). If nation states have historically emerged from a process of cultural homogenization of citizens living within internationally recognized territorial boundaries, federal or federalized nation states could decentralize competences to the territorial units in a context of relative cultural uniformity. All the above federal or quasi-federal states have in fact adopted one form or another of the fusion of powers or parliamentary government (which centralizes power in the executive or Cabinet dependent on the political confidence of the legislature's lower chamber, although mitigated by the sectorial competences of the higher chamber representing the territorial units), whereas the two federal unions considered have adopted one form or another of the separation of powers, although with a monocratic (the US) or collegial (Switzerland) executive (Fabbrini 2017a). However, when the cultural uniformity of the federal state is openly called into question by some of its territorial units (as in the case of Catalonia, Scotland, Flanders or Quebec), then the parliamentary (or fusion of powers) governance of the

federal state is no longer sustainable. It is implausible to integrate the claims to confederal nationhood of those units through the vertical centralizing thrust of parliamentary government.

Historically, the federal union constitutes the solution to James Madison's paradox of creating a republic of many republics with the 1787 constitutional pact elaborated in Philadelphia. During that convention, Onuf (1983: 197-198) wrote, "the debasement of state sovereignty was a crucial component in rethinking and reconstituting the American union. But it was also necessary to articulate new images of the union that would resolve the apparent paradox of sovereign states in a sovereign union. This was the Federalists' greatest achievement". That achievement was made possible by the empirical division of sovereignty between the federated states and the federal centre. The solution of that paradox emerged pragmatically, through the mediation between the view of nationalists (including Madison himself) and that of the defenders of state rights. The idea of divided sovereignty emerged out of political expediency rather than constitutional theory (Klarman 2016; Ellis 2016). It has been argued (Grimm 2015) that the solution found (to pass sovereignty to the People, thus letting them subsequently divide it, through a constitution expressing their will, between the various separate levels of government and the various separate branches constituting each level) is formally coherent with the Westphalian idea of a unitary concept of sovereignty. However, "confronted with the accusation that 'We the People' of the Preamble meant the people of a consolidated nation, Federalists explained that the states could not be enumerated without unreasonably presuming they would join; the phrase meant "We the People of the Several States", each a body politic solely accountable for the act of ratification" (Hendrickson 2003: 13).

Indeed, in setting up a republic of many republics, the American constitution makers moved beyond Westphalia, transforming sovereignty from a juridical (undivided) to an empirical (divisible) concept. They moved in the direction of a federal union, not a federal state. Madison's analytical framework does not imply (as Rodrik's does) a zero-sum redistribution of doses of the same sovereignty on different institutional settings. Nor does it assume that the complexity of a republic of many republics could be handled only through a differentiated confederal model (as Majone's framework does). Madison's framework envisages that the preferred distribution of policies between the national and supranational levels be negotiated and then enshrined in a constitutional pact, with a limited and enumerated distribution of policies assigned to the federal centre and all the rest to the federated states. James Madison writes in *Federalist no. 51*, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments

will control each other, at the same time that each will be controlled by itself” (now in Beard 1948: 227). James Madison’s view on integrating states is thus theoretically distinct from those of Giandomenico Majone and Dani Rodrik. The solution of the Federalists’ paradox lied thus in a political decision, of a constitutional status, identifying the dividing line between *self-government* and *shared government* (Elazar 1987). This approach has an explicit anti-centralizing bias because it fragments sovereignty among distinct institutional entities, rather than transferring a chosen amount of general sovereignty from one level (the federated state or canton) to a higher level (the federal centre). That political decision identifies and separates the policies to be shared at the federal centre’s level from those which must remain at the state/canton level. A sovereign union of sovereign states is based on multiple (constitutionally, two) levels of decision-making, not on multiple forms of decision-making within the same level (as in the differentiated governance of the EU).

