

THE IMPACT OF THE TREATY ON STABILITY, COORDINATION AND GOVERNANCE ON THE NATIONAL CONSTITUTIONAL STRUCTURE: THE REGIONAL EXAMPLE

Giuseppe Martinico*[†]

INTRODUCTION

This article aims to investigate the impact of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) and of the subsequent measures adopted by the European Union's (EU) Member States on their respective national constitutional structures, using Italy and Spain as examples. In order to do that, I shall examine the effects of these provisions on a sensitive constitutional area, represented by the domestic territorial organization. I picked this area because it can be traced back to the very idea of a State's "fundamental structure" as understood in Article 4.2 of the Treaty of the European Union (TEU) which establishes that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."¹

One might wonder whether the territorial organization of Member States really relates to the concept of national constitutional structure, since many of the 25 parties of the TSCG are not federal or regional orders.²

* Giuseppe Martinico is a García Pelayo Fellow, Centro de Estudios Políticos y Constitucionales, Madrid; Lecturer, Scuola Superiore S. Anna, Pisa (on leave), Many thanks to Giacomo Delledonne, Violeta Ruiz Almendral and Anna Margherita Russo. This paper is part of a broader enterprise funded by the DER 2011-23492 project, coordinated by professor Olesti Rayo (Universidad de Barcelona.)

[†] Suggested citation: Giuseppe Martinico, *The Impact of the Treaty on Stability, Coordination, and Governance on the National Constitutional Structure: A Regional Example*, MICH. J. INT'L L. EMERGING SCHOLARSHIP PROJECT (2013), <http://www.mjilonline.org/wordpress/wp-content/uploads/2013/martinico.pdf>.

1. Treaty on European Union art. 4.2, Feb. 7, 1992, 53 O.J. Eur. Union C 83/18 (updated by the Treaty of Lisbon, Dec. 13, 2007) [hereinafter TEU] ("The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.").

2. Anna Gamper, *A Global Theory of Federalism: The Nature and Challenges of a Federal State*, 6 GERMAN L. J. 1297, 1303 (2005); Anna Margherita Russo, *La Distribución Territorial del Poder en los Estados Miembros de la Unión Europea: El 'Federalizing Process' en Acción*, UGR.ES, http://www.ugr.es/~redce/REDCE17/articulos/10_RUSSO.htm (last visited May 16, 2013).

However, Article 4.2 TEU makes explicit reference to this area. Even in examining the content of Article 79 of the German Basic Law,³ one can understand the territorial structure as belonging to the untouchable core of many constitutions. This is undoubtedly true for the two legal orders that I chose for this article, Italy and Spain.

There are many reasons to explore Regions in this article. First, Regions play a fundamental role in the EU multilevel order, although they have traditionally been neglected by EU treaties through the famous principle of “territorial blindness.”⁴ The UK case is evidence of their importance, where, for instance: “approximately 80% of the policies which have been devolved are also policies for which the EU has a competence - e.g. fisheries, agriculture, environmental policy, economic development.”⁵ This has created an evident gap between the importance of their political mechanisms and the poverty of their legal status, and such a gap might be seen as one of the aspects of the EU democratic deficit.⁶

A second reason is the comparative law argument.⁷ This argument proposes that the relation between centre and periphery in times of crisis is a classic subject of comparative federalism. Traditionally, it is argued that the need to resolve financial crisis favors the centralization of powers. Supporters of this view frequently recall the New Deal, a regulatory scheme often defined as a turning point in the history of American federalism.⁸ More recently, Loubert stressed the impact of the American sovereign debt crisis of 1780 on the state of the Union.⁹ Finally, this is an area in constant

3. .GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 79, May 23, 1949, BGBl. III (Ger.) (“Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”).

4. .Stephen Weatherill, *The Challenge of the Regional Dimension in the European Union*, in *THE ROLE OF REGIONS AND SUB-NATIONAL ACTORS IN EUROPE* 1, 1 (Stephen Weatherill & Ulf Bernitz eds., 2005).

