THE FINANCIAL AUTONOMY OF SPAIN'S AUTONOMOUS COMMUNITIES AND THE ECONOMIC AND MONETARY UNION: A THREE-PHASE TRANSFORMATION*.

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1. Introduction

The territorial organization of power in Spain has been and continues to be under permanent review. The principle of openness by which the country's regions were not directly established by the Constitution of 1978 (SC), leaving the decision to constitute an autonomous communities to the territories themselves, created, from the outset, ample indeterminacy regarding the concreteness and details of Spain's model for territorial organization. This was a conscious choice of the constituent power that opted to deconstitutionalize much of the territorial conundrum[1]. The model of territorial organization remained open and the details were left for articulation by other infraconstitutional sources of law – Statutes of Autonomy or other organic laws[2]. What the constituent power failed to foresee was European integration, a process to which Spain would subsequently adhere in 1986 and which would also be a factor in transforming the model of territorial organization.

The implications and effects of EU integration on the Spanish territorial model have been analyzed from several perspectives. On the one hand, several pertinent studies analyze the

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[1] E. Fossas Espadaler, *El principio dispositivo en el Estado autonómico*, Madrid, Marcial Pons and Instituto Vasco de Administración Pública, 2007, pp. 43-48.
[2] *Ibidem* pp. 49-56.

institutional structures that afford the Autonomous Communities opportunities to participate in EU policy-making, either via the EU's own decision-making procedures or the domestic channels that allow Spain to present its position before the EU[3]. On the other hand, doctrinal approaches analyze specific fields in which the process of European integration has had decisive impact on the evolution of the territorial model. Studies on the transformation of the national principle of market unity, for example, stand out, for their reinforcement followed from the Union's initiatives to strengthen the European internal market[4]. There are also recent analyses, including this article, that examine the impact of economic and monetary union (EMU) on the financial autonomy of the Autonomous Communities[5].

In particular, this article shows how the financial autonomy of the Autonomous Communities, in terms of their spending power or capacity, has been transformed over the course of EMU development and implementation. The EU's intervention has been decisive and must not be underestimated. The article explicates the relational dynamics between constitutionalism and European integration that can potentially cause far-reaching constitutional transformations. Although such transformations are not EU objectives in and of themselves, they emerge because of its policies.

In the last decade, the process of European integration has been subject to intense scrutiny from the perspective of national constitutionalism, a perspective that has often been framed as a limit and obstacle to integration. Doctrinal debates over the limits that the constitutional identity clause poses for the process of European integration, a clause which was elaborated under the clause of respect for national identity before the Treaty of Lisbon,

[3] M. González Pascual, *Las Comunidades Autónomas en la Unión Europea. Condicionantes, evolución y perspectivas de futuro*, Barcelona, Instituto de Estudios Autonómicos, 2013; S. Muñoz Machado (ed.), A. Boix Palop, M. González Pascual, D. Sarmiento, M. Zelaia Garagarza, Las Comunidades Autónomas y la Unión Europea, Madrid, Academia Europea de Ciencias y Artes, European Academy of Sciences and Arts, 2013.

[4] Among others, see: E. Albertí Rovira, *Autonomía Política y unidad económica. Las dimensiones constitucional y europea de la libre circulación y de la unidad de mercado*, Madrid, Civitas, 1995; T. De la Quadra Salcedo Janini, *Mercado único y Constitución*, Madrid, Centro de Estudios Políticos y Constitucionales, 2008; J. Solanes Mullor, *The desconstitucionalización and Europeanization of the principle of market unity: State of the Autonomies under pressure*, in *Revista Vasca de Administración Pública* nº 109-II/2017, pp. 89-118.

[5] See P. Guerrero Vázquez, *Freno constitucional al endeudamiento y descentralización política*, Madrid, Fundación Manuel Giménez Abad, 2020; P. Guerrero Vázquez, *La autonomía financiera de las Comunidades Autónomas en un escenario de consolidación fiscal*, in E. Aranda Ávarez (dir.), *Las implicaciones constitucionales de la gobernanza económica europea*, Valencia, Tirant lo blanch, 2020.

have recently become constant[6]. Phenomena such as Brexit and the clash pitting the German Federal Constitutional Court against the Court of Justice of the European Union (CJEU) over the European Central Bank's public debt purchase program[7] underscore the relevance of the substantive discussion of red lines or limits on EU governance that derive from national constitutionalism and, ultimately, the legitimacy of European integration itself.

These few examples reveal the difficulty of the relationship between constitutionalism and European integration. Internal constitutional structures are conceived as bulwarks against greater integration or even as justification for reversing the project. Such a framing, from the national point of view, involves explicit or implicit criticism of overreach by EU institutions, either in the form of a measure adopted by the European Central Bank that would not correspond to its competencies as conferred by the Treaties or in the form of a doctrine developed through case law, such as the principle of the primacy of EU law, which has overstepped its power. Such criticism points out the excessive intervention of EU authorities and, to some extent, focuses on EU intrusion into the Member States' spheres of competence. At a much more discreet level, far from the grand deliberation over the possible violation a Member State's constitutional identity, the role of the principle of institutional – or procedural – autonomy of the Member States is also under discussion[8]. Although much more limited in scope, this principle has a central place in the debate over the level of EU intrusion into Member States' decision-making power[9].

This article does not go as far as engaging the above-mentioned debates over the boundaries of the European integration process. It focuses instead on the influence of the European integration process on the future of the Spanish territorial model, a case in which EU law takes advantage of the open texture of national constitutions[10]. The 1978 Spanish

[6] See A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*. Cambridge, Antwerp and Portland, Intersentia, 2013.

[7] BVerfG, judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15, paras. 1-237 (ECLI:DE:BVerfG:2020:rs20200505.2bvr085915) and subsequent press release from the CJEU nº 58/20 of 8 May 2020.

[8] J. Schwarze, *El Derecho administrativo europeo a la luz del Tratado de Lisboa: observaciones preliminares*, in M. Fuertes López (ed.), *Un procedimiento administrativo para Europa*, Cizur Menor, Aranzadi, 2012, p. 48.; X. Arzoz, *La autonomía institucional y procedimental de los Estados Miembros en la Unión Europea*, in *Revista de Administración Pública* nº 191/2013, pp. 163-165.

[9] C.M. Kakouris, *Do the Member States possess judicial procedural 'autonomy'?*, in *Common Market Law Review* nº 34(6), 1997, p. 1408; J. Delicostopoulus, *Towards European Procedural Primacy in National Legal Systems*, in *European Law Journal* nº 9(5), 2003, pp. 599-60.

[10] R. Guastini, *Teoría e ideología de la interpretación constitucional*, Madrid, Trotta, 2008, p. 30.

Constitution does not depart from this distinctive feature of constitutionalism, which allows EU law to permeate and induce transformations[11]. In Spain, the territorial organization of the State is configured as one of the most open or, more precisely, more indeterminate constitutional aspects of the constitutional order[12]. This characteristic of the Spanish constitutional legal system opens opportunities for EU law to induce changes in the model of territorial organization when EU objectives and policies make such changes necessary. Just such an objective was the perceived need to establish a system for common spending discipline within the EMU. This policy has led, as will be seen, to reduced financial autonomy for the Autonomous Communities in Spain and tighter central control of public finances.

To properly gauge the degree of the EU's intervention, it is first necessary to analyze the financial autonomy of the Autonomous Communities as it was initially configured in constitutional terms (section 2). Then, the evolution and implementation of the EMU can be examined, corresponding to three different stages in which the influence of the EMU on the financial autonomy of the Autonomous Communities shifts. In the first stage, the EMU was minimally invasive (pre-crisis EMU, section 3), while in the second it was intense (EMU in crisis, section 4). Finally, the third and current stage of EMU intrusion can be characterized as persistent yet reform-minded (reforming the EMU and administering the European recovery funds, section 5). Finally, some brief conclusions are offered that underscore the close relationship between constitutionalism, the process of European integration and the future of the Spanish territorial model.

2. Financial autonomy and spending power from the constitutional perspective

Despite its indeterminacy and the conscious preference of the constituent power for deconstitutionalization, the model of territorial organization stands as a decision of prime importance in the 1978 Spanish Constitution. The debate over the model to adopt and how to resolve one of the most long-standing disputes in Spain was part of the process of

[11] On the interpretative flexibility of the Spanish Constitution, see V. Ferreres Comella, *The Constitution of Spain. A Contextual Analysis*, Oxford y Portland, Hart Publishing, 2013.
[12] G. Ariño Ortiz, *Las autonomías, tres cuestiones cardinales*, in *Cuenta y Razón* nº 3/1981, pp. 29-32.

political negotiation during the Spain's transition to democracy and was included in the so-called constitutional *consenso* that gave rise to the new constitutional system[13]. The structural openness and principle of deconstitutionalization of Title VIII of the Spanish Constitution reflect the difficulty to reach political agreement on a historical conundrum, which is why the model of territorial organization was left open for subsequent elaboration and articulation[14]. The constitution notably called for the model to be completed through infraconstitutional norms – namely through Statutes of Autonomy – open to the territories that wished greater autonomy. This model also allowed a significant degree of asymmetry from one region to the next[15].

