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Why the EU's constitutional deadlock is hampering EMU reforms, and how this could be resolved

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ABSTRACT
Economic and financial crisis measures stretched the legal fundaments of the EMU Treaty framework to their utmost boundaries and provoked watering down, mutating or even circumventing the existing Treaty limits. Instead of continuing with this pattern when pursuing further reforms, we advise to not only adjust the underlying constitutional EMU framework substantively but address first and foremost the deadlock given by the rigid EU Treaty framework as such by de-constitutionalizing EMU law.

KEYWORDS EU Treaty limits; crisis measures; EMU reform; de-constitutionalization

Introduction

The Treaty of Maastricht created a single EU monetary policy being combined with decentralized economic and fiscal policies in the Member States. The financial crisis considerably challenged the functioning of the Eurozone system. With the objective to confront the revealed weaknesses of the economic governance regime decisive actions were taken, which impacted on the economic governance framework as well as on the interpretation and application of the underlying Treaty rules. The wording of the Treaties remained unchanged, except for the sole (and controversial) insertion of paragraph 3 of Article 136 Treaty of the Functioning of the European Union (TFEU). Yet, during the crisis, the system was tweaked, not to say fundamentally modified. From a lawyer's perspective, the legal foundations were stirred up and triggered essential and extensive debate, including decisive courts' rulings at national and EU level.

We argue that the manifold and well-founded critique and legal actions claiming Treaty violations, combined with the absence of initiatives for substantive Treaty reform, support the contention that there has been a constant fear of Treaty change failure. This attitude is being continued during the ongoing EMU reform debate. We argue that this poses a threat to the rule of law, that the necessity for Treaty change should be openly addressed

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and the EMU Treaty rules should be de-constitutionalized by introducing a competence clause bringing more capacity of flexible action in the field.

Managing the crisis

Exemplary controversies concerning the legality under the EMU Treaty framework are the reforms enhancing the obligation for sound public finances, a core principle of EMU. The Stability and Growth Pact reforms led to a complex set of rules since its inception as rather lose economic and fiscal policy coordination by the Maastricht Treaty. Some triggered fierce academic contestation, even if they had not yet been challenged in court. Exemplary is the newly introduced sanctioning mechanism for the multilateral surveillance procedure, which exceeds the Treaty rules allowing for non-binding guidelines and recommendations only (Weber, 2011). Arguably, also the introduction of reverse majority voting rules violates EU Treaty limits (Palmstorfer, 2014). Further reinforcement of national budgetary obligations – most importantly by a lower limit of the annual structural deficit of 0.5 per cent of the GDP at market prices than supranational budgetary limitations – could not be achieved for political reasons under the Treaty framework due to the resistance of the UK, specifically. Consequently, the Treaty on Stability, Coordination and Governance (TSCG) was adopted outside the EU legal framework by the willing states, being closely connected and supporting the EU system, including an obligation to implement those limits 'through provisions of binding force and permanent character, preferably constitutional'(TSCG, 2012). Its compatibility with national constitutions was challenged in various Member States.

Crucially important for systemic stability within EMU was the instalment of financial emergency assistance instruments for the Member States suffering from solvency and liquidity problems. Due to the limits and the rigid Treaty structure they were mostly created outside the EU Treaty framework, however with strong links to it (Merino, 2012). The rulings of several national courts and the Court of Justice of the European Union (CJEU) demonstrated legal concerns on the ESM (Herrmann, 2012). One aspect relates to these measures being based on a new interpretation of the no-bailout rule. The Treaties do not foresee financial assistance for Euro area members, except for the Union's support in case of emergency under Article 122(2) TFEU. The underlying rationale of the no-bailout rule assumes that financial markets would, through eventually imposing high-interest rates as 'sanctions' for high annual deficits and overall debts, exert sufficient pressure into the direction of sound Member States' budgets (Heinemann, 1995; Kempen, 2018). With the CJEU Pringle ruling on the legality of the establishment of the ESM, this market-based paradigm comes close to being substituted by strict conditions of structural reforms 'enforced' by the lending states (CJEU,

2012; Ioannidis, 2016). The legitimizing enhancement of Article 136 TFEU was qualified by the CJEU as only declaratory (CJEU, 2012), even if this step had certainly being considered essential to avoid a legal collapse (BVerfG, 2012; Wendel, 2013).