5. Caitríona A. Carter, *The Formulation of UK-EU Policy Post-Devolution: A Transformative Model of Governance?*, *MANCHESTER PAPERS IN POLITICS* 2 (2002), http://www.socialsciences.manchester.ac.uk/disciplines/politics/publications/workingpapers/documents/manchester_working_papers/MPP092002.pdf.

6. See Marco Dani, *Regions Standing Before the EU Courts - Towards a Constitutional Theory on "Direct and Individual" Participation of the Regions in the EU Decision-Making Processes*, in *AN EVER MORE COMPLEX UNION: THE REGIONAL VARIABLE AS A MISSING LINK IN THE EU CONSTITUTION?* 181, 197 (Roberto Toniatti, Francesco Palermo & Marco Dani eds., 2004).

7. For a recent comparison of the American and European democratic traditions, see ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW* 22-40 (2009).

8. See John Joseph Wallis & Wallace E. Oates, *The Impact of the New Deal on American Federalism*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 155, 156 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998).

9. Aart Loubert, *Sovereign Debt Threatens the Union: The Genesis of a Federation*, 8 *EUR. CONST. L. REV.* 442, 454 (2012).

evolution, as the growing literature in this ambit shows.¹⁰

Given that background, the motive to explore Spain and Italy in this piece is simple: they belong to the exclusive club of the so-called “P.I.G.S.” countries, a harsh acronym used to refer to Portugal, Italy, Ireland, Greece and Spain by many international newspapers, magazines and media.¹¹ These States supposedly suffer from the impact of the EU measures more heavily than other countries.

As for the structure of this piece, it will be divided into three parts. After having recalled the “place” usually given to Regions by EU law (Part I), I shall move to the analysis of the concrete measures at stake (Part II). Finally, some concluding remarks will be presented.

My approach is that of a scholar interested in European Union and comparative constitutional law, and thus I will pay attention to the national level when looking at the impact of the TSCG and the new European economic governance discipline.

I. THE PLACE OF REGIONS IN EU LAW

Traditionally it is said that EU law pays little attention to territorial separation of power in its Member States. This is the essence of the so-called “territorial blindness” of EU law. Such an attitude results in an underestimation of regional interests at EU level.

The regional lack of “voice” is present both at the substantive and procedural levels. Regions do not participate in the decision making phase unless in an indirect manner, and they are not privileged applicants.¹² This phenomenon has been explained by scholars in different ways; here I will summarize three competing views.

First, according to authors like Skoutaris, this phenomenon can be explained because the regional question is not a real issue shared at the supranational level. As a matter of fact, not all the EU Member States present a regional or federal system, since there are systems where Regions are mere administrative units without legislative powers.¹³

Another explanation might be connected to the fact that Regions do not have a common position or common interests. This explains the difficulties of the Committee of the Regions and the reasons why the Regions provided with legislative powers created the Conference of European Regional Legislative Assemblies (CALRE). This is also a confirmation of the

10. See, e.g., FEDERALISM IN THE EUROPEAN UNION, (Elke Cloots, Geert De Baere & Stefan Sottiaux eds., 2012); Anne Thies, *The Locus Standi of the Regions Before EU Courts*, in THE ROLE OF THE REGIONS IN EU GOVERNANCE 25, 25-54 (Carlo Panara & Alexander De Becker eds., 2011).

11. See, e.g., *Europe's PIGS, Country by Country*, BBC NEWS (Feb. 11, 2010, 1:55 PM), <http://news.bbc.co.uk/2/hi/8510603.stm>.

12. Thies, *supra* note 10, at 25-26.

13. Nikos Skoutaris, Seminar at Durham University on Federalism: The European Union's Uncommon Principle (Dec. 6, 2012).

existence of a two-speed European Union (legislative Regions versus administrative Regions: two actors with different priorities and interests). This phenomenon is also connected to the public international law origin of the EU. For instance, once the CJEU argued that:

[it is] apparent from the general scheme of the Treaties that the term "Member State," for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say, the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established it is apparent from the general scheme of the treaties that the term 'Member State', for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say, the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.¹⁴

Since its founding, the Treaties of the EU have been signed by the Member States. They are the reference mark of the EU legal system, and the holders of duties and rights are defined according to the Treaties. This is, in a nutshell, the reasoning of the CJEU.