Opting for deconstitutionalization, however, does not mean that the constituent power abstained from making any decision regarding the model of territorial organization. Much to the contrary, the constituent power made several pronouncements on the structural elements of the model and, in doing so, the principles for the territorial organization of the State were constitutionally enshrined[16]. The principles of *unity*, *political autonomy* and *solidarity* recognized in article 2 SC represent the constitutional values that underpin the entire model and guide the development of all its details through infraconstitutional regulation[17]. Unarguably, the Constitution stands as a guide for the development of the Spanish territorial organization model while the Statutes of Autonomy represent the primary mechanism responsible for establishing the norms that govern the particularities.

In addition, the guarantee of political autonomy for the Autonomous Communities is surely the most distinctive feature of Spain's constitutional architecture and has been defined and given expression by the Spanish Constitutional Court (SCC) case law that has been incrementally consolidated since the 1980s. Although the Constitution only mentions the «right to autonomy» without further qualification, the SCC has interpreted it as political, not merely administrative autonomy, which includes legislative and executive powers[18]. In short, Autonomous Communities enjoy the discretion, especially understood as a legislative capacity, to decide their policies within the framework of distribution of competences established by the Constitution and the respective Statutes of Autonomy.

[13] Ferreres Comella, supra note 11, pp. 162-166.
[14] Fossas Espadaler, supra note 1, pp. 44-48.
[15] Ferreres Comella, supra note 11, pp. 185-190.
[16] Fossas Espadaler, supra note 1, pp. 81-88.
[17] Ferreres Comella, supra note 11, 166-169.
[18] SCC nº 25/1981, of 14 July, para. 3; STC nº 4/1981, of 2 February, para. 3.

Accordingly, the principles of unity and solidarity discipline and limit the principle of political autonomy and shape the boundaries of the powers of the Autonomous Communities[19].

It is here, as an instrumental component of guaranteed political autonomy, that financial autonomy comes into play. Article 156.1 SC guarantees financial autonomy to the Autonomous Communities "for the development and exercising of their powers, in conformity with the principles of coordination with the State Treasury and solidarity amongst all Spaniards." The Constitution itself does not go much further than announcing the guarantee of financial autonomy of the Autonomous Communities and giving it instrumental character, that is, by qualifying it as necessary for the exercise of powers, inasmuch as it is needed by them for political autonomy. No precise definition of financial autonomy is found at the constitutional level and, again, it was left to the Spanish Constitutional Court to elaborate and flesh out the concept. Putting aside, however, the dimension of the principle of financial self-sufficiency – financial autonomy understood as the power to collect sufficient resources for the policies adopted – the dimension of financial autonomy that interests us more here, because of the impact that the EMU has had on it, is the other side of the coin: financial autonomy as spending authority, that is, the power to decide how much should be spent to carry out the policies Autonomous Communities are able to determine by virtue of their political autonomy. Understood in this sense, financial autonomy requires the authority to calculate and allocate the budget (in short, budgetary autonomy)[20]. Authority over spending, meaning being the power to decide how much to spend and on what, is intimately related to the capacity of the Autonomous Communities to implement their policies[21].

Still, the constitutional relevance of financial autonomy to spending power says little about the specific limits to which it is subject. It is a central constitutional value in the model of territorial organization, but little else can be deduced from the constitutional text. The Spanish Constitutional Court has specified that Article 156.1 SC gives rise to a power of coordination of the central government that necessarily limits the scope of the financial

[19] Regarding the principle of unity as a limit to political autonomy, see SCC nº 4/1981, of 2 February, para. 3. Regarding solidarity as a limit, see STC nº 64/1990, of 5 April. 7.
[20] SCC nº 63/1986, of 21 May, para. 9; STC nº 13/1992, of February 6, para. 7.
[21] SCC nº 13/1992, of 6 February, para. 7. See A. López Pérez, *La hacienda autónoma: una propuesta alternativa para la Comunidad Valenciana*, Barcelona, Bosch, 2009, pp. 55-57.

autonomy of the Autonomous Communities[22]. This power of coordination must be reinforced by specific competence titles that confer authority to central authorities, especially the competence to establish the bases and coordinate the general planning of the economic activity recognized in Article 149.1.13 SC, in which case central authorities are allowed to monitor and oversight over that aspect of the financial autonomy of the Autonomous Communities.

Despite these limits, the Spanish Constitutional Court has clarified that political autonomy itself, and therefore financial autonomy as a necessary mechanism for exercising that autonomy, implies an irreducible minimum that in no case can be infringed. On the one hand, the power of coordination emanating from Article 156.1 SC does not establish a hierarchical relationship as, in that sense, coordination and hierarchy are not comparable[23]. Generalized supervision by central institutions has therefore been ruled out[24]. On the other hand, a minimum threshold of discretion for the Autonomous Communities within their own field of powers means that they can never be denied control over the exercise of their competences[25]. This has specifically been emphasized in the field of financial autonomy and therefore takes on great relevance in the field of spending power[26].

In sum, the financial autonomy of the Autonomous Communities, whether considered on its own or as corollary to political autonomy, is constitutionally configured in Spain's model of territorial organization. It therefore enjoys constitutional protection even if the scope of that protection cannot be inferred from the constitutional text. While the Spanish Constitutional Court has attempted to determine the boundaries of the principle, it has only managed to proffer, much like the constitutional text, guidelines for the resolution of conflicts. These include the principles that the power to coordinate financial policy in certain areas does not automatically confer central authorities with hierarchical superiorit and that, even when the competence falls to central authorities, a minimum of discretion for the Autonomous Communities' exercise of their powers must be respected. All of these

[22] SCC nº 11/1984, of 1 February, para. 5; SCC nº 63/1986, de May 21, para. 8; SCC nº 62/2001, of 1 March, para. 4.
[23] SCC nº 76/1983, of 5 August, para. 12; SCC nº 27/1987, of 27 February, para. 6; SCC nº 40/1998, of 19 February, para. 53.
[24] M. Medina Guerrero, *La constitucionalización del principio de estabilidad presupuestaria*, in *Revista de Estudios Regionales*, nº 105/2016, p. 85.
[25] SCC nº 201/1988, of 26 November, para. 4; SCC nº 13/1992, of 6 February, para. 7.
[26] SCC nº 171/1996, of 30 October, para. 3.

criteria remain, therefore, open case law, applicable in a case-by-case analysis, which do not resolve the constitutional textual indeterminacy at their root.

Indeterminacy of the constituent and the non-excessive concreteness on the part of the Spanish Constitutional Court thus make it difficult to conclude, in the context of the larger European debates, that the model of territorial organization established by the Spanish Constitution represent an element of Spain's constitutional identity. Although it seems quite clear that the decentralized Spanish model of territorial organization is a constitutional decision whose core values are thus protected, the choice of the constituent power for a high degree of indeterminacy and strong deconstitutionalization leaves the specific form of the autonomous regions to infraconstitutional norms that lack robust protection from EU intervention. In this sense, the Spanish Constitutional Court, in formulating its doctrine of counter-limits to the principle of primacy of EU law, did not expressly mentioned the model of Spanish territorial organization as a red line not to be crossed[27].

Because of the textual indeterminacy in this matter and lack of concrete engagement by the Spanish Constitutional Court, the Spanish model of territorial organization does not provide a solid barrier against central government intervention in cases when, in order to satisfy EU objectives and policies, it imposes limits on the regions' financial autonomy. In other words, the constitutional barriers that protect the territorial model, although they do exist, do not stand up well to attacks by the central government that are backed by EU institutions. Adequate participation of the Autonomous Communities within the EU or in Spain's negotiations before the EU could compensate for this undermined protection of the Spanish territorial model. While EU or central government policies may affect the financial autonomy of the Autonomous Communities, the lack of explicit constitutional protections could be made up for by robust participation in the formulation of those policies. That is why studying the capacity for intervention in these policies of the Autonomous Communities is crucial.

[27] See Declaration of the Spanish Constitutional Court nº 1/2004, of 13 December, para. 2. In an ambiguous formulation, the Spanish Constitutional Court expressed that EU law must respect "the sovereignty of the State, our basic constitutional structures and the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights have special value".

3. First phase in the transformation: the EMU pre-crisis

The EMU first took shape in the 1990s during the process that led to the Euro. The need to harmonize economic and fiscal policies of the Member States pursuing integration into a single currency was inescapable[28]. In this context, the fiscal discipline of Member States – including spending capacity – was the object of attention from the earliest formulations of the EMU[29]. Control of public expenditure and budgetary stability were established as convergence criteria for entering the euro zone and thus, for the first time, the EU was afforded a mechanism to control excessive deficits of Member States[30].

