EMU and Central Bank: Chances Missed

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Articles EC 4 and 98 ff.; Draco I-29, II-69 ff., III-289a and b[1]

The modest place of the economic and monetary union in the Constitution

Both the EU- and the EC-Treaties refer in prominent places to the establishment of economic and monetary union (Articles 2 EU and EC). This union is mentioned as one of the principal means of achieving the Union's and the Community's economic and social objectives. Such a prominent place is not allotted it in the Constitution. In its effort to separate the basic provisions from the other provisions in the treaties, the Convention decided to retain only the European Union's objectives in the actual constitutional part. The concrete activities pertaining to the economic and monetary union, as well as its 'guiding principles' of stable prices, sound public finances and monetary conditions and a sustainable balance of payments were relegated to Part III that deals with the Union's policies.

As a result, the notion 'economic and monetary union', unlike the notion 'internal market', is nowhere to be found in Part I of the Constitution. The existence of an economic and monetary union (e.m.u.) is only revealed in Part III of the Constitution that deals with the policies and the functioning of the Union. In this Part, the second chapter of Title III is entitled 'Economic and Monetary Policy'. In the opening article of this chapter (Article III-67), one looks in vain for a reference to the e.m.u. as a means of achieving the purposes set forth in Article I-3(3). It is only in the following articles that one finds references to the concept as such.

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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The Constitution (leaving apart the exceptional positions of the United Kingdom and Denmark) differentiates between, on the one hand, Member States which 'are members of the euro area', 'are part of the euro area', 'have adopted the euro', or are 'without a derogation', and, on the other hand, Member States 'with a derogation' or 'which have not adopted the euro'. The latter are supposed to have obligations regarding to the achievement of the e.m.u., as appears from Article III-92(1) (cf., Article 121.1 EC). The Constitution avoids however regarding the achievement of the e.m.u. as the normal situation to which the provisions of the Chapter on economic and monetary policy should be addressed and the non-achievement thereof as an exceptional situation for which a specific regime should be needed. Often, provisions indicate themselves whether they concern only membership of the euro area or the reverse. There is also a section on transitional provisions applying to Member States with a derogation (Article III-91 to 96), which resembles a specific regime. Article III-91(2) lists provisions of the Constitution that do not apply to those Member States and measures with regard to which their voting rights are suspended. On the other hand, according to Article I-14(2), there are also specific provisions that apply to Member States that have adopted the euro (see Articles III-88 to 90 and the *Protocol on the Eurogroup*). This might give the impression that adopting the single currency is a special case of 'enhanced co-operation'.

One wonders whether the negligent and ambiguous manner in which the Constitution deals with the establishment of the e.m.u. is purely accidental. Or does it reflect the wish to play down its importance in view of the fact that it is looked upon with disfavour by a majority of political opinion in three 'old' Member States (Denmark, the United Kingdom, and Sweden) that have not entered the third stage for achieving it?

The asymmetry between economic and monetary policy

The asymmetry of the ways economic and monetary policy objectives are pursued under the EC Treaty has been retained in the Constitution. According to Article III-69 (cf., Article 4 EC), the e.m.u. is based on two pillars that are not equal in bearing power:

1. the adoption of an economic policy which is based on the close co-ordination of Member States' economic policies, and
2. the introduction of a single currency and the definition and the conduct of a single monetary policy and exchange rate policy.

As is evident from this provision and from Articles III-69 to 83 on economic and monetary policies (cf., Articles 98-104 EC), competence for *monetary* policy will exclusively lie with the Union, whereas competence for *economic*

policy rests with the Member States. While retaining responsibility for conducting their general economic policies, they are required to regard these policies as a matter of common concern and to co-ordinate them within the Council.

Wholly in line with these provisions, the Constitution qualifies monetary policy, as far as the Member States that have adopted the Euro are concerned, as an exclusive competence of the Union (Article I-12(1)). The current allocation of powers in the field of economic policy is also retained in the Constitution. If anything, it is even reinforced, as appears from the amendments to Articles I-11(3) and I-14(1) of the Convention's draft that the Heads of State or Governments adopted at their meeting on 18 June 2004. In the amended text, care is taken to avoid anything that could be explained as conferring on the Union itself a competence to co-ordinate the economic and employment policies of the Member States. Obviously Member States were prepared to go to great lengths to protect themselves against encroachment of their powers in these fields.