The "indifference" of the EU towards the domestic territorial organization of their Member States presents two sides. There is a good side resulting in a sort of respect for the internal vertical division of powers between centre and periphery¹⁵ (one could call it "territorial autonomy"). However, there is also a negative side represented by the impossibility of using domestic separation of powers as a way to justify non-compliance with EU law.¹⁶ Since States are the holders of the supranational obligations (this was evident according to the wording of Article 10 TEC), they are only responsible in case of violation of EU law.

However, Regions are key actors in the functioning of the EU and there is considerable evidence concerning such a role. One example of this is the EU cohesion policies, which are emblematic of the asymmetry existing

14. Case C-95/97, *Région Wallonne v. Comm'n*, 1997 E.C.R. I-1787.

15. Koen Lenaerts, *The Law of the European Union and the Exercise by Regions of Their Tax Powers* 3 (2011), http://fin.vlaanderen.be/nlapps/data/docattachments/2_LegalTheory_KoenLenaerts.pdf ("EU law does not interfere with the internal division of powers between national and regional authorities within a Member State. Regions exercising their own constitutional powers must however do so in a manner consistent with EU law.").

16. *Id.* (A Member State is thus not entitled to hide behind the domestic division of powers or federal structure in order to avoid the ECJ making a finding of an infringement or to escape its obligation to bring such infringement to an end.").

between their political importance and the ambiguity of their legal status in EU law.

In the field of cohesion policies, as Vida pointed out, Regions are crucial in the implementation phase (based on the so-called “new modes of governance”) but are excluded from the decision making phase¹⁷ (based on the involvement of the traditional institutional actors, the so-called “old mode of governance”).

This also explains the case law of the CJEU in this ambit. As pointed out by Caruso,¹⁸ it is possible, for instance, to detect the consequence of such a paradox in the case law of the CJEU concerning the regional policy. Indeed, many of the relevant decisions of the Commission in this field are formally addressed to Member States although they often result in having an impact on the Regions. The *Regione Sicilia* saga¹⁹ is emblematic of this trend: in spite of their concrete effects on regional actors, the CJEU has always kept a formalistic point of view, which looks at the addressee of the decision.

Other examples of the regional importance can be seen, for example, in the area of cross-border cooperation,²⁰ but it is also true that the EU has played a significant part in the territorial structure on some new Member States, favoring a sort of functional decentralization.²¹ The Lisbon Treaty has recently introduced novelties that have partly given new visibility to regional actors.²²

17. Krisztina Vida, *New Modes of Governance Project Paper, New Modes of Governance in EU Cohesion Policy - Emergence, Evolution, and Evaluation* (Oct. 2005), http://www.eu-newgov.org/database/DELIV/D01D16a_Background-Emergence_Cohesion_Policy.pdf.

18. Daniela Caruso, *Direct Concern in Regional Policy: The European Court of Justice and the Southern Question*, 17 EUR. L. J. 804, 811 (2011).

19. Case T-70/03, *Regione Siciliana v. Comm'n*, 2005 E.C.R. II-4212; Case C-15/06P, *Regione Siciliana v. Comm'n*, 2007 E.C.R. I-2594.

20. See Anna Margherita Russo, *Globalization and Cross-Border Cooperation in EU Law: A Transnational Research Agenda*, PERSPECTIVES ON FEDERALISM, Oct. 6, 2012, at E-9.