The adoption of the single currency therefore led to substantive limits on the spending capacity of the Member States that were imposed by the EU. The Maastricht Treaty of 1992 and the first iteration of the *Stability* and *Growth Pact* (SGP) in the 1990s introduced the need for coordinated economic policies in the Member States[31], prohibited excessive deficits as a general principle[32] and eventually established a ceiling for budget deficits that were not considered "excessive"[33]. However, despite the control mechanism envisaged to supervise Member States' compliance with fiscal discipline[34], it was rarely activated and de facto breaches of the common fiscal system, including ones by Germany and France,

[28] F.J. Carrera Hernández, *The Six-Pack y el Two-Pack ¿Más allá de las competencias atribuidas en los Tratados?*, in E. Aranda Ávarez (ed.), *Las implicaciones constitucionales de la gobernanza económica europea*, Valencia, Tirant lo blanch, 2020, pp. 35-42.

[29] S. Ruiz Tarrías, *Las dimensiones constitucionales de la Unión Económica y Monetaria Europea*, Pamplona, Civitas, 2016, pp. 39-67

[30] The convergence criteria were first determined in the former Article 109 J of the Treaty on the European Community (TEC, as amended by the Maastricht Treaty) and were developed by Protocol nº 13 on convergence criteria.

[31] Article 103 TEC, in its wording after The Maastricht Treaty. Economic coordination was intended to be intensified through a regular monitoring mechanism based on the obligation to present "stability programs". See Regulation (EC) nº 1466/9 of the Council, of 7 July 1997 on strengthening the surveillance of budgetary positions and the surveillance and coordination of economic policies.

[32] Article 104 C TEC, as amended by the Maastricht Treaty.

[33] Protocol nº 12, on the excessive deficit procedure. The limits were set at 3% of the nominal public deficit and 60% of public debt, values in proportion to the gross domestic product of each country.

[34] The first version of the surveillance mechanism was anchored in the former Article 104 C TEC, in its wording after the Maastricht Treaty and in Article 3 of the Protocol nº 12. It was further developed in Regulation (EC) nº 1467/9,7 of 7 July on the acceleration and clarification of the excessive deficit procedure. In short, Member States were obliged to provide their budgetary positions to the Commission. If the Commission understands that the State could be incurred in an excessive deficit, it has to approach the Council, which, acting by a qualified majority, will decide whether such a deficit exists. The Council may then issue recommendations to the Member State concerned, first on a confidential basis and, if the recommendations are not followed, they could be made public. If non-compliance persists, the Council may decide to apply sanctions.

were tolerated[35]. The 2005 reform of the SGP did not alter this initial formulation, but it did introduce the so-called medium-term budgetary objectives for closer surveillance of Member State's budgetary policies[36] and relaxed the excessive deficit procedure that allowed the Commission and the Council more leeway in resolving possible non-compliance[37].

The implementation of this first formulation of the EMU in Spain was carried out at the infraconstitutional level. The principle of budgetary stability was imposed at the central level through Article 3 of Law nº 18/2001 of 12 December 2001 on General Budgetary Stability and at the level of the Autonomous Communities and local entities by Article 3 of Organic Law nº 5/2001 of 13 December 2001, which complemented the General Law of Budget Stability. Beyond the introduction of this limiting principle at the time of preparing and approving any budget, the central government was granted authority to determine the amount of public deficit that the Autonomous Communities could incur[38]. The Spanish legislative reform of 2006, in line with the 2005 reform of the SGP, introduced the same flexibilization variables set at European level[39]. In sum, the EMU, which required certain spending controls in the Member States that were to adopt the single currency, crystallized in Spain through a legislative framework of infraconstitutional nature that enshrined the principle of budgetary stability and centralized the determination of acceptable public deficits of all public administrations.

The financial autonomy of the Autonomous Communities, in terms of spending capacity, was reduced by these substantive limits to their budgetary policy, especially by establishing

[35] In these two cases, the Council declared that excessive deficit was incurred (Decision noº 2003/89/EC in the case of Germany and Decision nº 2003/487/EC in the case of France). Despite this, and in contradiction with the Commission's proposals, the Council decided to suspend in its conclusions the excessive deficit procedure at the Council summit held on 25 November of 2003. The Court annulled the Council's conclusions, but no sanctioning or practical effect emerged for the two countries (CJEU C-27/04, of 13 July 2004, *Commission v Council*, EU:C:2004:436).

[36] See Regulation (EC) nº 1055/2005, of 27 June amending Regulation (EC) nº 1466/97 on strengthening the surveillance of budgetary positions and on the surveillance and coordination of economic policies.

[37] See Regulation (EC) nº 1056/2005, of 27 June amending Regulation (EC) nº 1467/97 on the acceleration and clarification of the excessive deficit procedure.

[38] Articles 5 and 6 of Organic Law nº 5/2001. In the Spanish case, the central government gained the power to determine the nominal deficit of the Autonomous Communities, unlike other decentralized systems, such as the German one, which focuses the control over the structural deficit of sub-state entities. Thus, in case of controlling the nominal deficit, that is, the annual deficit of each budgetary year and not the long-term structural budget, implies a greater interference in the financial autonomy of sub-state entities. See in this regard Guerrero Vázquez, *La autonomía financiera de las Comunidades Autónomas en un escenario de consolidación fiscal*, supra note 5, p. 332.

[39] Amendments introduced by Law nº 15/2006, of 26 May and Organic Law nº 3/2006, of 26 May.

the limit on the public deficit that they were allowed to incur. This limitation could have been minimized if the Autonomous Communities had enjoyed adequate participation in the decision-making process behind the determination and distribution of the public deficit, that is, if they had a voice in vote on the limits that were set, either at the EU or central level. With regards the capacity of the Autonomous Communities to participate in EMU decision-making, the same difficulties that European regions have always encountered in participating in EU policy-making were encountered[40]. Few channels for regional participation in EU institutions exist and even fewer for a voice in the design of the EMU, where the Commission and the Council have always been the protagonists[41].

This situation did not improve from the perspective of the domestic procedures foreseen to establish the position of Spain before the EU. Until 2004, the system of participation of the Autonomous Communities in EU affairs was based on sectoral conferences, within which they were informed of EU policies, the latter were discussed and, finally, agreements were reached with the central government[42]. The system of sectoral conferences was complemented by the participation of the Autonomous Communities in Commission's committees and by the possibility, however limited, of litigating before the Court of Justice of the European Union[43]. All of these processes are centrally coordinated and attribute clear primacy to the central institutions, a trait of the Spanish model that has attracted strong criticism because of its shortcomings in terms of facilitating effective participation of the Autonomous Communities in EU affairs[44]. The reform of the system in 2004 made a decisive improvement, as it allowed the direct participation of the Autonomous Communities in the Council and in the bodies preparing for Council meetings, particularly

[40] P. Pérez Tremps, *Comunidades Autónomas, Estado y Comunidad Europea*, Madrid, Ministerio de Justicia, 1987, pp. 131-132; J. Martín Pérez de Nanclares, *Comunidades Autónomas y Unión Europea: hacia una mejora de la participación directa de las Comunidades Autónomas en el proceso decisorio comunitario*, in *Revista de Derecho Comunitario*, nº 22/2005, p. 763.

[41] The channels of participation in the EU available to Regions have been the direct participation in the Council since the Maastricht Treaty, although such participation depends on the will of national governments, the system of consultations with the Commission when there is a regional interest (*Dialogue with associations of regional and local authorities on the formulation of European Union Policy*, COM(2003) 811 final), the establishment of the Committee of the Regions (CoR), currently governed by Article 305 et seq. of the Treaty on the Functioning of the European Union (TFEU), and the access to the Court of Justice of the European Union, in particular by the CoR though the action for annulment established by Article 263, first paragraph, of TFEU. See Muñoz Machado (dir.), supra note 3, 173-176.

[42] Agreement on the Internal Participation of the Autonomous Communities in Community Affairs through Sectoral Conferences of 30 November 1994.

[43] González Pascual, supra note 3, pp. 54-74.

[44] *Ibidem*, pp. 125-128.