Economic policy

Just as under the EC-Treaty, under the Constitution economic policy co-ordination takes place by the adoption *of broad guidelines* of the economic policies of the Member States and of the Union (Article III-71(2)), and in the context of a *multilateral surveillance* (Article III-71(3) and (4)) and an *excessive deficit procedure* (Article III-76). Typical for all three forms of co-ordination is the abandonment of the Community model of decision-making and supervising. In the decision-making process, the Commission retains the right of initiative, as has been confirmed by the Court of Justice (Stability Pact decision). Nevertheless its role is considerably reduced, because as a rule the Council of Ministers acts not on the basis of a proposal but on the basis of a recommendation or of reports from the Commission. The European Parliament is only informed *ex post* of the actions undertaken by the Council of Ministers. As to the method of supervising the Member States, the Council supplants to a great extent the Commission in its traditional role as the 'Guardian of the Treaty'.

Both the broad economic policy guidelines and the multilateral surveillance procedure are applications of the so-called 'open' method of co-ordination. Characteristic for this kind of co-ordination is that acts by the institutions lack legally binding force. The desired degree of co-ordination can only be brought about by peer review and benchmarking and through policy learning and consensus building.

In contrast to these two soft procedures, the *excessive deficit procedure* employs a more peremptory mode of co-ordination. It is a rule-based or 'closed'

system of co-ordination. A Member State's lax budgetary policy is not only detrimental to the economies of other Member States through its impact on interest rates, but it also undermines confidence in the Union's economic stability. Member States are therefore obliged, according to Article III-76(1), to avoid excessive government deficits (cf., Article 104.1 EC). In their budgetary policies Member States are bound, with a few exceptions, to respect two specific reference values as defined in the *Protocol on the excessive deficit procedure* (i.e., a budgetary deficit not exceeding 3%, and a government debt not exceeding 60% of the GDP).

A procedure is set out by Article III-76 to identify and counter such excessive deficits. The responsibilities for making the Member States observe budgetary discipline lies essentially with the Council. As proceedings against a Member State for failure to fulfil their obligation to avoid excessive government deficits are explicitly excluded, the application of the excessive deficit procedure is apparently considered to be pre-eminently a matter of economic appreciation that should be left in last instance to the Council of Ministers and not to the Court of Justice. A procedure in stages is followed, which may result in the imposition of sanctions. Sanctions may notably take the form of a non-interest-bearing deposit with the Commission of a considerable amount that might be converted into a fine.

There is an obvious lack of balance between the soft way the Union deals with the co-ordination of Member States' economic policies and the hard way it may handle a Member State with a budgetary deficit. On the one hand, at least in theory, budgetary discipline can only be imposed by coercive means when an excessive deficit exists. At that stage, a speedy reduction of the deficit demands a painful cutback in expenditure that may encounter fierce resistance within the Member State in question. On the other hand, the Council of Ministers may only by means of recommendations counteract national economic policies that may cause such deficits. Discipline is to be imposed in periods of deficit, but no special action is provided in times of surplus. It is like having no hard and fast rules on fire prevention but only on stamping it out when the fire is already raging.

The Stability and Growth Pact

The *Stability and Growth Pact* consists of a Resolution adopted by the European Council in June 1997 and two regulations, one on the strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies (No. 1466/97), the other on speeding up and clarifying the excessive deficit procedure (No. 1467/97). The Pact's core commitment is

to set the medium term objective of budgetary positions close to balance or in surplus so as to allow Member States to deal with normal cyclical fluctuations while keeping the government deficit within the 3% of GDP reference value. In the Pact the rules on the excessive deficit procedure are defined more precisely and strengthened. It also contains a so-called 'early warning' mechanism which is now in Article III-71(4).

Failing 'constitutionalization', the Pact cannot alter in any fundamental way the Constitution's reliance on the open method of co-ordination with regard to the economic and in particular budgetary policies of the Member States. The *Declaration on the Stability and Growth Pact*, which is to be incorporated in the Final Act, affirms that the Pact is an important tool for achieving the goals of raising growth potential and securing sound budgetary positions and reaffirms the commitment to its provisions. But these and other high-minded statements on public finances and budgetary positions in the Declaration cannot change the fact that their implementation remains under the Constitution as dependent on peer review and self-commitment by the Member States as it is at present under the EC-Treaty.

Monetary policy and the European System of Central Banks

The European Central Bank (ECB) has been allotted a place in Part I of the Constitution among the Union's 'Other Institutions and bodies' of the Union (Article I-29(1)). This means that the ECB, albeit not one of the institutions belonging to the single institutional framework (Article I-18), is integrated as an independent institution in Union law. The decision of the Court of Justice in the OLAF-case had already indicated that it would go too far to characterise the ECB, as some writers had done, as an independent specialised organisation or even a kind of new Community within the Community.

The ECB, together with the national central banks of the Member States that have adopted the euro, constitutes the ESCB. The Constitution does not alter the rules that govern their composition and functioning. The ECB is at the centre of the System. Together with the national banks, it conducts the Union's monetary policy.