21. See Russo, *supra* note 2 (discussing Romania as an example of the operation of the EU on new member States).

22. In this respect, one may recall several provisions introduced by the Lisbon Treaty. First, Article 5 of the TEU offered a slightly new formulation of the subsidiary principle. Particularly relevant in this Article is the explicit mention of the “regional and local level” when introducing the scope and function of the subsidiarity principle; this contrasts with the previous version of the Article 5, which did not do so. See TEU, *supra* note 1, art. 5. Second, the aforementioned Article 4. *Id.* Art. 4 ¶ 2. Third, Article 263 of the Treaty on the Functioning of the European Union, paragraph one, which concerns the possibility of the Committee of the Regions to go before the CJEU as a semi privileged applicant. Treaty on the Functioning of the European Union art. 263, May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU] (“The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.”). Finally one may recall Article 8 of Protocol

Moreover, even the CJEU has partially reconsidered its own position following the increase in importance of decentralisation processes within domestic systems with a series of cases.²³ Nevertheless, the territorial blindness of EU law has not been totally overcome as the still-thorny issue of the regional access to the CJEU shows.

In the next section I shall move to the impact of the recent EU anti-crisis measures on these actors, in order to see if these measures are acting as a factor favoring centralization.

II. THE TSCG: A SNAPSHOT

The Treaty on Stability, Coordination, and Governance (“TSCG”) was signed by 25 European leaders at the beginning of March 2012 and is divided into six parts: Purpose and Scope (Article 1), Consistency and Relationship with Law of the Union (Article 2), Fiscal Compact (Article 3-8), Economic Policy Coordination and Convergence (Article 9-11), Governance of the Euro Area (Article 12-13), General and Final Provisions (Article 14-16). From a constitutional viewpoint, the most important clauses are represented by Article 1²⁴ and Article 2, concerning the relationship with

No. 2 to the TFEU. Protocol Number Two to the Treaty on the Functioning of the European Union, art. 8, May 5, 2008, 2008 O.J. (C 115) [hereinafter Protocol Two] (“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.”). There are other sectorial novelties concerning policies where Regions have a crucial role, such as policies regarding cohesion. These are indirectly relevant for the purpose of this research. Among these policies, one can recall the following: 1. “Territorial Cohesion” - along with economic and social cohesion - is a general political goal of the EU. *See* TFEU art. 326. Cohesion as a whole belongs to the untouchable core of EU law as confirmed by the provisions concerning enhanced cooperation. TFEU art. 326. 2. The EP is now a full-fledged legislator, put on equal footing with the European Council. This also applies to EU cohesion policies. The EP also received new budgetary powers. 3. The novelties aimed at involving national parliaments, especially those giving national parliaments a role in the so-called early warning mechanism. TEU, *supra* note 1, art. 12. 4. Mechanisms for state aid, referenced in Article 107 of the TFEU. *See also* TFEU art. 349.

23. *See* Case C-302/97, *Konle v. Republik Österreich*, 1999 E.C.R. I-3099; Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-05123; Case C-88/03, *Portugal v. Comm’n*, 2006 E.C.R. I-7145; Joined Cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) & Others v. Juntas Generales del Territorio Histórico de Vizcaya & Others*, 2008 E.C.R. I-06747; Case C-428/07, *Horvath v. Sec’y of State for Env’t, Food & Rural Affairs*, 2009 E.C.R. I-06355; Cases C-106/09 & C-107/09, *Comm’n and Kingdom of Spain v. Gov’t of Gibraltar and United Kingdom of Great Britain & Northern Ireland* 2011 (not yet published).

24. Treaty on Stability, Coordination, and Governance in the Economic and Monetary

EU law and reaffirming the precedence of EU law over the Treaty. This is a point which is present in many other parts of the Treaty such as Article 3.2, which provides for the necessity for the States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to.” It is debatable whether this Article 3.2 is inconsistent with Article 4.2 of the TEU, which reinforces the necessity to respect the national identity and constitutional structure of the EU Member States.

Things are even more complex in countries whose fundamental laws are written in more than one document (see Sweden, for instance). Article 5 contains another reference to EU law; specifically, contracting parties subject to excessive deficit procedures must implement recovery programmes whose content and format have to be defined in EU law.

