LUISS SCHOOL OF EUROPEAN POLITICAL ECONOMY

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THE EUROPEAN MONETARY UNION (EMU): Evolution and Legal Challenges

Gian Luigi Tosato

1. THE COMPLETION OF THE EMU: A NEW CONSTITUTIONAL TREATY?

The implementation of a genuine EMU, as outlined in the Four/Five Presidents reports, calls for an investigation into the legal instruments required to attain this objective. Undoubtedly, the conclusion of a new constitutional Treaty would offer the most appropriate solution. Nevertheless, States are reluctant to embark on such a perilous endeavour, in light of past labors and even unsuccessful experiences. It is, thus, necessary to consider what can be achieved through alternative avenues.

2. ALTERNATIVE LEGAL INSTRUMENTS

There are two categories of possible alternative legal instruments. The first comprises instruments that are implemented within the EU legal order: it is exemplified by the Six Pack and Two Pack, the regulations setting up the two mechanisms of the Banking Union (SSM and SRM), the amendment of art. 136 TFUE, and certain inter-institutional agreements concluded by the EP. The second category includes legal instruments that are implemented outside the EU legal order, such as the Fiscal Compact, the ESM treaty, and the Intergovernmental Agreement (IGA). It is submitted that the first category of devices should be given precedence and exploited to their fullest possible extent, as instruments that operate outside the EU legal order could give rise to both institutional and normative difficulties.

3. LEGAL BASES WITHIN THE UNION

For the legal bases of the instruments falling within the first category, it is necessary to turn one's attention to article 136 TFUE (specific measures for the Euro area), artt. 20 TUE and 326-334 TFUE (enhanced cooperation procedure), and art. 352 TFUE (flexibility clause). The orthodox view is to construe these provisions in isolation, resulting in a narrow scope of their respective legal basis. It is suggested that this hermeneutical method is unsatisfactory. A preferable construction is to consider these provisions not individually but, rather, systematically and in combination. Pursuant to this view, the enhanced cooperation procedure could enable art. 136 measures to also apply to non-Euro States (the so called Europlus area). Analogously, the residual competence of art. 352 could extend legislative power under art. 136 beyond the limits to which it was assigned (namely, budgetary

discipline and coordination of economic policies). Furthermore, should the residual competence of art. 352 be incorporated into an enhanced cooperation, the unanimity requirement and the special legislative procedure under art. 352 could be subsequently converted into a majority rule and an ordinary legislative procedure (as provided by art. 333 TFEU).

4. INTER-INSTITUTIONAL AGREEMENTS

Inter-institutional agreements constitute a further type of legal instrument that fall within the EU legal order. Under art. 295 TFEU, they may be entered into by the EP, the Council, and the Commission "to make arrangements for their cooperation"; they may also be binding. These acts may involve the three aforementioned institutions, as is the case for the Inter-institutional Agreement between the EP, the Council, and the Commission on budgetary discipline (2 December 2013). Alternatively, they may only involve two of the aforementioned institutions, as exemplified by the Framework Agreement on relations between the EP and the Commission (20 October 2010). Inter-institutional agreements may also be concluded between institutions not expressly mentioned in art. 295 TFEU, such as the one between the EP and the ECB on procedures relating to the Single Supervisory Mechanism (9 October 2013). The agreements in question may clarify or supplement the Treaties, but they must not conflict with them (contra legem). Specifically, they cannot alter the functions and powers conferred by the Treaties to EU institutions. Nonetheless, they provide a useful device for filling gaps in the Treaties; notably, as in the past, they may serve the purpose of enhancing the legislative and political control functions of the EP.

5. SIMPLIFIED REVISION PROCEDURE

Measures under art. 352 TFEU (flexibility clause) or 295 TFEU (inter-institutional agreements) cannot result in a change of the Treaties. If a change is needed, recourse can be made to the simplified revision procedure of art. 48.6 TEU. Admittedly, this procedure, which is analogous to the ordinary revision procedure, requires approval by all Member States, in accordance with their respective constitutional systems. However, a distinction should be made between minor well-targeted amendments within the scope of art. 48.6 (i.e. those limited to EU internal policies and actions) and substantial reform of the Union through the ordinary revision procedure. Member States appear to be less averse to amendments of the first type, as evidenced by the swift approval of the amendment to art. 136.

6. EXTRA-EU AGREEMENTS

Extra-EU agreements may cover those areas which remain within the exclusive domain of Member States. Conversely, they cannot address matters falling within the exclusive competences of the Union. A problem arises when these agreements touch upon matters falling within shared competences. In Pringle, the Court of Justice did not object to the ESM being established outside the Union even though the same result could have been achieved through art. 352 TFEU. Effectively, Member States are entitled, not obliged, to exercise the residual competence provided by art. 352; the same can be said for the measures under art. 136 and the enhanced cooperation procedure. Nonetheless, the principle of sincere cooperation (art. 4.3 TEU) would require Member States to pursue their objectives outside the EU legal framework only when it is not feasible or too burdensome to do so within it. Furthermore, in due course, these initiatives should be channelled back into the EU legal order, as provided by art. 16 of the Fiscal Compact.

