

BEYOND THE EURO CRISIS

154

EUROPEAN CONSTITUTIONAL DILEMMAS AND
TREATY AMENDMENTS

Päivi Leino & Janne Salminen

FIIA BRIEFING PAPER 154 • May 2014



ULKOPOLIITTINEN INSTITUUTTI
UTRIKESPOLITISKA INSTITUTET
THE FINNISH INSTITUTE OF INTERNATIONAL AFFAIRS

BEYOND THE EURO CRISIS

EUROPEAN CONSTITUTIONAL DILEMMAS AND TREATY AMENDMENTS



Päivi Leino
Adjunct Professor
University of Helsinki

FIIA Briefing Paper 154
May 2014



Janne Salminen
Researcher
University of Turku

- The actual need for Treaty amendments is open to interpretation, for example in relation to the inclusion of the recent euro crisis-related international agreements in EU law. These questions are partly political in nature, and linked to the wider legitimacy of the EU and the integrity and clarity of its legal system.
- The full realization of the Commission's vision for the future of the EMU would require Treaty changes in order to revise the nature of competence in the area of economic policy and the general framework of cooperation.
- The recent discussion on the euro crisis measures has demonstrated that many member states have constitutional 'red lines' relating, for example, to the exercise of budgetary powers or sovereignty. It seems unlikely that these hurdles will be overcome in the short term.

The European Union research programme
The Finnish Institute of International Affairs

This paper discusses the legal and constitutional impact of the euro crisis in the European Union and in national constitutional structures. To this end, it briefly enumerates the revisions and amendments that have been made to the legal framework of the Economic and Monetary Union (EMU) during the years of crisis. This discussion paves the way for a glimpse into the future beyond the crisis. The focus of the current contribution is on the possible future Treaty amendments in the light of the discussion surrounding the recent revisions and the development needs exposed by the current crisis.

In the aftermath of the most acute phase of the crisis, many proposals and initiatives for amendments concerning the EMU legal framework have been tabled. Among them is the European Commission's ambitious functionalist policy paper, the Blueprint, which was adopted in November 2012,¹ as well as the report of the President of the European Council,² which lays out more moderate prospects. Furthermore, some court cases, such as the pending case concerning the ECB's Outright Monetary Transactions (OMT) programme, may even highlight the need to reconsider some Treaty amendments. Added to these are, of course, the numerous academic studies and papers speculating about the possible need to amend the current Treaties, or the need to adopt a completely separate Euro Treaty with the status of EU primary law.³

1 Communication from the Commission. *A blueprint for a deep and genuine economic and monetary union: Launching a European Debate*, COM/2012/0777 final.

2 Report by President of the European Council Herman Van Rompuy. *Towards a genuine economic and monetary union*, EUCO 120/20. Available at http://ec.europa.eu/economy_finance/crisis/documents/131201_en.pdf

3 Glienicker Gruppe: *Aufbruch in die Euro-Union*, 17.10.2013, available at <http://www.bruegel.org/publications/publication-detail/publication/798-aufbruch-in-die-euro-union>, visited 12 May 2014; J.-C. Piris (2011): *The Future of Europe. Towards a Two-Speed EU?*, Cambridge; C. Closa (2014): *Between a rock and a hard place: the future of EU treaty revisions*, SIEPS 2014:2epa, available at <http://www.sieps.se/en/publikationer/between-a-rock-and-a-hard-place-the-future-of-eu-treaty-revisions-20142epa>, visited 12 May 2014; A. Hinarejos (2012): 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration', *Cambridge Yearbook of European Legal Studies* 14: 243-268.

But politicians and academics have not only welcomed the prospect of enhancing the Treaties as far as the EMU is concerned. In addition, both the Treaty on Stability, Coordination and Governance in the EMU (the Fiscal Compact) and the agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (the SRF Agreement), both international agreements falling formally outside the legal framework of the EU, include a legal and political commitment to consider the incorporation of their contents into the EU legal framework within a specified time frame. The discussion concerning the further development of the EMU at the Treaty level remains rather abstract, however. It is particularly unclear whether these discussions will indeed result in any sort of changes at the Treaty level and, if they do, what these changes might entail. Yet even if the crisis at hand seems to have lost some of its earlier vigour, and the eager voices demanding further development of the EMU legal framework seem to have lost some of their earlier determination, the plans for EMU development are expected to remain on the table for the foreseeable future.