Comparative analysis of the US and Switzerland tells us that the policies handled by the federal centre have been historically limited but with a general jurisdictional value in their application (i.e. they do not allow opt-outs to those who are part of the federation) (Kelemen 2014) and with autonomous (particularly fiscal) resources to manage them (although the acquisition of those resources was highly contrasted by federated states/cantons, Wozniakowski 2017). Of course, separation is not written in stone. Parties and party systems play a crucial role in bridging both vertical and horizontal separate institutions, making thus possible their cooperation. Indeed, when they are not able to do that (as in the 1861-65 US), the federal union gets to collapse. This role changed with the changes in the parties and party systems. The historical development of federal unions inevitably affected the relations between levels of government, although much more in the US than in Switzerland. In the latter, the limited size of the union and its decision to avoid any direct international role guaranteed a continuity in the relations between levels of government. In the US, instead, the social complexity induced by industrialization, urbanization and technological innovation, combined with the powerful international projection of the country since the Second World War (Hendrickson 2009; Katznelson and Shafter 2002), introduced formidable discontinuities in the power relations between levels of government, increasing the number of policies vertically controlled by the federal centre or managed through the cooperation between levels of government (Schutze 2010). This transformation created a peculiar ‘American policy state’ (Karren and Skowronek 2017). However, the constitutional constraints on centralization have continued to operate, with the result of containing the thrust towards policy homogenization (Jacobs and King 2009). According to Hoffman, Parsons and Springer (2017), for instance, the US

single market has integrated much less than the EU single market, because of the US states' capacity to preserve their own powers and competences vis-à-vis the federal centre.

In conclusion, in federal unions, democratic legitimacy is promoted by a multiplicity of institutional forms combining state and citizen representation at the various separate levels of the decision-making system. The politicians elected at the various levels of the union are involved in a permanent negotiation's process on where to fix the competences between one level and the other of government. Legitimacy too is separate, as is the accountability of the representatives to the different constituencies that elected them. Separation of powers means that federal unions have no government, as the single institution of the last decision. The government is rather a process involving representatives operating within and through different and separate institutions.

The governance of the EU as a federal union

Once identified the governance's logic of a federal union, it is possible to apply that logic to the EU through a normative-deductive approach (for a normative-inductive approach to the EU, see Nicolaidis 2013). The EU, after all, is the most similar case to the other two federal unions ((US and Switzerland), since it consists of the aggregation of previously independent states, each one of them jealous of their national identity. The aggregated states are highly asymmetrical with regard to population, territorial size, economic capability and administrative structure. Nevertheless, these systemic features are rarely taken into consideration by the various reform proposals. This analytical exercise might be done at both vertical and horizontal level.

On the vertical level, it would be necessary to separate supranational governance from the national institutions of government, introducing a firewall between them. Through particularly the European Council, national governments are thrust directly into the EU decision-making process, a vertical fusion of powers that confuses responsibility between levels of government. National leaders may bring their domestic idiosyncrasies to the EU's highest executive institution, thus making the internal deliberation of the European Council potentially confrontational. What would happen if, together with Beata Szydlo and Viktor Urban, the European Council also included Marine Le Pen, Geert Wilders or Beppe Grillo's *protégée* Luigi di Maio? In crises with redistributive effects, with prime ministers carrying divergent policy preferences, the European Council is institutionally exposed to a decision-making stand-still. Unsurprisingly, leaders of the strongest national governments sought to overcome this decision-making stalemate through unilateral initiatives to manage the challenges which threatened their domestic consensus (the case of migration policy is paradigmatic, when Germany, whose chancellor needed to reduce the flow of

political refugees into her country in order to regain popularity at home, promoted with its allies an agreement with Turkey in March 2016, which was only subsequently approved by the European Council). It is certainly undeniable that the European Council played a crucial role in promoting the integration process, particularly as a crisis manager or arbitrator of the most intractable issues (Wessels 2016; Bickerton, Hodson and Puetter 2015). Nevertheless, its very existence is hardly compatible with the democratic requisite of identifying responsibility, thus guaranteeing the control of the decision-makers at the level where they operate.