COREPER[45]. However, direct participation is limited to specific Council formations that do not include economic or financial affairs, which involves the EMU[46]. Neither directly before the EU nor through the mechanisms of internal participation in EU affairs were the Autonomous Communities able to participate in the decision-making process of the EMU. However, despite this deficit of direct participation at EU level, the initial implementation of the EMU in Spain left an acceptable margin of internal participation to the Autonomous Communities concerning the distribution of the public deficit[47]. Although the central government played the predominant role in the decision, the participation of the Autonomous Communities was channeled through the Council for Fiscal and Financial Policy (a multilateral collaboration body). This Council issued a report prior to the central government's determination of the total deficit for all the Autonomous Communities and, subsequently, it fell to the Council to determine the individual deficit for each Autonomous Community[48]. The 2006 reform encouraged bilateral participation between the central government and the Autonomous Communities in the individualized determination of the deficit[49]. In addition to this participation in internal decision-making, the Spanish regulatory framework at the time did not provide for a robust control system that was binding on the Autonomous Communities. Deviation from previously set deficit limits would entail the obligation of the Autonomous Community to submit an «economic-financial plan for rebalancing» to the Council of Fiscal and Financial Policy, but nothing more, as the application of sanctions was not contemplated[50].

The similarity between the design of the first EMU and the implementation that was carried out in Spain in this first stage is worth noting. At both the EU and state levels, substantive limits were set on spending capacity, from the EU to the Member States and in Spain, from

[45] Agreements of 9 December 2004, of the Conference for Matters Related to the European Communities, on the Department for Regional Affairs in the Permanent Representation of Spain before the European Union and on the participation of the Autonomous Communities in the working groups of the Council of the European Union; and on the system of regional representation in the formations of the Council of the European Union.

[46] Over time, the possibility of participating in different Council formations has been expanded, but economic formations have not been included. See González Pascual, supra note 3, pp. 77-79.

[47] Guerrero Vázquez, La autonomía financiera de las Comunidades Autónomas en un escenario de consolidación fiscal, supra note 5, pp. 336-337.

[48] Article 6 Organic Law nº 5/2001, as originally drafted.

[49] Article 5.3 Organic Law nº 5/2001, as amended by Organic Law nº 3/2006, of 26 May. See J.F. Bellod Redondo, *Déficit y ciclo económico en la reforma de la ley de estabilidad presupuestaria*, in *Auditoria Pública* nº 43, 2007, pp. 96-97.

[50] Articles 7 and 8 Organic law nº 5/2001.

the central to the sub-state governments. In both cases, however, the capacity for control and supervision was limited by the weakness of the mechanisms envisaged: the instruments were designed to facilitate the provision of information, the preparation of correction plans and the issuance of recommendations. Much of what subsequently transpired relates to this lack of foresight. The failure to contemplate a sanctioning framework in the event of non-compliance with the requirements of EMU might have to do with the positive moment of the European integration process in which we found ourselves at the time; that is, the EMU was immersed in the optimistic construction of the single currency far from crisis[51]. Especially from the EU perspective, there was little worry focused on state non-compliance and sub-state entities were very rarely singled out or blamed for incurring excessive deficits. The positive climate and outlook that then characterized the European integration project translated into less intrusion by the EU into the internal decisions of Member States. For these reasons, the Spanish constitutional system was modulated without major shocks. The first implementation of the EMU was carried out at the infraconstitutional level, so no need to pass a constitutional reform was perceived. Although the Autonomous Communities did perceive an effective limitation of their financial autonomy in the form of the adoption of the principle of budgetary stability and the centralization of the determination of the public deficit – their participation at the state level in the distribution of the deficit and the lack of sanctioning mechanisms diminished their concern. The Spanish Constitutional Court, which had previously recognized the constitutional protection of the Autonomous Communities' financial autonomy, was given the opportunity to adjudicate certain dimensions of this first implementation, but declined to contest this initial modulation by the EMU of the financial autonomy of the Autonomous Communities[52].

[51] Carrera Hernández, supra note 28, p. 41.
[52] SCC nº 134/2011, of 20 June.

4. The second phase: EMU in crisis

The financial crisis of 2008 altered the positive outlook of European integration and difficulties flourished[53]. The EMU was not spared, and it underwent in-depth reform of its design[54]. However, the structural principles of EMU remained intact; i.e. both spending discipline imposed on the Member States under the principle of budgetary stability and deficit and public debt control endured[55]. The change involved a thorough transformation of the existing EMU supervisory and control mechanism aimed at improving effectiveness[56].

A brief review of EMU reforms during the Euro crisis demonstrates the desire of the EU to improve the supervisory mechanisms. The so-called *Six Pack*, a package of SGP reform measures launched in 2011, served this purpose. The European Semester sharpened the supervision and monitoring of Member States' fiscal discipline by obliging to draw up National Reform Programs (NRPs) and Stability Programs (SP), which created an institutional avenue for issuing specific recommendations to Member States[57]. The Excessive Deficit Procedure (EDP) was strengthened by introducing a new regime for sanctions and the sanction power of the SGP in general was also bolstered[58]. Two new control mechanisms were created that, when initiated with respect to a Member State,

[53] E. Chiti and P. Gustavo, *The Constitutional implications of the European responses to the financial and public debt crisis*, in *Common Market Law Review* nº 50(3)/2013, pp. 683-685.
[54] A. Calvo Hornero, *La arquitectura económica y financiera de la UEM y los efectos de la crisis*, in *Cuadernos Europeos de Deusto* nº 49/2013, pp. 92-93.
[55] The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), despite being an intergovernmental agreement outside EU law, maintained the same principles as the EU treaties and Protocol nº 12. The control of the excessive deficit was tightened with the introduction of a new rule that set the permissible ceiling of structural deficit at 0.5% (unless the public debt was less than 60%, in that case the limit of the structural deficit may amount to 1%), see Article 3.1(b) and (d) TSCG. Therefore, although the maximum values of 3% of nominal public deficit and 60% of public debt set by the Protocol nº 12 were maintained, the focus was on greater control of the structural deficit. Precisely, the mandate to incorporate the principle of budgetary stability at the internal level established in Article 3.2 TSCG, "preferably of constitutional rank", exemplified again the commitment to the principles of fiscal discipline maintained so far by the EU, but the need to take steps forward in its effective implementation at the internal level of the Member States. On the other hand, the Treaty establishing the European Stability Mechanism (ESM), also as an intergovernmental agreement, deepened the economic coordination of the Member States, with the creation of the ESM and, once again, strengthened structural principles already existing in the EMU.
[56] M. Ruffert, *The European debt crisis and European Union Law*, in *Common Market Law Review*, nº 48(6), 2011, pp. 1794-1797.
[57] See Regulation (EU) nº 1175/2011 of the European Parliament and of the Council of 16 November 2011.
[58] See Regulation (EU) nº 1177/2011 of 8 November 2011 and Regulation (EU) nº 1173/2011 of the European Parliament and of the Council of 16 November 2011.

entailed new disclosure obligations. On the one hand is the Macroeconomic Imbalances Procedure (MIP), a surveillance framework which allows the Council to issue indicative recommendations to the Member State[59]. On the other hand is an enhanced surveillance mechanism, the Excessive Imbalance Procedure (EIP). Going beyond a scoreboard of economic indicators, the Council recommendations articulated through it require the Member State concerned to submit a corrective action plan and timeline[60]. The final objective was to standardize the budgetary methodology and avoid discrepancies in the preparation and approval of public accounts[61].

Following the *Six Pack*, the so-called *Two Pack* launched in 2013 further strengthened monitoring of Member States' spending discipline. Its primary creation is the obligation to submit drafts of general national budgets to the Commission, which was added to the requirement introduced in 2005 for Stability Programs and the Medium-Term National Fiscal Plans (MTOs)[62]. Moreover, Member States subject to an EIP or a Financial Assistance Program are to undergo the so-called *enhanced supervision* which entails closer control by EU institutions[63]. In short, both the *Six Pack* and the *Two Pack* heightened the obligations on Member States to disclose information on expenditure and budget planning and, in some cases, especially in the case of the EIP, the Council recommendations nuancedly approach more of an obligation as compared to the hitherto *softness* of the EMU control mechanisms.

The reform of the EMU in Spain had greater impact on the principle of financial autonomy of the Autonomous Communities than the pre-crisis EMU budgetary controls. Although the EMU control principles did not change, Spain decided to impose greater substantive limitations on the spending capacity of the Autonomous Communities and more centralized spending controls[64]. These limitations did not come so much from the constitutional reform of Article 135 SC, since the now constitutional clause on budgetary stability retained its

[59] Article 6.1 Regulation (EU) nº 1176/2011 of the European Parliament and of the Council of 16 November 2011 (Council recommendations on the basis of the Article 121(2) TFEU).
[60] Article 7.2 Regulation (EU) nº 1176/2011 (Council recommendations on the basis of Article 121(4) TFEU). See also Regulation (EU) nº 1174/2011 of the European Parliament and of the Council of 16 November 2011.
[61] See Directive nº 2011/95/EU of the European Parliament and of the Council of 13 December 2011.
[62] Regulation (EU) nº 473/2013 of the European Parliament and of the Council of 21 May 2013.
[63] Regulation (EU) nº 472/2013 of the European Parliament and of the Council, of 21 May 2013.
[64] M. Medina Guerrero, *La constitucionalización de la regla del equilibrio presupuestario: integración europea, centralización estatal*, in *Revista de Estudios Políticos* nº 165/2014, pp. 196-208.

openness[65], but rather from the infraconstitutional regulations that were passed to implement it. Organic Law nº 2/2012, of 27 April, on Budgetary Stability and Financial Sustainability (OLBSFS) left the determination of the public deficit in the hands of the central government, while the control of the autonomous public debt was tightened with the principle of financial sustainability, an aggressive spending rule was introduced, and the permitted amount of so-called commercial debt was limited[66]. Apart from these limiting principles established in the budgetary stability legislation, the articulation of conditional funds in favor of the Autonomous Communities – the so-called Autonomous Liquidity Funds, or FLA – has also decreased the Autonomous Communities' decision-making capacity over public spending[67].

