

REFORMING EUROPE TRANSFORMATION OF EU COMPETENCE IN THE FIELD OF ECONOMICS WITH THE ANTI-CRISIS MEASURES

Laure Clément-Wilz

University Versailles Saint-Quentin

The “anti-crisis measures” are undoubtedly strengthening the involvement of the EU and / or its institutions, even though *a priori* the area of competence is still the same: fiscal discipline on the one hand, and the coordination of economic policy on the other. This set of instruments embraces national fiscal and economic policies, but also involves greater control exercised by EU institutions over the States, and in particular the euro zone countries. Two types of coordination are thus being merged, one based on flexible multilateral surveillance between States overseen by the Council, and the other based on a more rigid supervision on the part of the Commission. The monitoring of broad economic policy guidelines by the Commission and the Council is more precise than in the past, especially with the new mechanism of quasi-automatic sanctions for the euro zone countries; and the recommendations made with regard to the coordination of economic policy now have a mandatory character for the euro zone countries, under Article 136 of the TFEU concerning measures specific to the euro zone countries. The conditionality of financial assistance is adding a little more pressure on the States. There is a need both to strengthen democratization generally by reinforcing the role of the European Parliament and the national parliaments as well as to provide a clear legal basis for the new missions of the EU institutions.

1. The new “anti-crisis” measures and EU competence: an introduction

1.1. The “anti-crisis” measures in the field of economics

The “anti-crisis” measures correspond to a large body of law adopted to fight the economic and financial crisis and limit the

problem of sovereign debt. These sometimes fall outside the scope of the Union (the Treaty establishing the European Stability Mechanism, hereinafter the ESM Treaty,¹ and the Treaty on Stability, Coordination and Governance, hereinafter the SCG Treaty²) and sometimes within it, through secondary legislation (“Six Pack”³ and “Two Pack”⁴) or new soft law instruments such as the Europe 2020 strategy.⁵ These new measures are changing the exercise of the competence of the Union, its institutions and the States in the field of economic policy.

1.2. EU competence in the field of economic policy

The category of competence that covers economic policy does not appear to be so obvious, despite the typology of competences drawn up since the Lisbon Treaty. Article 2, paragraph 3 of the Treaty on the Functioning of the European Union (hereinafter the FEU Treaty or simply TFEU) provides that, “The Member States shall coordinate their economic and employment policies within arrangements..., which the Union shall have competence to

1. Treaty establishing the European Stability Mechanism, 2 February 2012, signed by the 17 Member States of the euro zone, entered into force on 27 September 2012.

2. Treaty on Stability, Coordination and Governance, 2 March 2012, signed by 25 Member States (the 27 Member States minus the United Kingdom and Czech Republic), entered into force on 1 January 2013. Also called the “Fiscal Pact”.

3. EU Parl. and Cons., Reg. 1175/2011, 16 Nov. 2011, amending Regulation (EC) 1466/97 of the Council on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJEU L 306, 23 Nov. 2011, p.12 and EU Cons., Reg. 1177/2011, 8 November 2011, modifying (EC) regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJEU L 306, 23 Nov. 2011, p.33; two regulations on macroeconomic surveillance (EU Parl. and Cons., Reg. 1176/2011, 16 Nov. 2011, on the prevention and correction of macroeconomic imbalances, OJEU L 306, 23 Nov. 2011, p. 25 and EU Parl. and Cons., Reg. 1174/2011, 16 Nov. 2011, establishing enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJEU L 306, 23 Nov. 2011, p. 8). Also, EU Parl. and Cons., Reg. 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJEU L 306, 23 Nov. 2011, p. 1 and EU Cons., Dir. 2011/85, 8 Nov. 2011, on requirements for budget frameworks of the Member States, OJEU L 306, 23 Nov. 2011, p. 41).

4. EU Parl. and Cons., Reg. 472/2013, 21 May 2013, on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJEU L 140, 27 May 2013, p.1; EU Parl.-Cons., Reg. 473/2013, 21 May 2013, establishing common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area, OJEU L 140, 27 May 2013, p. 11

5. Strategy approved by the European Council on 26 March 2010, upon a proposal by the Commission. This was a new strategy for growth and employment based on strengthened coordination of economic policy. See EU Cons., Recommendation 2010/410/EU, 13 July 2010, on broad economic policy guidelines of the Member States and of the Union, OJEU L 191, 23 July 2010.

provide.” Furthermore, economic policy is neither one of the shared competences (Article 4) nor among the so-called complementary competences (Article 6). It is found in a separate article, Article 5, TFEU, on economic policies, policies on employment and social policies, in which paragraph 1 states that, “The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.”