On the horizontal level, it would be necessary to introduce separation between the institutions which make up the decision-making process. Decision-making centralization in the European Council-Council circuit (*state governance A*) or in the EP-Commission circuit (*state governance B*) is incompatible with the need to guarantee the dual legitimacy of the EU. We have seen the implications of intergovernmentalism in the European Council, but also parliamentarization, if adopted, would imply the systemic domination of the largest over the smallest states in the EP, because citizens are divided not only along the partisan axis but also according to state interests. In this sense, the parliamentary election of the Commission president would not solve the dilemma of that dual legitimacy. Actually, the proposal to merge the role of president of the Commission and president of the European Council into a single presidential role, advanced most recently by Jean-Claude Juncker in his 13 September 2017 state of the union address, might even have unintended effects (for the parliamentarists). As the previous president of the European Council, Herman van Rompuy, reminded Juncker, nothing would guarantee that the sole president would come from the Commission and not from the European Council. It seems difficult to imagine the heads of national governments allowing themselves to be shepherded by a leader indirectly elected by the EP.

Through the horizontal separation of executive and legislative powers is instead possible to make the executive power independent from both the EP and European Council. Two options might be considered. The first option (*Executive 1*) goes in the direction of a unitary executive power. The head of a unitary executive power could emerge from a popular (albeit not direct) election as guaranteed by electoral colleges organized at state level. In unions of demographically asymmetrical states, with distinct national identities, the direct election of the executive's leader is never advisable, otherwise the larger states will be advantaged over the smaller ones. The state electoral college is a useful instrument for over-representing the smaller states compared to the larger ones, if one adopts, for instance, in allocating the electoral votes to each member state electoral college, the criterion of degressive proportionality as used by the EP. In such an election, however, the EP and its members would not have any role. The candidates for the presidential role

might be selected through parties' primaries across the EU member states, as suggested by several movements and leaders. It would thus be the prerogative of the elected president to form the executive, although within the constraints of the legislature's approval. The president would have the responsibility of representing the EU, although their decisions would have to be approved by the separate chambers of the bicameral legislature. The European Council would become the higher form of the legislative Council, with an acknowledged role of verifying the executive's proposals which were important for the member states. The national leaders of the European Council would no longer be members of an executive institution, a downsizing that would be acceptable to them given that the chief executive would not be voted for by the EP and they would continue to enjoy indisputable power in approving or rejecting the latter's proposals on strategic issues (such as foreign and diplomatic affairs, defence matters, financial and taxation issues, composition of the supranational courts, *inter alia*). It might be established that the executive's members, as proposed by the elected president, should be approved by the European Council for those in charge of policy fields of importance for the member states and by the EP for the others.

A second option (*Executive 2*) recognises instead the dual nature which the executive power has now acquired, consisting of both the European Council's and the Commission's presidents. For this option, the president of the Commission would continue to be elected by the EP (but, once elected, would not be dependent on it), while the president of the European Council must be elected by the citizens of the member states, again through their electoral colleges, on the basis of a short-list voted for by national leaders in the European Council. The two candidates for the presidency, selected through the vote of the national leaders, would then have to conduct their own electoral campaign in the individual states for winning the votes of the electoral colleges. Two candidates would guarantee a majority-based outcome and greater control in their selection by the national leaders (thus strengthening their role vis-à-vis the president of the Commission). Once elected, the candidate would become the president of the Union, co-directing the executive (consisting of the commissioners) with the president of the Commission, who might end up operating as the head of the administrative structure of the EU. They would be President of the Union because the European Council would withdraw from playing an executive role at the supranational level, substituting instead the Council when crucial issues for the member states are at stake in the legislative process. Whereas the vote by the Council or European Council should always be through an absolute majority of its members, it may be formalized that, in the specific and delimited issues on which the European Council will have its say, the needed majority should be, thus guaranteeing the confederal features of the EU (this might be true also for *Executive 1* option).

