

The Eurozone Crisis: Picking up the
pieces
or
the unbearable lightness of being an
(EU) lawyer

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Objectives – Summary of conclusions

- assess the response of the EU to the Eurozone crisis
- focus on Treaty on Stability, Coordination & Governance in the EMU
- Indecisiveness and prevarication at the political level
- Inadequate legal protection for private parties
- Fiscal Compact Treaty: good governance principles introduced at the expense of democracy and by constitutional experimentation at the margins of EU law; it gives rise to legal problems; it is far from clear that it can achieve its avowed objectives

Euro crisis

- Tripartite nature of crisis (Buitter):
- Sovereign insolvency crisis
- Sovereign liquidity crisis
- Banking crisis
- A complex matrix of economic, financial, political and institutional causes
- Asymmetry between “centralised monetary policy and decentralised fiscal and supply side policies” (HLSC The Euro-area crisis)

- Beginning of crisis October 2009; Greek deficit was close to 12.7% rather than 6.7%
- May 2010 : 1st bailout 145 bn euros
- 2012: 2st bailout 130 bn euros

- EU response
- Private law aspects

EU Response

- Council Regulation 407/2010 on European Financial Stabilisation Mechanism (EFSM)
- European Financial Stability Facility (EFSF)
- ECB Action
- European Council of 26.10.12:
 - Write down of Greek debt
 - Recapitalisation of Greek banks
 - Strengthening resources available through EFSF
- Treaty on European Stability Mechanism (ESM)
- Treaty on Stability, Coordination & Governance in the EMU [Fiscal Compact Treaty (FCT)]

ECB action

- ECB has “only one needle in its compass”: control of inflation (hence reluctance on issuing eurobonds)
- Purchase of bonds in secondary markets (Securities Markets Programme)
- Long Term Refinancing Operation (LTRO)

Treaty on European Stability Mechanism (ESM)

- Amendment to Article 136 TFEU (Council Decision 25.3.2011)
- “3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”
- BVerfG, 2BvR 987/10: conditions for legality of German participation in granting loans to Greece and setting up the EFSF

Private law aspects

- PSI (private sector involvement)
- Most Greek Government Bonds held by institutional investors
- About 90% governed by Greek law
- No *pari passu* clause; no Collective Action Clause
- Greek banks hit particularly hard
- Settle or Hold out?

- Argentinian experience not hopeful for hold-out creditors:
- *NML Capital, Ltd. v. Banco Central de la República Argentina*, CA 5 July 2011, (CA NY)
- *NML Capital case*, BIS, Swiss Tribunal federal, arrêt 12.07.2010 (JdT 2011 II p. 263)
- *NML Capital Limited v Republic of Argentina* [2011] UKSC 31

Fiscal Compact Treaty

- International Treaty alongside the EU treaties concluded by all but two EU Member States
- Objectives (Article 1)
 - Foster budgetary discipline
 - Strengthen coordination of economic policies
 - Improve governance of Euro-area
- It needs to be ratified by the Contracting Parties; to come into force 1.1.2013 or earlier provided that 12 parties ratify it
- Operates alongside so-called “six pack”

Fiscal compact (Article 3)

- The budgetary position of the general government must be balanced or in surplus
- Each contracting party undertakes that it will not have a structural deficit of more than 0.5% of GDP or, in certain cases, 1%
- Temporal deviations are permitted in exceptional circumstances
- In the event of significant deviations a correction mechanism is triggered automatically

- The mechanism includes the obligation of the Contracting Party to implement measures to correct the deviations over a defined period of time (Art 3(1)(3))
- Those rules must take effect in national law through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes (Art 3(2))

Avoidance of Excessive deficit (Arts 4-8)

- When the ratio of general government debt to gross domestic product exceeds 60 %, the Contracting Party must reduce it at an average rate of one twentieth per year
- The Contracting Party must put in place a programme including a detailed description of the structural reforms which must be put in place
- The content and format of these programmes is to be defined in EU law
- The programme is endorsed and monitored by the Commission and the Council
- Article 7: reverse qualified majority voting

Governance of the Euro-area

- The Heads of Government of the Contracting Parties whose currency is the euro meet informally in Euro Summit meetings and have their own President (Art 12)
- Conference of representatives of financial committees of national parliaments & the EP (Art 13)

Why a separate Treaty?

