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Euro-Crisis Law

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The euro – a big mistake

- Article 3(4) TEU: The Union shall establish an economic and monetary union whose currency is the euro
  - Euro is part of a larger project: EMU
  - Which is part of an even larger project: political union
- Why was it a mistake?
  - The EU is not an Optimal Currency Area
  - The rules set out were both too strict and too lenient
  - There was no contingency plan

Optimal Currency Area v Euro

- Capital mobility
  - EMU is OK
- Labour mobility
  - EMU is weak: language barriers/national markets
- Price/Wage flexibility
  - Wages set by unions, not my markets
- Ability to make internal transfers in case of asymmetric shock
  - Absent in EMU: no EU taxation/budget
  - Fiscal policy (tax and spending) is still national

How EMU was designed to avoid failure

- Enforce free movement of capital rules
- Central Bank & single currency
- Control National Budget Deficits
  - – Prohibit excessive deficits
  - – Absent single fiscal policy, ensure no state borrows too much
- Coordinate national economic policies
  - – Divergent policies make it hard for central bank to set interest rates

Why failure remained possible

- No labour mobility
- No central budget to rescue failing state
- No discipline by Member States
  - Incentive to borrow high (Greece, Spain, Ireland, Italy…)
  - Excessive deficit procedure weak

Euro-Crisis

- Banking Crisis (2008): financial markets fail, borrowing costs for states/firms rise: recession
- Greece 2009: high borrowing & uncertainty over capacity of repayment
- Domino effect 2010: will other states also be unable to repay debts? Will the Euro survive?
- Commitment by MS, EU, ECB to do 'whatever it takes' to rescue the euro

Euro-Crisis Law

- How can the EU & Member States
  1. Rescue those states that are in difficulty? (crisis management)
  2. Create a system that makes EMU sustainable? (crisis prevention)
- Euro-Crisis Law
  - Treaty Amendments, Regulations, Directives
  - International Treaties

Crisis management instruments

1. European Financial Stabilisation Mechanism (2010)
   - EUR 60 Billion
   - Under EU Law
2. European Financial Stability Facility (2010)
   - EUR 400 Billion
   - Under International Law, only Euro-area MS
3. European Stability Mechanism (2011/12)
   - Consolidates 1 & 2
   - EUR 700 Billion
   - Under International Law, only Euro-area MS
4. TFEU Amendment (2011)
   - Legal provision to support ESM

ESM: outside of EU Law, but subject to EU Law, borrowing EU institutions

Art 163(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.

National level debates

- Ratification debates: main themes
  - Among non-crisis states:
    - Are we too lenient? (moral hazard risk of ever more aid)
    - Cost of the measure & doubts on whether it is sufficient
    - Attempts by minority parties to secure further reforms (eg financial transactions tax, Germany)
    - Ensure participation of parliament in ESM-related discussions
  - Among crisis states
    - Strong opposition from minority governments, anti-euro parties grow, governments collapse, technical governments

Pringle v Ireland

- Irish Member of Parliament Challenges constitutionality of Treaty amendment under Irish and EU Law
  – Reference to ECJ
- Why make this challenge?

ECJ: is the amendment lawful?

- Can ECJ review this Treaty amendment?
  - Yes, if you use simplified procedures (Art 48 TEU)
- Does the amendment affect monetary policy (for which the EU has exclusive competence)?
  - No, it is an instrument of economic policy
- Does the amendment increase the EU's competences? 9Art 48(6) TEU)
  - No, because while it uses EU institutions, the ESM is established by Member States

What about the ‘no bailout clause’?

- Art 125 TFEU
  - The Union [& a Member State] shall not be liable for or assume the commitments of central governments, regional, local or other public authorities…
    - Reason: avoid more hazard
  - ECJ’s response
    - ESM is not a bail out because it is a loan to be repaid
    - Strict conditionality is attached to the loan so as to prevent future need for loans

Are these two responses consistent?

Domestic Legal Challenges

- German Constitutional Court:
  - Enhance participation of German Parliament
- French Conseil d'Etat
  - ESM finds & Parliamentary scrutiny
- Netherlands
  - Challenge against procedure for ESM adoption disallowed, court priorities practical implementation of Treaty
- Latvia:
  - constitutional court considers budget cuts (e.g. cuts in pensions; cuts in judges' salaries; cuts in working parents' childcare allowance)
    - Fundamental social rights
    - Principle of proportionality
  - Takeaway: court is the principal organ where trade-offs are debated publicly.

Discussion

- Procedures and accountability of ESM
  - Informal procedures: law v speed
    - Informal meetings of finance ministers
    - European Council meetings usually ‘fixed’ by Germany & France
    - Weak accountability for ESM actions (appeals to Board of Governors/ECJ)
  - Commission ‘borrowed’ by the ESM
    - Risks: resources used for ESM & not EU business; change of culture for Commission
  - Imbalance between debtor states & others
    - Solidarity v hierarchy

Conditionality

- Impact of strict conditionality
  - States borrowing must make significant adjustments to economy
    - Cut health/welfare spending
    - Raise taxes
    - Privatise industries
  - Compliance is monitored by the Commission/ECB/IMF
    - Commission &ECB are not formally competent under the Treaty
  - MOU may be varied (w/o much say by the aid recipient)
    - 6 revisions to Greek MOU (2010-2012)
  - Competences of the 'EU' grow as a result of memoranda of understanding:
    - Labour rights; taxation; property rights

Crisis prevention measures 1

- Six Pack
  - 6 Directives, obliging states to:
    - Avoid excessive deficits
    - Balance their budgets
    - Diversify economy
  - Enforcement
    - European Semester: review of national policies
    - Penalties for breach: 0.1 to 0.5 % of GDP
    - Sanctions:
      - Extremely complex procedure & high penalties
      - Not economically credible (Cf. no adverse market reaction in 2002 and 2004 when the excessive deficit rules are not enforced)

Crisis Prevention 2
The Fiscal Compact

- **Treaty on Stability, Coordination and Governance**
  - International Treaty (not signed by UK and Czech)
  - Balanced budget rule
  - Automatic mechanism to correct imbalance
  - To be enshrined in national constitutions

Takeaways

- Legal complexity overshadows analysis of effectiveness
- Logic of saving failing states transplanted to all Member States with European Semester etc.
  - Competences of the EU enlarged by international treaties
  - Democratic input at national level: largely irrelevant
  - National constitutional courts last place for protecting democracy & rights?
  - Impact on the future of the EU?
    - More Europe (Habermas)
    - Anti Europe