Whether it is unitary or dual, what counts is that the executive power must not only be separated from national executives, but also from the supranational EP. Both the executive and the legislature must have the power of legislative initiative, but every legislative decision must emerge from a process of checks and balances involving them both (and should be subjected to a diffuse judicial supervision). The more the powers (executive and legislative) are separated, the more they have an incentive to carry out reciprocal checks. The more the legislature is internally separated (the Council plus European Council representing the member states and the EP representing the citizens), the more it has an incentive to ensure reciprocal balance between its two chambers. Of course, it is necessary to identify mechanisms to prevent the separation turning into paralysing intra-institutional conflict (for the US case, see Cain 2015). Those decisions must then be overseen by the ECJ. Differentiated governance is incompatible with the EU as federal union. The policies allocated to the federal centre should be managed by the same governance system for making clear ‘who is responsible’ for the decisions taken. No opt-outs would be possible for the members of the union. Differentiation confounds accountability.

But if the policy responsibilities of the Brussels-based institutions should be managed through a single governance regime, at the same time, according to this model, those responsibilities should be limited and enumerated, because the bulk of policy responsibilities should remain at the national level. This would require a re-negotiation of the current distribution of policy responsibility. Some policies currently managed by the EU might return to national competence or unnecessary supranational regulations could be withdrawn. While other policies now monopolized by the member states (the strategic policies of Maastricht’s second and third pillars) should rather be managed at the supranational level. In a separation of power systems, the same policy can be also unpacked into different sub-policies, each one managed at different level of governance. The member states, for instance, can have their own military defence or national intelligence, although a separate structure of defence and intelligence should be set up at the supranational level, managed by supranational authorities legitimized by supranational electoral processes, without interference from national authorities. The supranational centre should have its own budget, based on supranational taxation and not on national financial transfers, distinct from the budget of the member states, in order to define a clear boundary between national and supranational resources and competences. The supranational centre must manage its enumerated policies, on the basis of its own electoral processes and without interference from the national authorities. At the end of the day, the supranational EU would have its piece of ‘divided sovereignty’ to exercise, at the same time the member states would have their piece of ‘divided sovereignty’ to exercise. Separation of powers is the institutional strategy for promoting divided sovereignty, a strategy that combines the

horizontal logic of governance with the vertical logic of government (Fabbrini 2017b). Legitimacy is separated at various levels and through different institutions. However, at each level, decision-makers should operate within a representation-accountability nexus connecting them with citizens' preferences, thus legitimizing the process' output.

Conclusion

Using a concept of governance inclusive of governmental patterns of decision-making, this article first identified the differentiated governance regime which has emerged in the EU since the 1992 Maastricht Treaty. Because that differentiation has been dramatically challenged the post-2008 multiple crises, the article secondly considered one of the main proposals (the Commission's White Paper on the Future of Europe) to meet those challenges. Five scenarios were indicated by the Commission, from which the article has identified three main options of reform. Each option has specific implications for the governance model of the post-crisis EU. Europe *à la carte* envisions the *club governance* model, whose intellectual source is James Buchanan's theory of clubs as interpreted by Giandomenico Majone, and which is intrinsically disinterested into the question of democratic legitimacy; Europe as a sovereign entity, whose intellectual source is Dani Rodrik's theory of international integration, envisions two forms of *state governance* models, both entrusting legitimacy to one or another form of political centralization; finally, the third option, a multispeed Europe, leaves unanswered the question of which governance is right for the future of the EU. Since the three options do not resolve the dilemma of democratic legitimacy in a union of states and citizens, then an alternative perspective was proposed.

This perspective, conceptualized as federal union, implies a governance system structured around multiple separations of powers. The intellectual source of this governance's model is James Madison's theory of creating a sovereign union of sovereign states (or, as Jacques Delors called many years later, a *Fédération d'Etats-Nations*). This perspective combines governance with government, horizontal political processes with vertical institutional patterns. In a federal union, the representation-accountability nexus is institutionalized at different levels and in different separated institutions, thus legitimizing the decision-making process taking place through their interaction. In the case of the EU, democratic legitimacy at the supranational level would imply a revision of the Brussels' governance structure, while at the national level it would imply an extension of the policies decided by domestic governments. However, the EU cannot develop as a federal union without a political choice and a rational design.