- Amendment of Protocol No 12 on EDP: Art 126(14) TFEU
- Amendment of the EU Treaties
- Separate Treaty alongside the EU Treaties
- EU legislation: 136, 121, 126 TFEU (cf six-pack)
- Use of enhanced cooperation: Art 329(1) TFEU
- Normative form of the fiscal compact was not dictated by its substantive provisions?

Advantages of introducing changes by Treaty amendment

- More democratic
- More transparent and has greater political resonance
- Greater legitimacy
- More efficient process of obtaining political commitment
- Force of primary law

- Unanimity in revision principle fails to capture the political dynamic
- But can a majority of EU Member States enter into a separate treaty where unanimity for revision is unobtainable?
- Can Member States confer powers to the EU institutions outside the Treaties?

Can the Member States proceed by a separate Treaty alongside the EU Treaties?

- Purist view vis-à-vis nuanced approach
- Treaty revision procedures are based on unanimity and are exclusive
- It upsets principle of institutional balance and powers of Member States
- Duty of cooperation: Art 4(3) TEU
- Pre-emption: when the EU adopts rules, Member States may not adopt measures which affect those rules or alter their scope (cf ERTA case law)

- ECJ places much emphasis on coherence and unity of EU law (Opinion 1/09 on patents court; Foto-Frost case) and even the autonomy of EU law
- Cf old inter-pillar jurisdiction on policing the boundaries: the ECJ had adopted an open – ended notion of encroachment:
- a measure adopted by the Union under the ex-second pillar (CFSP) or the ex-Third Pillar affected the provisions of the EC Treaty within the meaning of Article 47 TEU and therefore was invalid whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure actually prevented or limited the exercise by the Community of its competence:
C-440/05 *Commission v Council* [2007] ECR I-9097; Case C-91/05 *Commission v Council (ECOWAS case)* [2008] ECR I-3651

- EU law has never been a foreigner to pragmatic flexibility. Model of direct conflict pre-emption emerges as the legal rationalisation of results which are dictated by the political balance of powers
- The FCT is to be applied and interpreted in conformity with EU law, in particular, the duty of sincere cooperation laid down in Article 4(3) TEU (Article 2(1))
- Its provisions apply insofar as they are compatible with the EU Treaties. They shall not encroach upon the EU competences in the area of economic union (Article 2(2))
- Aim: to incorporate it in EU law within 5 years (Art 16)

Problems and tensions

- Unclear relationship with EU law; is the use of EU institutions legal?
- Article 13 TEU; an EU institution may not be conferred new powers; uncertain whether it can be conferred by the FCT powers which it has under the EU treaties

Judicial enforcement procedure (Art 8)

- If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes that a Contracting Party has failed to comply, the matter will be brought to the ECJ by **one or more of the Contracting Parties**. The judgment is **binding** and the parties must take the necessary measures to comply with the judgment within a period to be decided by the Court.
- Cf Article 273 TFEU

- If a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment, it may bring the case before the ECJ and request the imposition of financial sanctions
- If the ECJ finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment, which may not exceed 0,1 % of its gross domestic product.
- But are these issues suitable for judicial determination?

- The “State within the state” syndrome
- What about democracy?

Effectiveness of the treaty and implications for the euro-crisis

- Will the Treaty remain in its current form?
- Short term effects: none
- Long term: unclear
- A model of economic governance needs to be sufficiently flexible and supported by social consensus
- What is financial freedom? Morals, politics and law