Crisis management: Changes and their evaluation

Understanding the legal dimension of the current situation, including its constitutional consequences and prospects, calls for a return to the legislative changes made during the crisis both in the EU and in member states' legal systems, either through international agreements or based on the legal instruments the EU has at its disposal. The key consideration behind the changes relates to the division of competence between the EU and its member states, and the methods of integration applied in the original provisions on the EMU. These Treaty provisions have remained more or less the same since their introduction in 1993: a framework characterized as an economic coordination side preserving the national character of economic policies and a monetary pillar based on exclusive Union competence with supranational institutions. Current reforms and reform discussions are obviously stemming from the early choices.

The repairs made during the crisis can be roughly divided into two groups: measures aiming to stabilize the euro by providing financial assistance to member states, and measures concerning economic

and fiscal governance. As regards the former, various emergency mechanisms have been put in place. The European Financial Stabilisation Mechanism was established by an EU Regulation based on Article 122(2) TFEU. The eurozone member states then agreed to set up a temporary European Financial Stability Facility. An intergovernmental treaty was later approved in order to launch a permanent facility, the European Stability Mechanism. In addition, an amendment to Article 136 TFEU was approved in order to clarify that the possibility to establish such a facility for the member states did indeed exist.

With regard to the second group of measures, further development of the Stability and Growth Pact was initiated. The so-called six-pack legislation, consisting of five regulations and one directive, entered into force towards the end of 2011, contributing to a significant strengthening of the Pact. In addition, the so-called two-pack regulations were adopted. Moreover, in 2012, an international agreement, the Fiscal Compact, was concluded by the majority of member states in order to foster budgetary discipline and to strengthen the coordination between the member states' economic policies. The division between stabilization measures and those concerning economic governance is a relative one because there are many linkages between them, the most obvious being between the ESM and the Fiscal Compact: a member state can only obtain the assistance of the facility after agreeing to a number of strict conditions, part of which are contained in the Fiscal Compact.

In addition, in June 2012 the European Council set the objective of creating a Banking Union to be realized by the end of the current EU legislature. This is not necessarily understood as a part of the development of the EMU as such, and the legal bases used for the purpose, with the exception of the Single Supervisory Mechanism, have been found in the Article 114 of the TFEU relating to the internal market. While the necessity for a Banking Union has been linked to the objective of avoiding similar financial crises in the future, the sufficiency and appropriateness of the legal bases has also aroused debate. In addition, the crisis has affected the actions and position of the European Central Bank. The pending OMT case, for example, has raised discussion on the ways in which the ECB might have distanced itself from its tasks or compromised the independence it should enjoy. Similarly, the measures adopted in the

area of banking supervision have provoked a debate concerning the treaty-based independence of the ECB and the possibility to keep its many functions separate.

Many of the measures and agreements enumerated above have raised legal questions relating both to their constitutionality in the EU legal framework and to national constitutional requirements. In the EU context, however, there is nothing unusual in testing the limits and searching for the interpretation of various provisions in the courts. Indeed, it could be expected that the crisis measures would lead to jurisprudence of this kind, especially considering their intentional legal ambiguity on many key points.

The EU Court in Luxembourg has been given the opportunity to evaluate the constitutionality of the amendment of Article 136 TFEU, and particularly the ESM in the *Pringle* case, based on a preliminary reference from an Irish court. Courts in various member states, including Germany and Portugal, have assessed crisis-related measures and influenced their further development. The OMT case is yet another reminder of the way in which such constitutional developments have taken place: it is the first-ever reference from the German Federal Constitutional Court, which had previously never in the history of integration felt the need to consult the EU Court on the interpretation of EU law – a significant institutional consequence of euro crisis law. But when addressing these measures, the Courts have clearly not operated in a vacuum. So far, they have exercised judicial restraint when addressing political questions that are not amenable to a strictly legalistic review.