To these substantive limitations is added a mechanism of supervision, control and sanction for non-compliance with the spending restrictions associated with the increased vigilance of the EMU, in this case with respect to the Autonomous Communities[68]. Firstly and preventatively, the Autonomous Communities became subject to supervision[69]. Secondly, in the event of non-compliance, the central government was given the authority to impose corrective measures[70]. Thirdly and finally, and surely herein lies the greatest novelty severely affecting the financial self-determination of the Autonomous Communities, coercive measures can be taken if non-compliance persists. Sanctions might be imposed or, as a last option, Article 155 SC may be activated[71].

This centralization of disciplinary authority is not, however, accompanied by greater participation of the Autonomous Communities in decision-making processes within the EMU or at the domestic level. The monitoring mechanisms that were tightened at the EU

[65] M. Medina Guerrero, *El Estado autonómico en tiempos de disciplina fiscal*, in *Revista Española de Derecho Constitucional* nº 98, 2013, pp. 119-120.
[66] P. Guerrero Vázquez, *La autonomía financiera de las Comunidades Autónomas en un escenario de consolidación fiscal*, supra note 5, pp. 335-352.
[67] M. Medina Guerrero, *La constitucionalización de la regla del equilibrio presupuestario: integración europea, centralización estatal*, supra note 64, pp. 198-204.
[68] M. Medina Guerrero, *El Estado autonómico en tiempos de disciplina fiscal*, supra note 65, pp. 135-144; Guerrero Vázquez, *La autonomía financiera de las Comunidades Autónomas en un escenario de consolidación fiscal*, supra note *5*, pp. 352-356.
[69] Articles 18 and 19 OLBSFS.
[70] Articles 20 to 24 OLBSFS. Among them, you can subject to the central government authorization all the indebtedness operations of the Autonomous Community, its subsidies or subscription of agreements. The formulation of economic-financial plans and rebalancing plans may also be required.
[71] Articles 25 and 26 OLBSFS. Among them, the availability of credits and withholdings can be prevented, the central level can assume regulatory powers in matters of Autonomous Communities' taxes or may require a deposit of 0.2% of the regional GDP.

level are articulated as forums for interaction and dialogue between the EU institutions – in particular the Commission and the Council – and national governments, without any prominent role for the regions. All the disclosure obligations that serve as the basis for the recommendations issued by the Commission and the Council are elaborated and proposed by national governments. They internally determine the interlocutors within the EMU supervisory mechanism, which, in the Spanish case, is the central government. In short, the EMU that emerged from the most recent crises was designed to increase control and discipline over Member States' public expenditure without making the internal territorial organization of the State a variable of any significant weight.

The lack of preoccupation for the Member States' internal territorial organization is no novelty when compared to the previous structures of the EMU, but what does change in this second stage is the ability of the Autonomous Communities to participate internally in the measures of expenditure discipline. On the one hand, participation of the Autonomous Communities in determining Spain's position vis-à-vis the EU has not changed, as it continues to be followed the existing, deficient structures already described.

On the other hand, the budgetary stability regulations significantly reduced the level of participation of the Autonomous Communities. Specifically, the new regulations reduced the role that the Fiscal and Financial Policy Council previously played and, much more so, the bilaterality introduced in 2006 in the determination of the public deficit. The central institutions were given the key role in decision-making while the Autonomous Communities were relegated to advisory roles[72]. The new role of the Independent Authority for Fiscal Responsibility (AIREF) is interesting and should be emphasized, since this body is in charge of issuing reports prior to the central government's decision determining the individualized distribution of the deficit for each Autonomous Community[73]. The AIREF is articulated as an independent administrative authority at the central level without direct connection to the interests of the Autonomous Communities[74].

[72] The central government unilaterally determines the annual budgetary stability objective (level of public deficit) by agreement of the Council of Ministers (Article 15.1 OLBSFS). The establishment of the individualized deficit for each Autonomous Community is again determined by the central government by another agreement of the Council of Ministers (Article 16 OLBSFS). The Autonomous Communities only participate in the decision-making process within the Council of Fiscal and Financial Policy, which in both cases only it is expected to issue a report prior to the central government's decision.

[73] Article 16 OLBSFS.

[74] AIREF is conceived as a central state institution. Its president is appointed by the Council of Ministers, after appearing in the Congress of Deputies (Article 24 Law Organic nº 6/2013, of 14 November). No

Such a scenario is not unfamiliar for the Autonomous Communities and nor is the pressure exercised, directly, by the European supervisory mechanism of the EMU. Indeed, an Excessive Deficit Procedure (EDP) was initiated against Spain in 2009 that lasted until 2019[75] and in 2012 Spain was subjected to a Macroeconomic Imbalance Procedure (MIP)[76]. It should not be forgotten that Spain also requested a conditional Financial Assistance Program, as a result of which it was obliged to sign a Memorandum of Understanding (MoU)[77]. These two EMU supervisory processes and the MoU have put the focus on Spain's non-compliance with fiscal discipline and the need to reverse the situation. In the dialogue between the EU institutions and Spain that has taken place under these supervisory mechanisms, the responsibility of the Autonomous Communities as non-compliant agents has been emphasized. Both the EU in formulating its recommendations and the central government in disclosing information under the EMU supervisory mechanisms have stressed the role of the Autonomous Communities in non-compliance.

Thus, intense communication between EU institutions and Spain has taken place under the ordinary supervision of the European Semester. In the provision of information from Spain to the EU through the Stability Programs (SP) and the National Reform Programs (NPR), the central government has constantly blamed the Autonomous Communities for the public deficit which would therefore condone close monitoring by the central government[78]. After analyzing the SPs and NPRs, the Commission and the Council responded positively to the

committee or body with the presence of representatives of the Autonomous Communities is articulated within it.

[75] Council Decision nº 2009/417/EC, of 27 April 2009; Council Decision (EU) nº 2019/1001, of 14 of June.

[76] In 2012, the Commission, in its first Alert Mechanism Report (AMR) since the creation of the MIP, noted the need for an in-depth review of Spain (COM/2012/068 final). Since then and to this day, the Commission has qualified Spain with serious imbalances (in 2013 and 2014, see COM/2012/0751 final and COM/2013/0790 final) or only with imbalances (from 2015 to present, see the latest Report on the 2020 Alert Mechanism, COM/2019/651 final), a fact that has subject Spain to undergo successive Exhaustive Examinations since 2012.

[77] Memorandum of Understanding on Financial Sectoral Policy Conditions, signed in Brussels and Madrid on 23 July 2012, and Framework Agreement on Assistance Financial, signed in Madrid and Luxembourg on July 24 2012.

[78] Regarding the NPR, see NPR 2011, p. 40; NPR 2012, p. 59-60; NPR 2013, p. 97; NPR 2014, p. 98; NPR 2015, p. 95; NPR 2016, p. IV; NPR 2017, p.17; NPR 2018, pp.27-28, p. 71; NPR 2019, p. 15. All the NPRs presented by Spain to the EU institutions can be consulted at *Portal Institucional del Ministerio de Hacienda* [accessed: 29 May 2022]. Available in: https://www.hacienda.gob.es/es-ES/CDI/Paginas/EstrategiaPoliticaFiscal/ProgramaNacionalReformas.aspx.
Regarding the SP, see SP 2011, p. 5; SP 2012, p. 7; SP 2013, p. 22, SP 2014, p. 53; SP 2015, p. 20; SP 2016, p. 62; SP 2017, p. 52; SP 2018, p. 54; SP 2019, p. 65. All the SPs submitted by Spain to the EU institutions can be consulted at *Portal Institucional del Ministerio de Hacienda* [accessed: 29 May 2022]. Available in: https://www.hacienda.gob.es/es-ES/CDI/Paginas/EstrategiaPoliticaFiscal/Programasdeestabilidad.aspx.

specific recommendations to Spain, in the sense that they feel it has adequately understood its task to reduce the deficit at the regional level, but they also expressed clear concern over the understanding that the Autonomous Communities are mainly responsible for the excessive deficit and that strict application of Spanish legislation of budgetary stability is necessary[79].