The third part of the Treaty is devoted to economic policy and to economic policy coordination by the Member States, with the support of the Council, which develops broad guidelines of the economic policies (BGEPS) (Article 121, TFEU), which may be specific to the Eurogroup (Article 136, TFEU). There are also clauses on solidarity between Member States or the Union in the case of hardship or exceptional events (Article 122, TFEU) as well as provisions on budgetary discipline, which are based on the prohibition on public financing (Articles 123-125 TFEU) and the control of excessive government deficits (Article 126, TFEU). The Stability and Growth Pact is ultimately a device for preventive multilateral surveillance⁶ combined with a sanctions procedure,⁷ so that the deficit does not exceed 3% of GDP and the debt 60% of GDP.

These arrangements do not much reflect the provisions of Articles 3 and 5 of the TFEU: the Union does not act solely in the framework of the BGEPS. Depending on the degree of involvement of the EU, this is a matter of national powers exercised as part of the Union, i.e. national competences framed by the Union, or of genuine complementary competences within the meaning of Article 6, TFEU. This is what was confirmed by the Court of Justice in the Pringle judgement.⁸

The way this coordination competence is exercised can cause its very nature to vary. The stronger the constraint of the Union, the

6. Governed by EU Cons., Reg. 1466/97, 7 July 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJEU L 209, 2 August 1997 (amended by EU Cons., Reg. 1055/2005, 27 June 2005, OJEU L 174, 7 July 2005, p.1 then by Reg. 1175/2011, cited above).

7. Governed by EU Cons., Reg. 1467/97, aimed at speeding up and clarifying the implementation of the excessive deficit procedure, OJEU, L 209, 2 August 1997, amended by EU Cons., Reg. (EC) 1056/2005, 25 June 2005, OJEU L 174, 7 July 2005 then by Reg. 1177/2011, cited above. The entirety may be specific to the Eurogroup in virtue of Article 136 TFEU.

8. CJEU, 27 Nov. 2012, C-370/12, *Pringle*.

less we can speak of simple national competences coordinated within the Union.

More specifically, the way competence is exercised has evolved with the anti-crisis measures, whether this is within the framework of monitoring the broad guidelines of the economic policies, the prevention and correction of economic imbalances, or the new system of sanctions on States and controls over them when they receive financial assistance. The institutions are playing a new role, and an appropriate legal framework is critical to provide a better legal basis for these actions.

2. Surveillance of the broad economic policy guidelines

The European Semester, part of the “Six Pack”,⁹ aims to ensure closer coordination of economic policy¹⁰ through “the formulation, and the surveillance of the implementation, of the broad guidelines of the economic policies of the Member States and of the Union” and “the formulation, and the examination of the implementation, of the employment guidelines that must be taken into account by Member States”,¹¹ proposed by the Commission and adopted by the European Council at the beginning of the year. Upon presentation of national stability or convergence programmes, but also reforms and measures to make use of the Europe 2020 Strategy (smart, sustainable and inclusive growth, in areas such as employment, research, innovation, energy and social inclusion), the Commission shall proceed with an evaluation in May-June. If necessary, the Commission issues country-specific recommendations. The Council then considers the recommendations and the European Council approves them. The Member States thus receive policy guidance prior to finalizing their draft budget for the following year.

9. The European Semester was born out of an informal decision of the Ecofin Council meeting of 6 September 2010, which was itself based on the conclusions of the European Council meeting of June 2010. It has been functioning since 2011, even before the legal rules governing its implementation had been adopted. It is now integrated into Regulation 1466/97, cited above (as amended by Regulation 1175/2011, cited above) in Article 2 bis, par. 2.

10. On the early presentation of these new instruments, see *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions – Reinforcing economic policy coordination*, COM/2010/0250 final.

11. Reg. 1466/97, as amended by Reg. 1175/2011, cited above, Article 2 a. The Six Pack “establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances” (CJEU, 27 Nov. 2012, *Pringle*, cited above, pt 58).