Many researchers claim that the recent rapid changes in the legal framework rely on a flexible interpretation of the Treaties.⁴ Regardless of the outcome of the various court decisions, the constitutionality of the recent developments will remain fundamentally challenged. These challenges have been identified

4 For further references, see P. Leino and J. Salminen (2013): 'Should the Economic and Monetary Union Be Democratic After All? Some Reflections on the Current Crisis', *German Law Journal* 14(7): 844–868. See also K. Tuori and K. Tuori (2014): *The Eurozone Crisis – A Constitutional Analysis*, Cambridge Studies in European Law and Policy.

as posing a potential risk to the legitimacy of the EU, and the traditional understanding of the EU as a 'Union based on law'. The new developments give rise to several other problems as well. The usage of a system whereby the EU Treaties and international agreements are used in parallel has obvious consequences for the transparency, democratic nature and accountability of the new solutions. This is because the structures outside the EU are generally believed to offer weaker democratic guarantees for decision-making than the EU framework would be able to provide – a conclusion that would certainly need to be reconsidered in greater detail. Moreover, the web of changes at various levels and in different forms and processes presents an obvious challenge to the clarity of the overall system. For while the EMU has – since its creation – been characterized by differentiation within the EU, the euro crisis law is yet another source of differentiation and poses a further risk to the unity of EU law.⁵

However, even if it is acknowledged that these rather fundamental problems might actually shake the very foundations of the EU's legal architecture, as evidenced in the amount of academic and political discussion concerning the legality and appropriateness of euro crisis law and actions, so far none of the relevant constitutional actors have hailed the measures as unconstitutional. The various ways in which the crisis has been handled and solutions identified are an indication of the incredible capacity of the EU legal framework to adapt without revising the Treaties. The six-pack and two-pack legislation is a case in point. By the extensive exhaustion of the legal bases that the Treaties have had to offer, these pieces of legislation have provided new possibilities to strengthen the economic policy coordination.

Moreover, if we look at the stability facilities and their *de facto* meaning compared with the legal requirements the Treaties set for the EMU environment, it is no wonder that they have provoked constitutional debate. The member states have dealt with those issues that have proved politically and/or constitutionally impossible to handle within the EU framework by entering into international agreements, thus providing possibilities for willing member states to proceed in the further development of the EMU without the need to engage in a discussion

on the reallocation of competences between the EU and its member states. From a legal point of view, this option has been fully possible.

The design of the legal instruments for the Banking Union follows the pattern of previous actions. Again, the EU is relying on the innovative use of the legal bases provided by the Treaties and effectively exhausting the competence provided through the adoption of the Single Resolution Mechanism. Disagreement on the appropriateness of its legal basis continues, but has been resolved in part through an international agreement, the SRF Agreement, between the member states. And similarly to the question concerning the compatibility of the stability facilities with the EU legal framework, these arrangements might also be tested by the courts. So far, all the relevant international agreements have overcome the legal challenges and been justified politically. They are believed to be temporary in nature, even if interpretations vary on the steps required to terminate them. The question of developing European guarantees for deposits remains to be addressed, however.

Key issues of the recent developments

At this point, four additional issues should be recognized. First, in the functionalist approach to the development of the EU's legal framework, visible for example in the Commission Blueprint, form follows function. As far as the Treaty provides the competence to act, this competence should be exercised by the institutions of the EU. This entails that the measures needed to develop the EMU should in the first instance be designed within the boundaries set by the existing Treaties, while fully exploiting the legal bases it provides. This is legally possible, but not the only alternative, since often actions by the member states alone or acting together is also a viable option.

Second, in cases where the constitution forms the basis for several levels of powers, all equipped with their own competences, questions of interpretation tend to emerge concerning the constitutional holder and the allocation of particular powers. In this context, however, one should emphasize that the need for interpretation is nothing new, especially as far as the need to interpret a constitution is concerned: constitutions rely to varying degrees

5 See P. Leino and J. Salminen (2013).

on interpretative practice. This is particularly true when considering the innovative interpretation possibilities that the Treaties have always provided. The development of euro crisis law has been characterized by constructive ambiguity, and issues that were previously considered to be unconstitutional sometimes prove to be constitutional after interpretation. To this end, one should bear in mind that rigid constitutions in particular usually evolve by interpretation. In the EU setting, the constitutional Treaty structures are especially rigid in the sense that they are difficult to amend. The rigidity of the provisions concerning the reform process of the EU Treaties makes it difficult to agree on amending them. This institutional challenge might be even harder in the EMU context because interest in the development of the provisions differs between those member states that are “in” and those that are “out”.⁶