7. HIERARCHY BETWEEN THE AVAILABLE LEGAL INSTRUMENTS

The Four/Five Presidents report on the completion of the EMU call for a more integrated framework of financial, budgetary, and economic policies, as well as a strengthened democratic legitimacy. Furthermore, they delineate the measures required to achieve these objectives. It is submitted that the legal instruments necessary to implement these measures should be adopted pursuant to the following hierarchical order. Firstly, priority should be given to instruments available within the EU legal framework over those that lie outside of it. Secondly, instruments having a general scope should be chosen over those that differentiate between Member States. Thirdly, interventions should be founded upon existing legal bases rather than on those requiring Treaty revisions. This proposed hierarchy is consonant with the principle of sincere cooperation (art. 4.3 TEU), which aims to ensure the largest participation of Member States in the integration process and to safeguard EU inter-institutional balance.

8. MEASURES TO COMPLETE THE EMU

Several measures required to complete the EMU can be implemented through EU legislation. For example, a legal basis could be provided by art. 113 TFEU for the limitation of tax dumping among Member States, by art. 114 TFEU for the regulation of capital markets and establishment of a common deposit guarantee scheme, by art. 152.2 TFEU for the enactment of minimum standards for the labour markets, and by art. 311 TFEU for the introduction of autonomous EU tax levies. In the absence of the required Member State consent (unanimity or qualified majority), the scope of these measures should be limited to the Eurozone (art. 136) or to the Member States wishing to take part in an enhanced cooperation initiative (as is presently the case of the FTT). By contrast, no adequate legal bases appears to be available for the specific measures necessary to complete the Banking Union (such as a backstop for general systemic crises and a single deposit guarantee fund) and to provide the EU with its own fiscal capacity. For these interventions, recourse could be made to the flexibility clause of art. 352 TFEU, the simplified revision procedure under art. 48.6 TEU, or extra-EU agreements.

9. THE DEMOCRATIC LEGITIMACY ISSUE

The increasing executive functions of the European Council (EC) are not subject to a proper democratic control. They are not controlled by either National Parliaments or the EP. The former ensures democratic legitimacy of the positions of their respective representatives within the EC, but not the deliberations of the EC as a collective institution of the Union. As for the EP, it is granted political control over the Commission, but it lacks similar power with respect to the EC. It is submitted that a remedy to the ensuing democratic deficit could be sought in two ways. Firstly, by the conclusion of an inter-institutional agreement providing for the European Commission President's enhanced accountability before the EP. Secondly, by fully exploiting the cooperation between the EP and National Parliaments, as advocated by Protocol n. 1 of the Lisbon Treaty and art. 13 of the Fiscal Compact. The relationship between the EP and the Eurozone poses a special problem. It is questionable whether democratic control over the Eurozone can be assured by the EP, as this institution also includes representatives elected in Member States that do not belong to this area. To overcome this possible difficulty, a targeted simplified revision of art. 137 TFEU could offer a satisfactory solution. The creation of an ad hoc Committee within the EP, one composed exclusively of Euro States and granted delegated powers for Eurozone affairs, could provide an alternative avenue. Nevertheless, this solution would likely raise problematic institutional challenges.

10. EXIT FROM THE MONETARY UNION

The Lisbon Treaty, whilst providing for withdrawal from the EU, contains no provision for the exit from the Euro. Consequently, the question arises as to whether withdrawal from the monetary union can take place without leaving the EU altogether. Under international law (the 1969 Vienna Convention on the Law of Treaties), a party may withdraw from a treaty by mutual agreement of the participants or in the event of a fundamental change of the relevant circumstances, even in the absence of a treaty provision to this effect. The German Constitutional Court upheld the applicability of these rules to the termination of the Fiscal Compact, but it appears questionable whether the same reasoning would be justified with respect to the monetary union. Actually, although membership in the euro is generally deemed irrevocable, a separate withdrawal from the euro is not expressly prohibited by the Lisbon Treaty. Equally, no such prohibition could be systematically inferred, since (at least presently) there is no inseparable bond between the monetary union and the Union as a whole. Evidence to the contrary is provided by the presence of some Member States that have not adopted the Euro. A fundamental change of circumstances could possibly occur in the event of an acknowledged, irreparable failure by the monetary union to achieve its financial stability objectives or to respect the general values and principles of the Union. The expulsion of a State from the monetary union should not be considered admissible. This can be inferred a fortiori from art. 7 TEU, which does not contemplate the expulsion of a Member State from the EU even in the event of serious breaches of the fundamental values of the Union. Payment defaults by a State do not entail its automatic exclusion from the monetary union, as evidenced by the "haircut" suffered by Greece and Cyprus' creditors. It is questionable whether such exclusion should take place in the event of the introduction of a parallel currency adopted solely for domestic transactions. By contrast, the exit from the monetary union would be a fait accompli, if the euro were entirely replaced by a national currency.