For instance, with the adoption on 13 November 2013 of the Annual Growth Survey, the Commission launched the fourth European Semester of economic policy coordination for the year 2014. It renewed the focus on five priorities: pursuing differentiated, growth-friendly fiscal consolidation; restoring normal lending to the economy; promoting growth and competitiveness for today and tomorrow; tackling unemployment and the social consequences of the crisis; and modernizing the public administration.

In May 2013, based on the economic and social performance of each Member State, the Commission published the Communication “Moving Europe Beyond the Crisis”,¹² along with the proposed recommendations for each Member State. In the general formulation of key points for action, the Commission discusses the five priorities to be followed by the States, listed above, and made specific recommendations for each of the priorities. With regard to pursuing differentiated, growth-friendly fiscal consolidation, for example, it places particular emphasis on the need to reduce spending. It stressed that, “the structure of tax systems, and particularly the shifting of the tax base from labour to other sources, is an essential aspect of on-going reforms”. The Commission came out in favour of increases in the taxation of real estate and of “environmental taxes, for example by taxing sources of pollution and greenhouse gas emissions”. It recommended “increasing the minimum statutory retirement age in line with the increase in life expectancy, as well as phasing out early retirement schemes, in combination with efforts to sustain lifelong learning and the employment rate of older workers.” With regard to promoting competitiveness, the Commission recommended indexing wages to productivity.

This communication was accompanied by specific recommendations for each State, which are sent for the Council’s approval. With regard to France, it stated for example that, “Many professional service providers still face restrictions as regards their legal form and shareholding structure (e.g. restrictions on capital ownership for veterinarians and lawyers),”¹³ or that the market for notaries and taxis is too closed. It recommended among other

12. COM (2013) 350 final.

13. COM(2013) 360 final.

things “to bring the pension system into balance in a sustainable manner no later than 2020, for example by adapting indexation rules, further increasing the statutory retirement age and full-pension contribution period and reviewing special schemes, while avoiding an increase in employers' social contributions,” as well as “to increase the cost-effectiveness of healthcare expenditure, including in the areas of pharmaceutical spending”, and finally to “ensure that developments in the minimum wage are supportive of competitiveness and job creation, taking into account the existence of wage support schemes and social contribution exemptions.”

This increased pressure on the States must be accompanied by a strengthening of democratic control.

Recommendations

- To strengthen democratic control of the whole procedure by greater immediate involvement of the European Parliament and national parliaments through new practices.
- To strive to give greater legitimacy to the action of the Council and the Commission in the context of their new missions, if need be by amending the treaties.

3. The new system of sanctions affecting the euro zone members

Since the adoption of the “Six Pack” in 2011, the focus has been on debt reduction.¹⁴ Regulation 1176/2011 has a prevention component that establishes a mechanism for the control of excessive macroeconomic imbalances, based on an alert mechanism to “facilitate the early detection and monitoring of imbalances.”¹⁵

14. Dir. 2011/85, cited above, Whereas 18. Reg. 1466/97 as amended (by Reg. 1175/2011), cited above, Article 5(1) al. 2 and Whereas 18; see also the SCG Treaty, Articles 4 and 6.

15. Reg. 1176/2011, cited above, Article 3. The point is “to supplement the multilateral surveillance procedure referred to in paragraphs 3 and 4 of Article 121 TFEU with specific rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances” (Ibid, Whereas 9). This regulation provides for an early alert mechanism. In addition, if the Commission considers that there are excessive imbalances in a Member State, it recommends that the State develops a corrective action plan and sets deadlines for the new measures. This recommendation is adopted by the Council. The Commission ensures throughout the year that the Member State actually proceeds to correct the noted imbalances (see Commission, Memo/13/318, 10 April 2013).