As for the Excessive Deficit Procedure (EDP) opened against Spain in 2009, after a period during which the Autonomous Communities were note mentioned, both the Commission and the Council identified them as causing Spain's excessive deficit in 2012[80]. EU institutions adopted the view that was expressed by the central government and noted shortcomings in the application of the Spanish legislative rules on budgetary stability[81]. Above all, the dialogue between the EU institutions and Spain in 2016 should be highlighted, when a fine for excessive deficit was nearly imposed on Spain. Here, both the Commission and the Council focused on the Autonomous Communities as the main culprits for the deficits and stressed the need to effectively apply Spanish budgetary stability regulations[82].

A similar dialogue took place under the Macroeconomic Imbalance Procedure (MIP). In the Alert Mechanism Report (AMR) that initiates the process by identifying a concerning imbalance in a Member State, the Autonomous Communities were not pointed out

[79] See Council Recommendation of 12 July 2011 (2011/C 212/01), recital 8 and recommendation 1; Council Recommendation of 10 July 2012 (2012/C 219/24), recital 10 and recommendation 1; Council Recommendation of 9 July 2013 (2013/C 217/20), recital 10 and recommendation 1; Council Recommendation of 8 July 2014 (2014/ C 247/08), recommendation 1; Council Recommendation of 14 July 2015 (2015/C 272/13), recital 9 and recommendation 1; Council Recommendation of 12 July 2016 (2016/C 299)/02), recital 5.

[80] All the documentation of the EDP related to Spain can be consulted at the following European Commission website [accessed: 29 May 2022]. Available in: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/corrective-arm-excessive-deficit-procedure/closed-excessive-deficit-procedures/spain_en.

[81] Commission Recommendation to the Council for the adoption of a Recommendation, 6 July 2012 WITH((2012) 0397 final, recital 9; Council Recommendation of 21 June 2013 with a view to bringing an end to the situation of an excessive government deficit in Spain, 2013/C 180/02, recital 14.

[82] Recommendation of the Commission of 9 March 2016 on the measures to be taken by Spain to ensure a timely correction of its actual deficit C(2016) 5200 final, recitals 4, 6 and 10; Council Decision (EU) nº 2016/1222 of 12 July 2016 states that Spain has not taken effective measures to follow the Council Recommendation of 21 June 2013, recital 11; Council Implementing Decision (EU) nº 2017/2351 of 9 August 2016 on the imposition of a fine on Spain for failing to comply with effective measures to correct its excessive deficit, recital 13.

directly[83]. The subsequent In-Depth Reviews[84], however, asserted that the failure of the Autonomous Communities to comply with the principle of budgetary stability entailed an overall risk to the country's economic situation[85]. Calls were also made for effective implementation of budgetary stability regulations. These reviews also pointed out the failure to implement corrective or coercive measures for non-compliance in certain instances[86]. They denounced the limited use of the measures provided for in the Spanish budgetary stability regulations because they did not provide adequate incentive for fiscal discipline on the part of the Autonomous Communities[87].

Finally, the MoU signed by Spain and the Commission as a condition for access to the Financial Assistance Program emphasized Spain's obligation to correct the excessive deficit before 2014. In addition to the obligation to present a multiannual budget for 2013-2014 specifying the structural measures to correct the excessive deficit, the MoU expressly called for the implementation «without hesitation» of the Budgetary Stability Act[88]. Clearly, the sentiments of the EU institutions expressed in the EDP, the MIP and the supervision exercised under the European Semester all again stressed the necessity that Spain tackle its excessive deficit that was primarily seen as caused by the excessive spending by the Autonomous Communities.

To summarize, this second stage of constitutional transformation led to a reduction in the financial autonomy of the Autonomous Communities in the context of intense influence of the EMU supervisory mechanisms which focused attention on the Autonomous Communities. In the dialogue between the EU institutions and the Spanish central government under the supervisory structures of the EMU, the Autonomous Communities were stigmatized and repeatedly blamed for Spain's excessive deficit and even upbraided

[83] All AMRs can be consulted at the following European Commission website [accessed: 29 May 2022]. Available in: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/macroeconomic-imbalances-procedure/alert-mechanism-report_en.

[84] All In-Depth Examinations related to Spain are available in the following European Commission website [accessed: 29 May 2022]. Available in: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/macroeconomic-imbalances-procedure/depth-reviews_en.

[85] European Commission, *Macroeconomic imbalances*. *Spain*, in *Occasional Papers* nº 103, July 2012, p. 42.

[86] European Commission, *Macroeconomic imbalances. Spain*, *Occasional Papers*, nº 216, June 2015, pp. 2 and 46; European Commission, *Country Report Spain 2016*, SWD(2016) 78 final, pp. 70, 78 y 80-81.

[87] European Commission, *Country Report Spain 2017*, SWD(2017) 74 final, pp. 3, 25-30; European Commission *Country Report Spain 2018*, SWD(2018) 207 final, p.28.

[88] MoU, paragraphs 29 to 31.

as a contributing factor towards macroeconomic imbalance. The strengthening of control over the Autonomous Communities' expenditure discipline at the domestic level coincided with this dialogue within the EMU.

Here again, Spain's constitutional protections for territorial organization did not represent strong barriers in the process of European integration and, as a result, supervision within the structures of EMU during the period of the Euro crisis directly influenced the transformation of the country's constitutional territorial model. The Spanish Constitutional Court, as in the first phase of EU integration, accepted the constitutional modulation and fully validated the infraconstitucional regulations of budgetary stability that reformulated the financial autonomy of the Autonomous Communities[89].

5. The third phase: Reforming the EMU and administering the European Recovery Funds

The recently proposed EMU reform does not imply any change in terms of the level of participation of the regions in the process of European integration[90]. Although every initiative proposed has been paralyzed by the Covid-19 crisis and the difficulty of reaching consensus for approval among Member States, it is nonetheless worthwhile to examine them, however briefly, to verify the lack of any substantial alteration in an EMU designed by and for the States: the regional factor remains absent. Moreover, the pandemic, without affecting the structures of EMU as they are currently articulated, has introduced a novel element in the form of European funding to help Member States to address and mitigate the health and economic crisis[91]. A synthetic reference will also be made to its management and the role of the Autonomous Communities in them.

[89] See SCC nº 215/2014, of 18 December. In this decision the SCC analyzes the constitutionality of practically the entire OLBSFS, both the substantive limitations to financial autonomy and the supervisory and control framework (preventive, corrective, and coercive measures), without finding any unconstitutionality. There has been some subsequent resolution of the Spanish Constitutional Court that has also analyzed some specific aspects of the OLBSFS, such as SCC nº 101/2016, of May 25, in relation to the limits on commercial debt, without finding again any unconstitutionality.

[90] For an overview of the reforms proposed, see A. Olesti Rayo, *The institutional consolidation of the Economic and Monetary Union within the European Union: proposals and actions*, in *Revista catalana de dret públic* nº 59/2019, pp. 36-41.

[91] For more details on the Recovery Plan for Europe, see the following European Commission website [accessed: 29 May 2022]. Available in: https://ec.europa.eu/info/strategy/recovery-plan-europe_en.

The first reform proposal of the EMU would create a European Monetary Fund (EMF) to replace the ESM and integrate this structure into EU law[92]. Like the ESM, the proposed EMF does not bring subnational European regions into its decision-making mechanisms[93]. At most, regional parliaments can play an indirect control role through the principle of subsidiarity since the EMF will be accountable to the EU institutions and to national parliaments[94]. Similarly, the so-called Minister for the Economy and Finance is articulated as an initiative to redistribute responsibilities between the Commission, the Council and the Eurogroup, without any role for the regions[95]. Nor does the proposal on «new budgetary instruments» give the regions any voice, as it involves a new set of tools within the scope of EU budgetary law[96].

More relevant are proposals related to the package of measures meant to strengthen fiscal responsibility and the medium-term budgetary orientation in Member States[97]. The main objective of this proposal is internalizing the intergovernmental framework of the TSCG within the EU[98]. Surely one of its most important institutional purposes is strengthening the role of independent national bodies responsible for ensuring fiscal discipline[99]. The proposal aims to strengthen such bodies, both in terms of their status and independence vis-a-vis the political institutions of the Member States and their role within the mechanism for supervising fiscal discipline. The EU proposal only expressly stipulates a minimum level of these bodies' institutional configuration, so it should be possible to incorporate the European regions into their governing boards at the domestic level[100]. As the regions are directly affected by measures for fiscal discipline, it seems appropriate to involve them, or at least to open channels of participation within the institutional structures of these bodies.