Another problematic provision is Article 8, which grants the CJEU jurisdiction to rule on the parties’ compliance with the requirements of Article 3.2 of the Treaty. Is this provision compatible with the Treaty on the Functioning of the European Union (“TFEU”)? The Preamble of the international agreement refers to Articles 273 and 260 of the TFEU, but Article 273 seems to be very clear in anchoring the jurisdiction of the CJEU to the EU Treaties. As it is clear from the wording of these articles, the TSCG aims to bind parties, which was missing in the previous instruments of the European economic governance. This also explains the concern for the role to be played by the political institutions in the new contexts. The debate about the alleged loss of power of the European Parliament is emblematic from this point of view: it might look paradoxical that now many scholars have started worrying about the role of the European Parliament in the economy of this new Treaty since its position is relatively stronger than it was in the past, especially if one compares the position of this institution in the TSCG to that it had in the previous Stability and Growth Pacts as pointed out by Fasone.²⁵

Nonetheless, every attempt at finding the exact “place” of EU institutions in the TSCG needs to clarify first the exact “scope” of this new international agreement, and here scholars are divided. According to some,²⁶

Union, art. 1, Mar. 2, 2012 (stating that the aim of the Treaty is “to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union’s objectives for sustainable growth, employment, competitiveness and social cohesion.”).

25. Cristina Fasone, *The Struggle of the European Parliament to Participate in the New Economic Governance* (Robert Schuman Center For Advanced Studies, EUDO - European Union Democracy Observatory, European University Institute Working Papers RSCAS 2012/45, 2012), available at http://cadmus.eui.eu/bitstream/handle/1814/23429/RSCAS_2012_45.pdf?sequence=1.

26. See European Union Committee, *The Euro Area Crisis*, 2012, H.L. ¶¶ 71-125 (U.K.), available at <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldecom/260/26008.htm>.

the new international agreement would add “very little to the measures already set out in EU law or which have been or could be proposed as part of EU law.”²⁷ A confirmation of this can be found in the words pronounced at the end December 2011 by Guy Verhofstadt: “it is for political, symbolic reasons that they want to do this agreement.”²⁸ On the other hand, as the UK Minister for Europe said, “there is no provision in the European Union treaties to make a balanced budget rule binding in a Member State’s national law or subject to the jurisdiction of the European Court of Justice. There is no provision in the existing treaties for an automatic correction mechanism where a Member State deviates from that balanced budget path.”²⁹ Moreover, those who argue that this international agreement would add something new, tend to recall that this new treaty would confer new powers on some EU institutions, *in primis* the Commission.³⁰

There are also analyses that have tried to assess the impact of the TSCG (and national measures taken at national level) on the role of some key domestic actors or policies, for instance the role of national parliaments.³¹ I will do something similar, by analysing the effects of the new EU economic governance on the role of Regions.

A. *The TSCG: Its Impact on Territorial Organization*

After having recalled the structure and some of the problematic points of this international agreement, I shall move to the concrete measures included in this treaty or adopted at national level on the regional positions.

First, it should be recalled that Article 3 of the TSCG applies to both regional and local governments, as evidenced by the reference made by Article 4 of the TSCG to Protocol number 12, devoted to the procedure in the event of excessive deficit.

Indeed, Article 2 of Protocol number 12 clarifies that “government means general government that is central government, regional or local government and social security funds, to the exclusion of commercial operations, as defined in the European System of Integrated Economic Accounts.” In order to assess the effects of these provisions it is necessary to adopt a multilevel perspective, looking at what is going on at national level as well as what is happening on an EU level.

In Italy, Article 81 of the Constitution was recently amended to

27. *Id.* ¶ 102.

28. Honor Mahoney, *Doubts Increase Over Usefulness of New Fiscal Treaty*, EUOBSERVER.COM (Dec. 20, 2011, 11:04 PM), <http://euobserver.com/843/114698>.