The third consideration relates to the Treaty reform procedures under Article 48 TEU. The ordinary amendment procedure was developed in order to turn the process into a celebration of democracy by requiring a broad debate on the intended amendments in a Convention, and finally culminating in a round of ratifications in all member states, following a referendum in some cases. But the current Treaty also recognizes two simpler ways of revising the Treaty in a more piecemeal fashion by modifying limited parts. The simplified revision procedure under Article 48(6) TEU concerns amendments relating to the internal policies and actions of the EU, but cannot be used to widen EU competence. The amendment has to be adopted by the European Council unanimously, and the decision is subject to approval by each member state under its own constitutional requirements, whatever they may be. This also implies that – as far as national procedures are concerned – the simplified procedure may not be much simpler than the ordinary procedure in actual fact.

In addition, the *passerelle* under Article 48(7) TEU allows the European Council to transfer matters from unanimous to qualified majority voting by the Council, and transfer matters from a special to the

ordinary legislative procedure based on a unanimous decision by the European Council with the consent of the European Parliament. Each national parliament has the possibility to prevent such an amendment by opposing it within a six-month period. Given that the use of simplified revision procedures is limited to existing EU competence, the general procedure is turning into a democratic headache: there are doubts as to the possibilities of getting any amendments approved by the European people. This is linked to the experiences in the run-up to the Lisbon Treaty, which effectively dampened interest in engaging in a time- and political-energy-consuming procedure, which might not lead anywhere in the end except back to square one.

Ideally, however, proposals for the development of the EMU framework should not be constrained because of a presumed need to avoid Treaty changes at all costs, especially if and when amendments prove absolutely necessary, in cases where the limits set by the Treaties prove too narrow, for example, or if legitimacy considerations are found to require more detailed reform. There are also hidden risks in adopting deficient legislation through the political or constitutional fear of Treaty changes. On the other hand, knowing the difficulties involved in Treaty amendments in the context of the current crisis, demands for amendments to the Treaties have also been used politically in order to delay or hinder changes being made. This goes to show how legal or constitutional challenges sometimes prove to be political in nature in the end.

Fourth, these considerations are of particular importance in the EMU context, which has remained a contested political, constitutional, and economic adventure since its creation. Accordingly, for various reasons stemming from fears related to sovereignty and to transferring state powers to the EU, especially many of the new proposals for the development of the EMU were specifically eliminated by the member states already when introducing the EMU. Already in 1999 Francis Snyder considered that “...in future also, political conflicts about EMU are likely often to appear in legal camouflage”. In the EMU, this discourse is one where politics and law are intertwined: it is a “*dialectical relationship between politics and law, political discourse and*

6 T. Beukers (2014): *Flexibilisation of the Euro Area: Challenges and Opportunities*. EUI Working Paper MWP, European University Institute.

monetary discourse, and political discourse and legal discourse”.⁷

The Question Concerning Future Treaty Amendments

The Lisbon Treaty was expected to deliver sustainable constitutional outcomes. In other words, it was designed to prevent the need for constant Treaty reform processes and to prepare the Union for future needs by providing a solid Treaty framework with some built-in flexibility. However, as far as EMU is concerned, the most noteworthy aspect relates to what was *not* done. The major reform process only resulted in minor changes as far as the provisions concerning EMU are concerned.

One example of trying to future-proof the Treaty are the specific *passerelle* clauses introduced at strategic places, where future needs to make amendments could be foreseen. The EMU Title in the Treaty does not include any of these. Another noteworthy aspect relates to the confirmation of the *sui generis* character of economic policy among the EU policies. At this point in time, it is all too easy to conclude that the Treaty was ill-prepared for the economic crisis that hit the Union soon after its entry into force. For this reason, Treaty amendments were suddenly back on the table again. Both the measures taken during the crisis and future possibilities are both closely linked to the question of the extent of EU competence, which translates into questions concerning the legal basis: without an appropriate Treaty basis, the EU cannot act. In the event that the action is still deemed necessary, the appropriate basis has to be created by amending the Treaties, or the member states have to find another solution outside the EU legal framework.