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[92] Proposal for a Council Regulation on the establishment of the European Monetary Fund of 6 December 2017, COM(2017) 927 final.
[93] Both the Board of Governors and the Council of Governors Directors are composed of members appointed by Member States. The Commission and the European Central Bank also have representatives, but they do not have the right to vote. See Articles 5 and 6 of the proposed EMF Statute.
[94] Article 6 proposal for a Regulation on the establishment of the European Monetary Fund, of 6 December 2017, COM(2017) 927 final.
[95] Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank: a European Minister for Economic Affairs and Finance of 6 December 2017, COM(2017) 823 final.
[96] Communication of the Commission to the European Parliament, the European Council, the Council and the European Central Bank of 6 December 2017, COM(2017) 822 final.
[97] Proposal for a Council Directive laying down provisions to strengthen fiscal responsibility and the medium-term budgetary orientation in the Member States of 6 December 2017, COM(2017) 824 final.
[98] Proposal for a Council Directive, COM(2017) 824 final, considering fifth.
[99] *Ibidem*, Article 3.4.
[100] *Ibidem*, Article 3.7.

As yet, the AIREF has not shown any sensitivity to the concerns of subnational regions. It is an independent administrative authority linked to the central government and as such does not provide direct channels of participation to the Autonomous Communities[101].

In examining the proposals to reform the EMU, the new rules on structural reforms stand out[102]. These rules aim to create a new mechanism that would help Member States to implement the structural reforms identified during the European Semester supervisory procedure. Accordingly, the structural reforms would be identified by the Member States themselves in their NPR, the Commission would approve the reforms through a legislative act of implementation and allocate funding for them from the so-called Performance Reserve[103]. This fund would consist of a six percent levy on a set of European Funds: the European Regional Development Fund, the European Social Fund and the Cohesion Funds[104]. The European regions have vehemently opposed this proposal because it would divert part of the Performance Reserve for a purpose – structural reforms – that deviates from the objective of some of these funds, including that of reducing regional differences in the EU[105]. This proposal brings the low level of regional participation in the EMU decision-making process into sharp focus. The regions denounce the transfer of funds that respond to a regional logic to the EMU structure, thereby escaping their capacity to influence their allocation. The proposal seeks to assign part of the Performance Reserve to control under the European Semester, that is, to an agent outside the regions. In this way, the Reserve would be *deregionalized* to finance projects other than strictly regional interests.

In short, no change of course in the structures of the EMU that would allow the European regions to have greater influence has been observed. However, the pandemic has opened a window of possibilities, especially internally, for the involvement of the regions in the distribution of extraordinary European funds to counter the health and economic crisis provoked by Covid-19. The approval of these funds has exceptionally been carried out

[101] See supra note 74.
[102] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) nº 1303/2013 of the European Parliament and of the Council of 17 December 2013 and repealing Regulation (EC) nº 1083/2006 of the Council of 56 December 2017, COM(2017) 826 final.
[103] *Ibidem*, Article 1.7.
[104] *Ibidem*, Article 1.5.
[105] Resolution of the European Committee of the Regions on changing the ESI funds Common Provisions Regulation to support structural reforms of 1 February 2018 (2018/C 176/02).

outside the structures of the EMU[106]. More precisely, managing the pandemic has required fundamental decisions to be moved out of the current EMU – and of the EMU targeted for reform – and this lesson should be considered when the reforms are taken up again in the future. From the point of view of the regions, the window opens internally on how each Member State will manage this extraordinary spending capacity.

In the Spanish case, the document *España puede. Plan de Recuperación, Transformación y Resiliencia* initially guided the implementation of the European recovery funds[107], while the general budgetary regulations for 2021 advanced more specific questions about their implementation[108]. Under NextGenerationEU, Spain was granted a total of 140,000 million euros, of which 71,000 million correspond to direct transfers and the rest in the form of loans[109]. Regarding the direct transfers, 59,168 million euros are conveyed through the *Recovery and Resilience Facility* and, internally, no explicit participation of the Autonomous Communities in their distribution is foreseen[110]. In contrast, the 12,400 million euros in direct transfers provided for in the *REACT-EU* do stipulate participation of the Autonomous Communities. More specifically, these funds are to be programmed in collaboration with the Autonomous Communities within the framework of the cohesion policy[111].

The question is therefore how to articulate the participation of the Autonomous Communities in practice. It should be noted that the Spanish Government intended to remove the Autonomous Communities from any involvement in the management of the bulk of the European recovery funds, since they will be considered to have direct control over the management of a small part. Likewise, only a brief reference is made, without any detail, to the Sectoral Conference of European Funds and the Conference of Autonomous Presidents, which stipulate mechanisms for the Autonomous Communities to participate in

[106] The exceptional funds of the Recovery Plan for Europe were approved by intergovernmental agreement between Member States on 10 November 2020.
[107] This document was presented on 7 October by the Spanish Government. *La Moncloa* [accessed: 29 May 2022]. Available in: https://www.lamoncloa.gob.es/presidente/actividades/Paginas/2020/espana-puede.aspx.
[108] See Law nº 11/2020, of December 30, on the General State Budget for the year 2021. See also the *Informe económico y financiero de los Presupuestos Generales del Estado para 2021* [accessed: 29 May 2022]. Available in: https://www.sepg.pap.hacienda.gob.es/Presup/PGE2021Proyecto/MaestroTomos/PGE-ROM/doc/L_21_A_A1.PDF.
[109] *España Puede. Plan de Recuperación, Transformación y Resiliencia*, supra note 107, pp. 13-14. See also the *Informe económico y financiero de los Presupuestos Generales del Estado para 2021*, supra note 108, pp. 95-97.
[110] *España Puede. Plan de Recuperación, Transformación y Resiliencia*, supra note 107, p. 13.
[111] *Ibidem*, p. 14.

the management of this part of the funds[112]. Everything indicates that the Spanish Government seeks to centralize the management of these funds leaving few channels of co-management to the Autonomous Communities. This means that, again, regional participation in spending decisions will be reduced, in that they will have little to say to which areas, sectors or programs the funds may be allocated.

The implementation of the extraordinary European funds for 2021 took place along the lines indicated. The General State Budgets for 2021 incorporate 24,196 million euros from the *Recovery and Resilience Facility* and 2,436 million from the *REACT-EU*[113]. Again, express participation of the Autonomous Communities was only foreseen – overwhelmingly in the execution, much less in terms of allocation – for funds from the *REACT-EU* that, in the 2021 budget, were allocated to the purchase of Covid-19 vaccines and the health administration that deals with epidemiological crises[114]. The new institutional framework created for the purpose of allowing the Autonomous Communities decision-making power over these funds did not, again, reflect that purpose in any substantive manner[115]. In general, the management and distribution of funds was effectively centralized leaving little room to the Autonomous Communities[116]. The mechanisms envisaged for governance are mostly centralized[117]. The system of sectoral conferences used to involve the Autonomous Communities, creating the so-called Sectoral Conference of the Recovery, Transformation and Resilience Plan thus remains an open question[118]. It remains to be seen what will be in practice the effective participation of the Autonomous communities in those sectoral conferences in terms of the distribution and subsequent management of the funds.

[112] *Ibidem*, pp. 18-19.
[113] *Informe económico y financiero de los Presupuestos Generales del Estado para 2021*, supra note 108., p. 98.
[114] *Ibidem*
[115] Royal Decree-Law nº 36/2020, of 30 December, approving urgent measures for the modernization of the Public Administration and for the implementation of the Recovery, Transformation and Resilience Plan.
[116] R. Jiménez Asensio, Fondos europeos: entre política y gestión, *La mirada institucional* [accessed: 29 May 2022]. Available in: https://rafaeljimenezasensio.com/2020/12/16/fondos-europeos-entre-politica-y-gestion/.
[117] The Committee for the Recovery, Transformation and Resilience is made up of members of the central government (Article 14 Royal Decree-Law nº 36/2020), while the Technical Committee that will support it will be appointed by the Committee (Article 15 Royal Decree-Law nº 36/2020). The monitoring of the entire model will be in the hands of the Department of Economic Affairs and the G20 of the Presidency of the Government (article 16 Royal Decree-Law nº 36/2020). There is the possibility of setting up forums and high-level groups for spaces of participation, two of them managed by the Department of Economic Affairs and G20 (article 17 Royal Decree-Law nº 36/2020).
[118] Article 19 Royal Decree-Law nº 36/2020.