REFERENCES

- Beard, C. A. (ed.) (1948). *The Enduring Federalist*, New York: Frederick Ungar Publishing Co.
- Bellamy, R. and S. Kroger (2017). 'A democratic justification of differentiated integration in a heterogeneous EU', *Journal of European Integration*, 39, no. 5, pp. 625-639.
- Bickerton, C. J., D. Hodson and U. Puetter (eds.) (2015). *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford: Oxford University Press.
- Borzel, T. A. (2016). 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Public', *Journal of Common Market Studies*, 54, pp. 8-31.
- Buchanan, J.M. (1965). 'An Economic Theory of Clubs', *Economica*, 32, n. 1, pp.1-14.
- Cain, B.A. (2015). *Democracy More or Less: America's Political Reform Quandary*, Cambridge, Cambridge University Press.
- Christiansen, T. (2016). 'After the *Spitzenkandidaten*: fundamental change in the EU's political system?', *West European Politics*, 39, no. 5, pp. 992-1010.
- Closa, C. (2015). 'Flexibility Mechanisms in the Lisbon Treaty', A Study for the AFCO Committee, European Parliament.
- Dehousse, R. (2011). *The 'Community Method': Obstinate or Obsolete?* New York: Palgrave Macmillan.
- Dinan, D. (ed.) (2006). *Origins and Evolution of the European Union*, Oxford, Oxford University Press.
- Egan, M. P. (2015). *Single Markets: Economic Integration in Europe and the United States*, Oxford: Oxford University Press.
- Elazar, D. (1987). *Exploring Federalism*, Tuscaloosa: The University of Alabama Press.
- Ellis, J.J. (2016). *The Quartet: Orchestrating the Second American Revolution, 1783-1789*, New York, Vintage.
- Fabbrini, F. (2016). *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*, Oxford, Oxford University Press.
- Fabbrini, S. (2017a). 'Intergovernmentalism in the European Union. A comparative federalism perspective', *Journal of European Public Policy*, v. 24, no. 4, pp. 580-597.
- Fabbrini, S. (2017b). 'Which Democracy for a Union of States? A Comparative Perspective of the European Union', *Global Policy*, 8, no. 3, 2017, pp. 14-22.
- Fabbrini, S. (2016). 'From consensus to domination: the intergovernmental union', *Journal of European Integration*, 38, n. 5, pp. 587-599.
- Fabbrini, S. (2015a). *Which European Union? Europe After the Euro Crisis*, Cambridge, Cambridge University Press.

Fabbrini, S. (2015b). 'Alternative Views of the European Union: Which Institutional Architecture for a Political Union?', in Simona Piattoni (ed.), *The European Union: Democratic Principles and Institutional Architecture in Times of Crisis*, Oxford, Oxford University Press, pp. 184-200.

Fabbrini, S. and U. Puetter (eds.) (2016). 'Integration Without Supranationalisation: The Central Role of the European Council in Post-Lisbon EU Politics', Special issue, *Journal of European Integration*, 38, n. 5, 2016.

Fabbrini, S. (2010). *Compound Democracies: Why the United States and Europe Are Becoming Similar*, Oxford: Oxford University Press, 2nd edition.

Fossum, J. E. and M. Jachtenfuchs (2017). 'Federal challenges and challenges to federalism. Insights from the EU and federal states', *Journal of European Public Policy*, 24, n. 4, pp. 467-485.

Fukuyama, F. (2014). *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy*, New York, Farrar, Straus and Giroux.

Genschel, P. and M. Jachtenfuchs (eds.). *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press.

Genschel, P. and M. Jachtenfuchs (2017). 'Different Crises, Similar Reactions: The Integration of Core State Powers in the Debt and Refugees Crises Compared', paper submitted at the ECPR General Conference, University of Oslo, Oslo, 6-9 September.

Grimm, D. (2005). *Sovereignty: The Origin and Future of a Political and Legal Concept*, New York: Columbia University Press.

Hendrickson, D. C. (2003). *Peace Pact: The Lost World of the American Founding*, Lawrence: University Press of Kansas.