29. *See* European Union Committee, *supra* note 25.

30. Select Committee on the European Union, *The Euro Area Crisis: Oral and Written Evidence*, Supplementary Written Evidence of Professor Paul Craig, 2012, H.L. at 22 (U.K.) *available at* <http://www.parliament.uk/documents/lords-committees/eu-select/euroareacrisis/Evidencevolume.pdf>.

31. Elena Griglio & Nicola Lupo, *Parliamentary Democracy and the Eurozone Crisis*, 1 L. & ECON. YEARLY REV. 313, 340 (2012).

introduce an express mention of the “balanced budget”³² principle through constitutional law 1/2012. Articles 97, 117 and, above all, the first paragraph of Article 119³³ were also amended. The wording of Article 119³⁴ clearly limits the possible recourse to borrowing for Regions and Local Authorities. While this provision seems feasible for local authorities to finance investment spending, it also adds, “with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole.”

The Monti government established many cuts, and some of these measures have also impacted on the regional structures: the case of law decree 138/2011, then converted into law by Act number 148/2011 is emblematic. In fact, Article 14 has reduced the number of members of Regional Councils (whose internal organization belongs to the exclusive legislative competence of Regions) and establishes incentives to induce Regions to make choices consistent with what is provided for in the decree (in this respect authors have talked of “financial blackmail.”)³⁵

32.Art. 81 Costituzione [Cost.] (It.) (“The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle.”).

33.Art. 97 Costituzione [Cost.] (It.) (“General government entities, in accordance with European Union law, shall ensure the balance of their budgets and the sustainability of the public debt.”). The Italian Constitution goes on to limit the margin of Regions and Local Authorities in the field of matters of regional and local finance, by introducing new constraints on the local authorities. Art. 119 Costituzione [Cost.]. For a discussion of these reforms, see Tonia Groppi, *Editorial: The Impact of the Financial Crisis on the Italian Written Constitution* 4 ITALIAN J. PUB. L. 1 (2012).

34. Art. 119 Costituzione [Cost.] (It.) (“Municipalities, provinces, metropolitan cities and regions shall have revenue and expenditure autonomy, subject to the obligation to balance their budgets, and shall contribute to ensuring compliance with the economic and financial constraints imposed under European Union law. Municipalities, provinces, metropolitan cities and regions shall have independent financial resources. They set and levy taxes and collect revenues of their own, in compliance with the Constitution and according to the principles of co-ordination of public finance and the tax system. They share in the revenues from State taxes related to their respective territories. State legislation shall provide for an equalization fund - with no allocation constraints - for the territories having lower per-capita tax-raising capacity. Revenues raised from the above-mentioned sources shall enable municipalities, provinces, metropolitan cities and regions to fully finance the public functions attributed to them. The State shall allocate supplementary resources and adopt special measures in favor of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to eliminate economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions. Municipalities, provinces, metropolitan cities and regions have their own assets, which are allocated to them pursuant to general principles laid down in State legislation. They may have recourse to borrowing only as a means of financing investment expenditure, with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole. State guarantees on loans contracted by such authorities are not admissible.”).

35. Gianliborio Mazzola, *Le regioni fra riforme costituzionali, crisi finanziarie e federalismo*, AMMINISTRAZIONE IN CAMMINO (2012), available at http://www.amministrazioneincammino.luiss.it/wp-content/uploads/2012/06/Mazzola_Regioni_riforme-Cost_crisi_federalismo.pdf. See also

Other legal measures, such as law decree number 78/2010 (“Urgent measures for financial stabilization and economic competitiveness”), converted in to law by Act n. 122/2010, are based on a dangerous vision of the notion of emergence. As Falcon pointed out, this vision of emergence is presented as a source able to justify every kind of intervention.³⁶ This discipline has been questioned in front of the Italian Constitutional Court, which, in the judgment 151/2012,³⁷ rejected the very centrist interpretation that the State had given of the measures in law decree n. 78/2010. These are just a few examples showing the risk of centralization in the Italian system induced by the EU anti-crisis measures.³⁸

Other emblematic examples are Spain’s Article 135 and Organic Law 2/2012 (“Budgetary Stability and Financial Sustainability.”) Scholars stressed that these provisions should be read with other provisions on excessive debt and deficit and with the Internal Stability Pact system,³⁹ established by Organic Law 5/2001 and the Royal Decree 2/2007, since they share the same centralistic approach.