This last and recent stage offers some possibilities for the inclusion of the Autonomous Communities in the co-governance of expenditure which would reduce the impact of the progressive limitation of their financial autonomy. In both the first stage (pre-crisis) and the second stage (Euro crisis), the EMU has focused on expenditure control and fiscal discipline in Member States, first to create a single currency, then to counter financial crisis. Particularly in the second stage, these developments have led to strong pressure in the case of Spain to reduce the self-governance of the Autonomous Communities. However, the reform of the EMU was paralyzed during the pandemic. Moreover, it seems that the need for public spending to mitigate the health crisis has opened potential avenues for extraordinary financing mechanisms that, unlike previous periods, departs from the model of strong central control of public spending at the national level. In the management of these new mechanisms articulated outside the structures of the EMU, particularly in the case of the European recovery funds, Member States could show more responsiveness or sensitivity to their particular model of territorial organization in order to facilitate and leverage greater participation of sub-state entities.

6. Conclusions

Clashes between constitutionalism and European integration only comprise one dimension of the common European history. Another very relevant aspect has to do with the transformation, in many cases silent and often, surprisingly, without contestation, of national constitutional law under the influence of EU law. This is a transcendent phenomenon that must be examined and understood, since any change in constitutional structure involves the transformation of principles, values or institutions that are rooted in the political system of a Member State. Shedding light on the constitutional transformations that derive from the European integration implies understanding better the relationship between a particular Member State and the common European project. It facilitates the implementation of the objectives of the EU at the internal level, allows difficulties to be identified and clarifies a process of integration, that of the European Union, one in which the particularities of its relationship to its Member States often remain opaque.

Accordingly, Spain's territorial model is precisely one of the relevant constitutional structures in the country's 1978 Constitution. It was meant to respond to pressing concerns of the constituent power long before the many implications of adopting a single currency in the euro zone were contemplated. It reflects the original decisions of the constituent power to create a model of constitutionally enshrined territorial decentralization yet, at the same time, one of an indeterminate nature that left open to its subsequent concretion to the political branches and courts. This double characteristic of the Spanish territorial organization model – constitutionally guaranteed in its values and principles, but open in terms of its concreteness – has makes it especially sensitive to the process of European integration. Similarly, its unique characteristics make it suitable for a careful study, far from the din of the major clashes between EU institutions and national constitutional traditions, of the capacity for transformation and permeability of European integration in domestic constitutional law.

The influence of the EMU on the Spanish territorial organization model is inarguable. A progressive reduction in the financial autonomy of the Autonomous Communities can be seen since the 1990s. Although the explicit objective of the EMU is the discipline of Member States' public spending to keep the public deficits and debt at bay, and although theoretically the EMU does not purport to limiting Member States' authority to decide the means used to achieve these objectives, in practice Spain has been forced to revise the territorial model of its constitution. In the pre-crisis stage, when the substantive principles of budgetary stability and control of the public deficit and debt were established, the discretion of the Member States to meet the goals was respected, and thus the Spanish regulatory framework left a certain margin of action to the Autonomous Communities. When the EMU went into crisis, however, the situation changed radically. Pressure from the supervisory structures of the EMU led to a radically different scenario at the internal Spanish level which resulted in significant reduction of the spending capacity of the Autonomous Communities. In the current context of the Covid-19 pandemic, possibilities have been opened for greater participation of the Autonomous Communities in the allocation of the European recovery funds, but no significant changes have been made to the structure of the EMU to formalize the participation of Spain's constitutionally recognized subnational authorities in the EMU decision-making process.

In this progressive transformation of the territorial model, the dialogue between Spain and the EU institutions within the framework of the EMU supervisory mechanisms has taken on particular relevance. Communication between the Spanish central government and the EU institutions intensified during the euro crisis when the Autonomous Communities were singled out as non-compliant agents and Spain was encouraged to tackle the regional deficit and rigorously apply the budgetary stability measures. In this dialogue, the EU did not maintain neutrality with regards the means used by Spain to reduce its excessive public deficit and debt or its macroeconomic imbalances. On the contrary, EU institutions pointed out those they felt were responsible for the non-compliance and urged Spain's central government to take measures focusing on them. In short, the reform of the constitutional and legislative framework of budgetary stability, which brought substantive limits on the financial autonomy of the Autonomous Communities and, for the first time, a preventative regime with sanction power in the event of non-compliance, came out of this dialogue between Spain and EU institutions.

All these developments occurred in the context of limited capacity for the Autonomous Communities to participate in the decision-making processes, both at the EU and the domestic level. The EMU was not designed to give a voice to the European regions. Any regional input relies on the internal Member State mechanisms for participation by the regions. In the case of Spain, the Autonomous Communities have faced serious deficiencies in terms of their ability to participate in determining the position of the State before the EU since the very creation of the EMU. In the case of the budgetary stability regulations, their first formulation left some margin for the Autonomous Communities to determine the degree of public deficit incurred, but after that initial stage, control of the expenditure was greatly centralized and the participation of the Autonomous Communities in its determination and management similarly reduced.

This transformation of the territorial model was not the objective of the EMU. The EMU focused on the fiscal discipline of the Member States for the purpose of monetary stability in the euro zone, but it does seem to have had a decisive influence on the Spanish territorial constitutional model. During the dialogue that took place in the EMU during the Euro crisis, the EU went beyond setting objectives when it placed the onus of reducing Spain's public deficit on the Autonomous Communities. The EMU structure clearly supported the

strengthening of Spain's central government budgetary stability regulations to the clear detriment of the financial autonomy of the Autonomous Communities.

This phased reduction of the Autonomous Communities' financial self-determination has been accepted by the Spanish Constitutional Court. The original deconstitutionalization of the country's territorial organization through indeterminacy to be fleshed out through infraconstitutional legislation initially enabled changes and reduction of the financial autonomy of the Autonomous Communities. Such developments do not cause great surprise in the constitutional jurisprudence. Still, the transformation of the territorial model offers an example of a low-intensity clash between a national constitutional model and European integration. The EU demanded greater fiscal discipline from Spain and the central government responded by centralizing fiscal power to the central government and away from the Autonomous Communities. In this common task, neither the EU nor the Spanish central government have found a solid barrier in the constitutional entrenchment of the territorial model that prevents them from achieving their objectives.

Abstract: The most distinctive feature of the Spanish State of Autonomies is the recognition of political autonomy for the Autonomous Communities. Financial autonomy, to greater or lesser degree but nonetheless inherently, is fundamentally necessary for political autonomy. The Spanish constitutional system enshrines such autonomy, both in the constitutional text and in constitutional case-law. The Economic and Monetary Union (EMU), however, has provided the impetus for a substantial transformation of spending power of the Autonomous Communities that is directly tied to the principle of financial autonomy that derives from their constitutionally established political autonomy. This article examines this transformation. It identifies three phases of respect for Spain's territorial constitutional model: the EMU before the Euro crisis when budgetary surveillance largely operated on the level of recommendations, the period starting in 2008 when the EMU underwent a series of fiscal crises that introduced severe conditionality and resulted in greater centralization of budgetary discipline by the central government in Madrid and a third phase involving efforts to reform the EMU and counter the Covid-19 pandemic through the allocation and management of the European funds for recovery. The article analyzes the interaction between the Spanish constitutional system and the European

Union Law and reveals the role of EU Law as a decisive driver of constitutional transformation and evolution of the Spanish State of Autonomie.

Abstract: La caratteristica maggiormente distintiva dello Stato spagnolo delle autonomie è il riconoscimento dell'autonomia politica delle Comunità autonome. L'autonomia finanziaria, in misura maggiore o minore, ma comunque intrinseca, è fondamentalmente necessaria per l'autonomia politica. Il sistema costituzionale spagnolo sancisce tale autonomia, sia nel testo costituzionale che nella giurisprudenza costituzionale. L'Unione Economica e Monetaria (UEM), tuttavia, ha dato l'impulso per una sostanziale trasformazione del potere di spesa delle Comunità Autonome, che è direttamente legato al principio di autonomia finanziaria che deriva dalla loro autonomia politica costituzionalmente prevista. Il presente contributo analizza tale trasformazione. Sono identificate tre fasi di attuazione del modello da parte dello Stato spagnolo delle autonomie: l'UEM prima della crisi dell'euro, quando il controllo di bilancio si operava in gran parte a livello di raccomandazioni, il periodo a partire dal 2008, quando l'UEM ha subito una serie di crisi finanziarie che hanno portato a introdurre severe condizionalità e hanno portato a una maggiore centralizzazione della disciplina di bilancio da parte del governo centrale di Madrid e una terza fase che comprende gli sforzi per riformare l'UEM e contrastare la pandemia da Covid-19 attraverso l'assegnazione e la gestione dei fondi europei per la ripresa. L'articolo analizza l'interazione tra il sistema costituzionale spagnolo e il diritto dell'Unione Europea, evidenziando il ruolo del diritto dell'UE quale motore decisivo della trasformazione costituzionale e dell'evoluzione dello Stato spagnolo delle autonomie.

Keywords: Autonomous Communities – Economic and Monetary Union (EMU) – financial autonomy – Spain.

Parole chiave: Comunità autonome – Unione Economica e Monetaria (UEM) – autonomia finanziaria – Spagna.