At the second front of EMU, monetary policy, the European Central Bank (ECB) stepped in as a decisive problem solver during and in the aftermath of the crisis. With the ambition of 'doing whatever it takes' (European Central Bank, 2012) it announced and deployed unconventional monetary policy measures. Its bond-buying schemes made the ECB the largest creditor in the euro area and provoked accusations of the bank overstepping its mandate (Tuori, 2016). However, the CJEU sanctioned these measures as legal, thereby upheld the ECB's broadening of its monetary policy mandate (CJEU, 2015, 2018). Furthermore, the ECB took over the role as core supervisor of significant financial institutions in the Banking Union aiming for a common supervisory and regulating system (Busch & Ferrarini, 2015; Chiti & Santoro, 2019). By secondary law, the ECB was conferred upon specific tasks concerning policies relating to the prudential supervision of credit institutions and a framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities was established. This expanded ECB's existing Treaty mandate (Manger-Nestler & Böttner, 2014). In this context new agencies with far-reaching discretionary and legally binding powers were created, the CJEU arguably by overthrowing its previous, longstanding, and restrictive jurisprudence (Chamon, 2010; CJEU, 2014).

All in all, the reforms resulted in substantive and institutional changes of EMU law, as well as in a circumvention of procedural requirements under the EU Treaties (De Witte, 2012; Selmayr, 2013; Tuori & Tuori, 2014). In fact, as outlined in many cases a Treaty change would have been recommendable if not indispensable. This seems to be blocked by the fear of negative referenda, such as on the Constitutional Treaty and the Lisbon Treaty.

EMU reform initiatives – a critical appraisal

We witness the same pattern of avoiding any Treaty reform in relation to the reform proposals tabled by EU institutions initiated in 2012 with a set of communications and reports repeating the ambition for deepening and completing EMU (European Commission, 2012, 2017a, 2017b; Juncker *et al.*, 2015; Van Rompuy, 2012; Van Rompuy *et al.*, 2012).

At the same time they refrain from proposing amendments of EMU-related Treaty provisions. Those proposals admittedly being in tension with the existing Treaty law were dropped as not being feasible under the current legal framework, such as the creation of Eurobonds (European Commission, 2011), a Redemption Fund and Pact (European Commission, 2012) or the Convergence

and Competitiveness Instrument (European Commission, 2013). Such restraint towards fundamental reforms can also be traced in the Commission's proposals of 2017 (European Commission, 2017c, 2018a, 2018b). On the positive side, they include the first comprehensive package of concrete legislative proposals and initiatives. However, the option of Treaty amendment is cautiously avoided. (Lentsch, 2018) Instead, the daring assumption prevails that the transformation of the ESM into a European Monetary Fund, the establishment of a European Minister of Economy and Finance, the introduction of a Euro area fiscal capacity or new structural convergence tools are fully in line with the existing Treaty framework.

In other words: the rather detailed economic governance provisions in the EU Treaties combined with the rigidity of the Treaty amendment process, requiring all Member States' agreement and ratification according to the national laws – and thus guarantees a veto right for every Member State – is a 'constitutional' deadlock for further (integrative) steps in the field. The fear of Treaty change failure creates the temptation to declare reforms covered by the Treaties, which would need such changes. The well-founded rationale for the reforms ('without alternative') creates a temptation for judges to bend the law for the sake of avoiding economic turmoil or collapse. This, in turn, puts the rule of law, an essential fundament of the EU Treaties under stress. The law is stretched to the outmost, sometimes neglected and violated, but neither properly enforced nor amended, as it should be (Lentsch, 2017, p. 2018).