As Ruiz Almendral pointed out, the constitutional reform was passed after an important decision of the Constitutional Court,⁴⁰ whereby the Court declared the provisions of some of the Stability laws unconstitutional for violation of the financial autonomy of the Autonomous Communities. This demonstrates that some of the tensions between centre and periphery were present even before the constitutional reform induced by the European debt crisis.

Returning to the new Article 135 of the Spanish Constitution, its paragraph 6 is particularly relevant. It states that “[t]he Autonomous Communities, in accordance with their respective laws and within the limits referred to in this article, shall take the appropriate procedures for effective implementation of the principle of stability in their rules and budgetary decisions.” Further, paragraph 2 of Article 135 states: “[t]he State and the Self-governing Communities must be authorized by Act in order to issue Public Debt bonds or to contract loans.”

This passage is important because, as emphasized by scholars,⁴¹ this

Decreto Legge 10 ottobre 2012, n. 174 (It.), which, among other things, has extended some of the controls that in a first moment were applicable to State only performed by the Corte dei conti, “an Institution with the role of safeguarding public finance and guaranteeing the respect of jurisdictional order.” CORTE DEI CONTI, http://www.corteconti.it/english_corner/chi_siamo/ (last visited May 21, 2013).

36. Giandomenico Falcon, *Editoriale: La crisi e l'ordinamento costituzionale*, LE REGIONI 11 (2012).

37. Corte Cost., 14 giugno 2012, n. 151, 2012 (It.).

38. See also Falcon, *supra* note 36, at 11.

39. Violeta Ruiz Almendral, “Curbing the Deficit in Spain and its Autonomous Communities: a Constitutional Conundrum,” paper presented at the Centro de Estudios Políticos y Constitucionales, on 23 October 2012.

40. S.T.C., Aug. 17, 2011 (S.T.C., No. 134) (Spain).

41. Violeta Ruiz Almendral, *Curbing the Deficit in Spain and its Autonomous Communities: a Constitutional Conundrum* 10 (Centro de Estudios Políticos y

limitation of the possibility of contracting loans for the Autonomous Communities represents a major paradigm shift compared to the past, when financial autonomy and the increase in regional tax power had been the center of the reformist agenda of the Spanish Autonomous State.

Other provisions confirm the centralization. One example is Article 10.3 of Law n. 2/2012, which asks the State to ensure coordination between the budgetary policies of territorial actors (Autonomous Communities, municipalities) and the center. However, this centralization is only partly connected to what is happening at European level, as it has its roots in previous events:

A consequence of the new rules is that they facilitate a re-centralization of the Communities' powers. This idea is coherent with the ongoing centralization that the Fiscal Compact implies. It is also consistent with the European Union's Economic Constitution, which previously implied a centralization of powers and the transformation of the Member States' economic constitutions.⁴²

These observations ring true for Spain and Italy as well. It has been suggested that the "Spanish State of Autonomies was already in a changing course of re-centralization,"⁴³ so the new rules "may serve to accelerate the process."⁴⁴ This is true also for Italy; despite the bombast of federalism and constitutional reforms employed by all recent Italian governments, the crucial issue of "fiscal federalism"⁴⁵ has not been realized completely, more than 10 years after the constitutional reform of 2001, which had been modified by Article 119 for the first time. This reveals a more complex mosaic, where the EU is just one piece of a larger set of factors to be taken into account.

CONCLUSION

Undoubtedly it is possible to detect that the TSCG has caused centralization. This is a trend that confirms the history of the federalization process in times of crisis, with an important variant reflecting the

Constitucionales, Conference Working Paper, Oct. 23, 2012) (on file with the author).