To date, the euro crisis has prompted one of the first amendments to the EU Treaties since the Lisbon Treaty. This amendment procedure took advantage of the possibilities presented by the new simplified revision procedure, according to

which the European Council agreed on amending Article 136(3) TFEU. The decision was challenged, however, not only because of doubts as to whether the amendment remained within the limits of the competence specified for the simplified revision procedure, but also because the decision to clarify Article 136 TFEU to enable the establishment of a stability mechanism indicated that the matter did indeed require clarifying, suggesting that doubts may have existed all along. The above-mentioned *Pringle* case specifically concerned, among other things, the applicability of the simplified revision procedure, and whether the proposed amendment to Article 136 TFEU did in fact involve an increase in the competences conferred on the EU. The Court found that the amendment did not confer any new competences on the EU, since it does not enable the EU to undertake any action which it could not have taken prior to the amendment.

As indicated, some of the future amendments might relate to international agreements that have been concluded outside the EU legal framework. In addition to the Fiscal Compact and the forthcoming SRF Agreement, which make specific stipulations on the prospects of inclusion, the relationship of the ESM Treaty to the EU legal framework might need to be re-evaluated. However, the competence considerations relating to all of these agreements remain complicated and contested, and disagreement on the measures needed for the inclusion of these agreements persists, even if this solution would remedy the partial fragmentation of the legal framework.

So, are there further amendments to come? Before embarking on an extensive Treaty reform, there are good reasons to test the Lisbon Treaty together with its new surrounding framework for strengthened economic governance in ‘normal conditions’, and to examine the proper division of economic and fiscal competence with all its nuances between the EU and its member states based on such experiences. For the time being, there seem to be no particular constitutional reasons to develop the EU constitutional framework further. Thus far, the EU and the member states have created the legal and political means deemed necessary, but not possible under the current Treaties, by concluding agreements outside the EU legal framework. As this has been legally possible, there is no particular constitutional *need* to amend the Treaties to accommodate them.

7 F. Snyder (1999): ‘EMU Revisited. Are We Making a Constitution? What Constitution are We Making?’, in G. de Búrca and P. Craig (eds.), *European Union Law: An Evolutionary Perspective*, Oxford; F. Snyder (2011): ‘EMU – Integration and Differentiation: Metaphor for European Union’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford.

At the same time, one could claim that the opening-up of the formal Treaty-revision process would in itself serve the Union's democratic legitimacy in providing a forum for debate. Against this background, the Commission Blueprint issued in November 2012 is courageous in visualizing the future EMU. As such, it is an interesting step in paving the way for openings that are likely to be politically contested, keeping in mind that in many member states, questions relating to budgetary competence and the need to preserve sovereignty in certain key questions have effectively imposed limits on the EU-based solutions.

The Blueprint proposes measures for three different time frames and argues for a departure from the legally blurry 'exceptional and transitional basis' of the past few years. Instead, the future deepening of the EMU should build on the institutional and legal framework of the Treaty, which should be complemented with carefully prepared changes ensuring political and democratic ownership. The Blueprint, with its clear institutional ambitions on the Commission's part, calls for a strengthened EU role for revising national budgets in line with European commitments, the adoption of a substantial central budget derived in part from an autonomous EU power of taxation, as well as the possibility to issue the EU's own sovereign debt. In the Commission's vision, the revisited EMU would naturally be run by a strengthened Commission and co-legislated by the European Parliament, with the Court of Justice of the European Union enjoying strengthened competences.

Some of these alternatives have been on the table and rejected before. A closer look at the Commission Blueprint makes it evident that in the Commission's vision everything that can be done without changing the Treaties should be done. The Commission is also very precise when stating which of its proposals can be adopted – according to its own interpretation – within the limits of the current Treaties, occasionally invoking the flexibility clause in Article 352 TFEU. Yet some of the medium- and long-term considerations include elements in the Commission's vision which also presume Treaty amendment and the clear allocation of new competences to the EU. With the European Parliament election approaching, it is clear that these elements will find their way into the debates preceding the appointment of the Commission, as well as into its programme.