Regulation 1174/2011 provides a mechanism for progressive penalties: an interest-bearing deposit and then a fine.¹⁶

The preventive (multilateral surveillance with regards to the coordination of economic policy¹⁷) and corrective components (the procedure to avoid excessive deficits of the Member States¹⁸) of the Stability and Growth Pact are enhanced by an appropriate system of penalties provided for the euro zone members in Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area.¹⁹

As for the preventive arm, a new penalty was created, the interest-bearing deposit, which is applied when the Member State has not taken adequate steps to respond to the Council recommendations.²⁰ This is a quasi-automatic sanction, since the penalty recommended by the Commission is deemed adopted unless the Council opposes it by a qualified majority vote.²¹

These new penalties are extended in the corrective component of the Stability and Growth Pact, with the establishment of non-interest-bearing deposits, prior to the imposition of fines.²² Henceforth, the Council adopts the Commission's decision only by a reverse qualified majority, and no longer by a reverse majority.²³ This "Copernican revolution"²⁴ means that the penalties now have a semi-automatic character.

Alongside this are the new rules set out by the Two-Pack, which has been in force since 30 May 2013²⁵ and applies only to the

16. Reg. 1174/2011, cited above, Article 2.

17. Reg. 1466/97, cited above.

18. Reg. 1467/97, cited above.

19. Reg. 1173/2011, cited above..

20. Reg. 1173/2011, Article 4.

21. Reg. 1173/2011, cited above, Art. 4, paragraphs 1 and 2.

22. Reg. 1173/2011, cited above, Art. 5 and 6.

23. Reg. 1466/97 amended, cited above. Article 6, paragraph 2, al. 5; Reg. 1173/2011, cited above, Art. 6; Reg. 1174/2011, cited above, Article 3, paragraph 3; SCG Treaty, Article 3, paragraph 3.

24. N. de Sadeleer, "The new architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?", *Maastricht Journal of Comparative and EU Law*, 2012, pp. 354-383.

25. EU Parl.-Cons., Reg. 472/2013, 21 May 2013, on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJEU L 140, 27 May 2013, p. 1 and EU Parl.-Cons., Reg. 473/2013, 21 May 2013, establishing common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area, OJEU L 140, 27 May 2013, p. 11.

Member States of the euro zone.²⁶ All these States must henceforth submit a three-year budget plan in April of each year, and then in October a budget plan for the following year. In other words, the States' budget bills must be submitted to the Commission, which will examine them and issue an opinion on them by November 30th at the latest.²⁷

In the context of measures specific to the euro zone countries that are subject to an excessive deficit procedure, the Two-Pack “sets out provisions for enhanced monitoring of budgetary policies in the euro area and for ensuring that national budgets are consistent with the economic policy guidance issued in the context of the SGP and the European Semester for economic policy coordination...”.²⁸ It provides for the euro zone States to present an economic partnership programme.²⁹ This decision is taken by the Council, which rules on a qualified majority on a proposal by the Commission. These programmes are subject to a quarterly inspection and to strict conditions in case of financial assistance.

Recommendation

— To clarify the legal basis of these new penalties associated with the broad economic guidelines.

4. Controls on States receiving financial assistance

The controls are particularly tough on States receiving financial assistance:

As part of the Two-Pack, the macroeconomic adjustment programmes³⁰ drawn up by the Member States experiencing difficulties that could have “serious adverse effects” on the rest of the

26. Cf. F. Allemant and F. Martucci, “La nouvelle gouvernance de l’Union économique et monétaire”, CDE, 2012, p. 12 and 409.

27. Reg. 473/2013, cited above, Art. 7.

28. Reg. 473/2013, 21 May 2013, establishing common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area, OJEU L 140, 27 May 2013, p. 11, Art. 1.

29. Reg. 473/2013, 21 May 2013, establishing common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area, OJEU L 140, 27 May 2013, p. 11, Art. 9.

30. Reg. 472/2013, cited above, Art. 3 (“enhanced surveillance”).

euro zone are subject to quarterly financial inspections and must meet strict conditions if they receive financial assistance.³¹

Likewise, the ESM Treaty conditions the benefit of financing on signing the SCG Treaty.³² Furthermore, “the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.”³³ The ESM makes coordination at the European Union level more effective. It “shall thus constitute an impressive means for strengthening control by the Union and the euro zone Member States over a State’s economic policy.”³⁴

Recommendation

— To strengthen democratic control of this entire procedure by greater immediate involvement of the European Parliament and the national parliaments through new practices.

5. The new role of EU institutions in economic matters

The stronger control exercised over the States is necessarily being accompanied by a greater role for EU institutions, in particular the Commission and the Council.