42. Almendral, *supra* note 41, at 10.

43. *Id.*

44. *Id.*

45. See Filippo Scuto, *The Italian Parliament Paves the Way to "Fiscal Federalism,"* 2 PERSPECTIVES ON FEDERALISM, no. 1, 2010, at E-67 (discussing how this discipline is governed by law number 42/2009, which has been implemented through several legislative acts).

46. See Enoch Albertí, *El impacto de la crisis financiera en el estado autonómico español*, (REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL Working Paper, 2013) (on file with the author).

particularities of the EU. Who takes advantage of centralization is not the EU, but the Member States,⁴⁶ in order to comply with the supranational obligations as a particular model of cooperative federalism.⁴⁷

Is this centralization consistent with the traditional territorial blindness of EU law? I would say yes. In fact, as we saw, one of the two meanings of territorial blindness consisted of the impossibility, for States, to hide behind the territorial articulation of domestic power when in presence of a violation of EU law. This element has favored centralization of power over the years. When looking at the Italian case, for example, many instances of an EU law-driven reform can be found in the case law of the Italian Constitutional Court. The engine of this process has been the above-mentioned territorial blindness of the EU.

Under EU law, the Member State is the only entity liable for non-compliance with the requirements of EU law. On several occasions, the CJEU has not taken notice of the domestic power division system when dealing with cases of non-compliance.⁴⁸ This, in turn, has forced the Italian actors to modify the original distribution of powers enshrined in the Constitution in order to avoid EU penalties.⁴⁹ To be sure, the Italian Constitutional Court has always been lenient with adaptations to the list of competences set forth in Article 117. We could say that the European mandate has only increased that predisposition, giving the Italian Constitutional Court an additional reason for centralising competences in favor of the State.⁵⁰

Similar dynamics have occurred in Spain, where “as regards the Autonomous Communities’ powers, another centralising tendency was generated by the fact that the institution habitually participating in the Council of the EU is the *State* government. As a result the constitutional system of division of competences and the balance on which it is based have become unsettled.”⁵¹ Constitutional Courts have played an ambivalent role in these dynamics, sometimes defending the original division of competences, sometimes favoring the centralization.

However, and this is another crucial point, the pressure coming from the EU is not sufficient to explain the whole relation between center and periphery. Indeed, the TSCG is not the only engine of centralization: as noted, in Spain, this centralizing trend began before the TSCG was

47. SCHÜTZE, *supra* note 7.

48. See, e.g., Case 169/82, *Comm'n v. Italy*, 1984 E.C.R. 1603; Case 168/85, *Comm'n v. Italy*, 1986 E.C.R. 2945.

49. See Paolo Bilancia, Francesco Palermo, & Ornella Porchia, *The European Fitness of Italian Regions*, 2 PERSPECTIVES ON FEDERALISM, no. 2, 2010, at E-1.

50. See also, Giuseppe Martinico, *The Impact of 'Regional Blindness' on the Italian Regional State*, in FEDERALISM IN THE EUROPEAN UNION 362, 363 (Elke Cloots, Geert De Baere & Stefan Sottiaux eds., 2012).

51. Maite Zelaia Garagarza, *The Spanish State Structure and EU Law: The View of the Spanish Constitutional Court*, in FEDERALISM IN THE EUROPEAN UNION 381, 383 (Elke Cloots, Geert De Baere & Stefan Sottiaux eds., 2012).

approved and the same decision of the States to centralize in order to promote compliance with European obligations is not directly required by the EU. This is a decision that each State makes, using its discretion with reference to the choice of instrument adapted to ensure the goal imposed by supranational law.

In conclusion, it is true that the TSCG favors centralization and the erosion of regional autonomy, but its pressure is only a piece of a larger mosaic, where autonomy and place of Regions is also affected by other reasons which may lead back to policy decisions taken by States within their margins of appreciation.