The Commission Blueprint provides a basis for identifying the kind of reforms that might be useful, and subsequently, how these reforms could be carried out. To date, many proposals have been given short shrift and shot down. It is too easy to hastily state that a 'true' fiscal union reaching beyond coordination, or the creation of European government bonds issued by the euro area member states jointly, call for Treaty revision. However, these questions are much more wide-ranging. In this discussion, an obvious hurdle relates to the discrepancy between Treaty reforms presuming the participation of all EU member states, and the fact that the acute measures would be likely to affect euro states with greater intensity.

The division between "ins" and "outs" also affects the discussion concerning the Banking Union and financial market competence in general, which is already regulated by the EU on the basis of internal market competence without a specific legal basis in the Treaties. The relevant question today is more related to the limits of this competence, in so much as it refers to general internal market competence, and the effect that exercising this competence has on the "outs", particularly those outside the Single Supervisory Mechanism.

One solution would be the clarification of EU competence in these areas through the introduction of specific legal bases related to the Banking Union, and even financial markets more generally, in the same way that the Lisbon Treaty previously provided for an attempt to clarify the limits of EU competence for a number of new specific legal bases in matters that were once regulated under the flexibility clauses. As regards the Single Supervisory Mechanism more specifically, the odd union between the Supervisory Authority and the ECB would benefit from being readdressed.

It is not difficult to speculate about future scenarios concerning the development of the EMU framework. Several outcomes are possible, ranging from a complete reform of the EMU provisions to a number of more limited modifications. Alternatively, the EMU provisions could be rewritten in order to create more flexibility to adapt the framework if deemed necessary. This could be done by introducing a specific flexibility clause just for the euro-area member states, giving them possibilities to adopt measures for the euro area if necessary for the purposes of

the EMU.⁸ In this way, the euro-area member states would benefit from a similar kind of flexibility for the EMU to that which is possible under Article 352 TFEU, but without the need to engage all the member states in the decision-making. But the relationship of such a clause to the division of competence and the nature of economic policy competence would also require a deeper analysis. Furthermore, even the “outs” remain eager to maintain their control and role as participants, which makes this option unlikely to succeed. On balance, the most attractive solution might be yet another international agreement between the euro states outside the EU legal framework, even if this contradicts the aspiration of remaining within the EU framework – an aspiration that is frequently alluded to, but seldom practised in the euro crisis context.

The current discussions prove that in today’s constitutionally compound setting the constitutional developments at the EU level are tied to the constitutions of the member states. In Finland, for example, the euro crisis law has been relevant for the constitution and its interpretative practice.⁹ This entails a two-track relationship whereby euro crisis laws impact national constitutional orders, and national constitutional orders influence the development of euro crisis legislation and – subsequently – the further development of the EMU. When it comes to evaluating the necessity to reform the Treaties, European and national constitutional considerations are intertwined.

One of the obvious obstacles to the development of euro crisis legislation at the level of the Treaties relates to its democratic legitimacy. National constitutional demands relating to the legitimacy of the future arrangements are often controversial. National parliaments tend to be jealous when it comes to their competences and budgetary sovereignty, and a Treaty revision presumes their unanimous consent. Although the traditional sovereignty doctrines of the member states have been affected and re-modified in the evolving EU, the traditional claims have returned with gusto in the field of EMU

development. National constitutional constraints may be numerous, and also vary from member state to member state. Constitutional attitudes towards integration in the economic field also tend to vary. Currently, however, it is also possible that the most fundamental obstacle to the further development of the EMU is not to be found in the national constitutions, but in the gulf that exists between the European elites and the general public.

The Finnish Institute of International Affairs
tel. +358 9 432 7000
fax. +358 9 432 7799
www.fii.fi

ISBN 978-951-769-415-5
ISSN 1795-8059

Cover photo: Mammal/Flickr
Language editing: Lynn Nikkanen

The Finnish Institute of International Affairs is an independent research institute that produces high-level research to support political decision-making and public debate both nationally and internationally. The Institute undertakes quality control in editing publications but the responsibility for the views expressed ultimately rests with the authors.

8 T. Beukers (2014).

9 See P. Leino and J. Salminen (2013b): ‘The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU DecisionMaking?’, *European Constitutional Law Review (EuConst)* 9(3): 451–479.