Under the ESM Treaty, once the ESM has been activated by a decision of the Board of Governors, the Commission is given a mandate by the Board to negotiate, in liaison with the IMF and the European Central Bank, a macroeconomic adjustment programme with the State concerned, which is concretized in a memorandum

31. Reg. 472/2013, cited above, Art. 7. The regulation insists on “full consistency between the Union multilateral surveillance framework established by the Treaty on the Functioning of the European Union and the possible policy conditions attached to financial assistance” (Ibid., Whereas 3).

32. “[T]he granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article.” (ESM Treaty, Whereas 5).

33. ESM Treaty, cited above, Art. 12.

34. F. Martucci, “La solidarité intéressée dans la zone euro : les mécanismes de stabilité”, *Etudes européennes*, 3 Aug. 2012, p. 1-20 (available at www.etudes-europeennes.eu), 17.

of understanding. The Commission is then responsible for ensuring that the State fulfils the conditions set out in the programme. In this respect, the Court of Justice held that, “the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, ... provided that those tasks do not alter the essential character of the powers conferred on those institutions.”³⁵ This thus involves new missions, but not new allocated authority in the sense of the competences given to the Commission, which can already take similar action under the Stability and Growth Pact.

As for the Court of Justice, it has also seen its powers strengthened through two international treaties. The SCG Treaty provides that a Contracting Party can apply to the Court of Justice if it believes that another Party has not respected their obligations under the Treaty, in particular the transposition of the “golden rule” into a constitutional or equivalent text.³⁶ In case of failure to comply with the Court’s decision, a Contracting Party may bring an action for this failure [*“manquement sur manquement”*], which results in the payment of a fine or a lump sum.³⁷ It is also competent to consider any claims regarding decisions of the Board of Governors, the executive body of the ESM.³⁸

Recommendation

— To work to give greater legitimacy to the action of the Council and the Commission in the framework of their new missions, through new practices, and, where necessary, by amending the treaties.

6. Conclusion

The “anti-crisis” measures are undeniably strengthening the role of the Union and/or its institutions, whereas *a priori* the area of competence remains the same: fiscal discipline (Six Pack, Two

35. CJEU, 27 Nov. 2012, *Pringle*, cited above, pt 158.

36. SCG Treaty, cited above, Art. 8, par. 1.

37. SCG Treaty, cited above, Art. 8, par. 2.

38. ESM Treaty, cited above, Art. 37, par. 3.

Pack, SCG Treaty, European Semester), on the one hand, and coordination of economic policy on the other (Europe 2020 Strategy, European Semester, Six Pack).

The recent adoption of these various instruments reflects a new approach to economic issues: embracing both budget policy and national economic policy, it also involves greater control over the States, in particular the euro zone countries, by EU institutions. A comprehensive approach is now being taken that simultaneously covers excessive deficits, debt issues, macroeconomic imbalances and the lack of competitiveness.³⁹

Europe's more comprehensive approach to economic and fiscal policy is leading to a merger of two types of coordination: one based on a system of flexible multilateral surveillance between States, headed by the Council, and another based on stricter surveillance on the part of the Commission.

The surveillance of broad economic policy guidelines by the Commission and the Council is more precise than in the past.

With the new quasi-automatic mechanism of sanctions for the euro zone countries, the recommendations taken under Article 121, paragraph 4, TFEU (coordination of economic policy) are acquiring a mandatory character for the euro zone countries through the application of Article 136, TFEU (measures specific to the euro zone countries).

The conditionality of financial assistance is changing the nature of coordination between the EU Member States, i.e. the coordination ensured by the European Union in the field of economics.

EU institutions, including the Commission and the Court of Justice, are gaining power in a domain that previously tended to be left to the good political auspices of each State.

39. J.V. Louis, "La nouvelle 'gouvernance' économique de l'espace euro", in *Mélanges en l'honneur du Professeur Joël Molinier*, LGDJ, 2012, pp. 405-427, 411.

Principal recommendations

- To strengthen democratic control over the entire process by greater involvement of the European Parliament and the national parliaments.
- To clarify the legal basis for the new penalties associated with the broad economic guidelines.
- To work to give greater legitimacy to the action of the Council and the Commission in the framework of their new missions, through new practices, and where necessary by amending the treaties.