This creates remarkable legal uncertainty, putting at risk the unity of the EU legal order and neglecting its balanced set-up (De Witte, 2012).

De-constitutionalizing EMU treaty law

Certainly, the necessary substantive Treaty revisions including the adaption of EMU competences require consensus and thus may politically be difficult to achieve. Treaty revisions have become – and certainly will be – a rocky endeavour as can be witnessed by the Lisbon Treaty in 2009 being postponed after the failure of ratification in Ireland or the failed ratification of the Constitutional Draft Treaty of 2004 in France and the Netherlands. Nevertheless, the debate about a fundamental Treaty reform should be started, instead of further circumventing or watering down the given Treaty limits and thereby also threatening the essential rule of law principle anchored in Article 2 TEU.

Thereby, a clear reform perspective aiming at a better functioning and resilient EMU including a political union should be offered to the European citizens, in line with the explicit objective to complete the EMU by 2025.

The present deadlock given by the rigid and limited constitutional framework must be tackled (see the contribution to this debate section by Puetter & Puntscher Riekmann, 2020). An adequate legal basis for swift action in times of

crisis and the option of policy adjustments without immediately triggering cumbersome Treaty revision is needed. The necessary and deliberate change could be achieved by de-constitutionalizing the economic governance provisions. Instead of very detailed economic governance provisions in the Treaties, more flexibility, including a certain capacity and room for dynamism and adaptability of the system should be provided for. The introduction of qualified majority voting modalities should enhance the dynamics of the integration process, as can be learnt from the field of the internal market (Voet van Vormizeele, 2015). This may include the form of a respective enhanced constitutional provision determining the agreed general competence on economic governance and giving the power to respectively adopt secondary law. However, taking inspiration from Article 126(14) TFEU allowing the Council, by a special legislative procedure, instead of a Treaty amendment under Article 48 TEU, to unanimously replace or specify single or all provisions and aspects of the Protocol No 12 on the Excessive Deficit Procedure[1] would only be a first and insufficient step (Hamer, 2015). More courageous change could be modelled after Article 114 TFEU, the most important single market provision allowing for the approximation of laws by the ordinary legislative procedure. A similar provision should be enacted for EU Economic Union legislation, and at the same time replace clumsy and burdensome provisions like those on multilateral surveillance and excessive deficit (Articles 121 and 126 TFEU). Hand in hand, many of those details could be transferred into secondary legislation, thereby making future developments much more flexible. Integrating the ESM into the EU's constitutional system should form part of such development. In short, it should be considered developing the EMU, and specifically the economic part of it,[2] towards a supranational governance system, including the ordinary legislative procedure, thus also putting the European Parliament on equal footing, and fully integrate the EMU into the existing EU framework.

It goes without saying that this would require a Treaty change. Unanimous consent of the Member States, undeniably politically a major challenge, is indispensable for making the system more flexible. In other words: the systemic change needs unanimity, the change of the many details currently 'locked' in primary law should be made more flexible. The change we are suggesting is a matter of principle, not of detail. Of course, entering that avenue would require thorough preparation. That such a change is politically difficult to achieve should not impede academia to continuously raise the point, for the sake of a functional and efficient future EMU system.

Conclusion

As outlined, the crisis management measures as well as reform initiatives reflect the hindrances for further and necessary development in the field of

the EMU. The rigidity of the EU Treaties' amendment process and the related fear of Treaty change impedes further substantial reforms. To tackle this deadlock we suggest addressing and advancing the existing constitutional system by terminating the mechanisms of facile blockage for each Member State and provide for feasible reform options by majority decision.

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Notes

1. Such legislation has to remain within the scope of Art 126 TFEU and requires unanimity in the Council as it concerns laws with the status of primary law.
2. Monetary policy, by contrast, should not fundamentally be changed, and keep the ECB as the central and independent actor.

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