The ECB has legal personality. It has been given quite extensive law-making powers and the right to be consulted by Community and, subject to certain conditions, by national authorities in its fields of competence. It has the exclusive right to authorise the issue of euro bank notes in the Union but it shares the right to issue such notes with the national central banks. The ESCB's primary objective is the maintenance of price stability. Support of the general economic policies in the Union is clearly a subordinated objective, as it should not

prejudice the pursuit of the primary objective. As a result price stability is set apart as an objective of the Union's internal and external monetary policy overriding other economic objectives, like a sustained economic growth and a high rate of employment. Except for a revision of the Constitution, the balance between divergent economic objectives in the Union is governed by price stability (Articles 105 EC, I-29(2), III-77).

As well as the EC Treaty, the Constitution highlights the independence of the ECB and the ESCB in the exercise of its powers and for its finances (Articles 108 and 109 EC; I-29(4) and III-80). Being an integral part of the System, national central banks, as much as the ECB, must be independent when exercising the powers and carrying out the tasks and duties conferred upon them by the Constitution and the ESCB/ECB Statute. Accordingly, Member States are obliged to ensure the compatibility of their national legislation, including the statutes of the central bank, to this requirement (Article III-81). Consequently, the ECB and the national banks participating in the System not only enjoy an exceptional degree of independence but, moreover, see their independence legally entrenched and immune to any interference except for a revision of the Union's Constitution.

The institutional and personal independence laid down in the Constitution shields the European System of Central Banks from being unduly influenced by the Union's political institutions, the national governments or interest groups (cf., the Court's OLAF decision, paragraph 134). These are supposed to be often too eager to reap the short-term benefits of an expansive monetary policy (cf., the reasoning of the German Constitutional Court in its Maastricht decision). However, the recognition that the ECB has such independence does not have the consequence of exempting it from every rule of Union law or shielding it from any kind of legislative action taken by the Union's legislature (cf., the Court's OLAF decision, paragraph 135).

As the ECB has the duty not only to maintain price stability, but also to support the general economic policies in the Union, two sorts of contacts are established with the institutions of the Union that have responsibilities with regard to these policies. In the first place, cross-participation between the ECB and the Council is provided for as well as the attendance of a member of the Commission in the Governing Council. In the second place, reporting obligations are imposed on the ECB to the European Parliament, the Council of Ministers, the European Council and the Commission.

As the President of the ECB presents the annual report to the European Parliament, participates in the general debate on the report and regularly appears in the competent parliamentary commission, a dialogue has developed in which, to a certain degree, the ECB's public accountability can find expression. This

will certainly not be enough to silence criticisms on the lack of democratic accountability of the ECB under the Constitution. Having regard to the ECB's powers, the sole opportunity to criticize its policies in parliament, accompanied by measures to improve the transparency of its actions, is insufficient from a democratic point of view. Concrete legal instruments to hold the ECB accountable are lacking. Its monetary policy decisions cannot be overridden, even when they concern setting the targets of monetary policy. Nor can its governors be dismissed on account of bad performance.

Conclusions

The asymmetry of the ways economic and monetary policy objectives are to be pursued under the Constitution presents one of the main problems facing the future working of the e.m.u. As there is an intimate connection between monetary union and broader issues of general economic policies, the asymmetry renders it difficult to achieve a coherent policy mix and may result in a too great dominance of the pursuit of monetary objectives over the economic ones.

The desire to keep all elements of the Maastricht agreement on substance and form of the e.m.u. intact, as long as it was under construction, is understandable. But the drafting of a Constitution ten years later offered a good opportunity to distinguish between the more fundamental elements that merit constitutional entrenchment on the one hand and the more time-bound elements of the e.m.u., which should only be protected from hasty or casual amendment on the other. Regrettably, the Convention and the IGC refrained from making such a distinction. As a result, certain provisions, which will certainly not bear the test of time, like those imposing price stability as the overriding objective of ECB policy and establishing ECB' independence to an unparalleled degree, can only be modified by revising the Constitution. As this will need the unanimous agreement of the Member States, there is little chance of that happening in a Union of 25 or more countries. Fortunately, the *Stability and Growth Pact*'s core commitment on medium term budgetary policy has not been incorporated into the Constitution and the definition of reference values in the *Protocol on the excessive deficit procedure* may still be altered by a European law (Article III-76(13)).

Questions for future scholarship and practice

1. Will the lack of balance between the 'soft' Union competences on co-ordination of the economic policies of the Member States and the 'hard' Union competences on the handling of Member States with a budgetary deficit, fi-

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nally cause the Members States to transfer more economic co-ordination competences to the Union?
2. Can the dialogue that has been established between the ECB and Union institutions lead to a relaxation of price stability as the overriding objective of the ESCB and thus redeem the rigidity caused by the entrenchment of this objective?
3. How can the ECB's democratic accountability be reinforced without violating its independence as conceived in the Constitution?

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