Hendrickson, D. C. (2009). *Union, Nation, or Empire: The American Debate Over International Relations, 1789-1941*, Lawrence: University Press of Kansas.

Heritier, A. (2007). *Explaining Institutional Change in Europe*, Oxford: Oxford University Press.

Hoffman, L., C. Parsons and B. Springer (2017). 'Hayek, Polany, and single market (Or how Europe's single market surpassed America's)', paper delivered at the Conference of the European Union Studies Association, Miami, Florida, May 4-7.

Hooghe, L. and G. Marks (2001). *Multi-level Governance and European Integration*, Lanham, Maryland, Rowman and Littlefield.

Jachtenfuchs, M. (1995). 'Theoretical Perspectives on European Governance', *European Law Journal*, 1, no. 2, pp. 115-33.

Jacobs, L. and D. King (eds.) (2009). *The Unsustainable American State*, Oxford: Oxford University Press.

Katznelson, I. and M. Shefter (eds.) (2002). *Shaped by War and Trade: International Influences on American Political Development*, Princeton: Princeton University Press.

Kelemen, D. (2014). 'Building the New European State? Federalism, Core State Powers, and European Integration', in Genschel, P. and M. Jachtenfuchs (eds.). *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press, pp. 211-229.

Klarman, M.J. (2016). *The Framers' Coup: The Making of the United States Constitution*, Oxford: Oxford University Press.

Krastev, I. (2017). *After Europe*, Philadelphia, University of Pennsylvania Press.

Lacroix, J. and K. Nicolaidis (eds.) (2010). *European Stories: Intellectual Debates on Europe in National Context*, Oxford: Oxford University Press.

Lhotta, R. and von Blumenthal, J. (2015) 'Intergovernmental relations in the federal republic of Germany: complex co-operation and party politics', in J. Poirer, C. Saunders and J. Kincaid (eds), *Intergovernmental Relations in Federal Systems: Comparative Structure and Dynamics*, Oxford: Oxford University Press, pp. 206–38.

Majone, G. (2014). *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* Cambridge: Cambridge University Press.

Matthijs, M. (2017). 'Europe After Brexit: A less Perfect Union', *Foreign Affairs*, January-February.

Nicolaidis, K. (2013). 'European Democracy and Its Crisis', *Journal of Common Market Studies*, 51, no. 2, pp. 351-369.

Onuf, P. S. (1983). *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787*, Philadelphia, University of Pennsylvania Press.

Orren, K. and S. Skowronek (2017). *The Policy State: An American Predicament*, Cambridge, Harvard University Press.

Piattoni, S. (2010). *The Theory of Multi-Level Governance: Conceptual, Empirical and Normative Challenges*, Oxford, Oxford University Press.

Pierre, J. (ed.) (2000). *Debating Governance*, Oxford, Oxford University Press.

Puetter, U. (2014). *The European Council and the Council: New Intergovernmentalism and Institutional Change*, Oxford: Oxford University Press.

Rodrik, D. (2011). *The Globalization Paradox: Democracy and the Future of World Economy*, New York: W.W. Norton and Company.

Sabel, C. and J. Zeitlin (2012). *Experimentalist Governance in the European Union. Towards a New Architecture*, Oxford, Oxford University Press, 2nd edition.

Scharpf, F.W. (2009). 'Legitimacy in the Multilevel European Polity', *European Political Science Review*, 1, no. 2, pp.173-204.

Schmidt, V. (2013). 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput', *Political Studies*, 61, no.1, pp. 2-22.

Schutze, R. (2010). *From Dual to Cooperative Federalism*, Oxford: Oxford University Press.

Wessels, W. (1997). 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes', *Journal of Common Market Studies*, 35, no. 2, pp. 267-299.

Wessels, W. (2016). *The European Council*, New York: Palgrave.

Wozniakowski, T.P. (2017). 'Why the sovereign debt crisis could lead to a federal fiscal union: the paradoxical origins of fiscalization in the United States and insights for the European Union', *Journal of European Public Policy*, <http://dx.doi.org/10.1080/13501763.2017.1285340>