THE FINANCE CRISIS IN EUROPE AND POSSIBLE REMEDIES: PROBLEMS OF EU LAW AND CONSTITUTIONAL LAW

Rainer Arnold, University of Regensburg

Economic and financial crises are embedded into the global, regional and national political and legal context. The expansion of economics and the transnational nature of politics are the reasons for the internationalization of crises. Multinational cooperation systems work under specific transnational conditions and, if they fail, their failure has transnational effects. Globalization corresponds to the requirements of contemporary task performance but globalizes also the crises. The instruments to face such international or regional–transnational crises have necessarily to be adapted their very nature; national remedies do not seem to be sufficient, they must be complementary to multinational instruments.

Keywords: Economic crises, financial crises, transnational nature of politics, internationalization of crises

1. The legal complexity of the finance crisis problem

Economic and financial crises are embedded into the global, regional and national political and legal context. The expansion of economics and the transnational nature of politics are the reasons for the internationalization of crises. Multinational cooperation systems work under specific transnational conditions and, if they fail, their failure has transnational effects. Globalization corresponds to the requirements of contemporary task performance but globalizes also the crises. The instruments to face such international or regional–transnational crises have necessarily to be adapted their very nature; national remedies do not seem to be sufficient, they must be complementary to multinational instruments.

If a look at the Euro zone crisis we have to take into account that there is a national and supranational, EU related dimension of the crisis as well as of the mechanisms to be used for remedying the problems. As a third component, international law plays an important role, insofar as subsidies from the International Monetary Fund (IMF) are concerned. The legal problems focus on EU law as well as on national constitutional law. Therefore, the following reflections shall mainly consider these both dimensions.

As to the member states of the European Union, their constitutional instruments for remedying the financial crisis are not only those of national constitutional law but are closely connected to the provisions of the European Union law, especially to the regulations laid down by the Treaty on the Functioning of the European Union (TrFEU).

As a first summary we can state that the legal concepts with reference to the financial crisis of today in European Union member states must be seen from a three level perspective: from international, supranational and national law. These three levels are connected one to the other so that the solutions cannot be isolated, but have to be adjusted to all three levels.

Before analyzing the supranational and national concepts and specific provisions of the legal orders in question it should be stated that the financial crisis is mainly a state debt crisis. States have to make politics for fulfilling their tasks. For this purpose they need money and have to get it by taxes or by credits. The latter way is particularly dangerous because it entails payment of interests and therefore increases the amount of the public

debt considerably. The high level of indebtedness is the nucleus of the crisis. If politics shall go on, more money is needed for the government of the State. It is much more difficult for indebted countries to get money from the capital market under good conditions than for countries with a high level of indebtedness. Risk premiums make the credits more expensive. Therefore, the credit crisis will increase if the financial credibility of the country is not assured.

2. The EU legal order and the financial crisis

a) The relevant normative concepts

The EU law provisions which are of major importance in this context, are only a few: the articles 122 -125, 136 with its new paragraph III and 143, 144 TrFEU. Besides that the principle of solidarity between all the members of the EU must be taken into consideration. The first mentioned provisions are placed in the chapter on economy policy. While article 120 establishes the principle of the open market economy with free competition and article 121 states that the member states have to consider their economic policies as a matter of common concern which shall be coordinated by them within the Council. Article 122 gives the Council the competence to decide upon measures "appropriate to the economic situation". This general provision targets in particular (but not exclusively) serious difficulties in the supply of certain products. It shall be mentioned that in this provision the principle of solidarity between the member states is specifically mentioned, the principle which is of great importance in the debate on the compatibility of the various financial aid measures with EU law.

A further provision of highest significance is article 125, the famous no bailout clause. The European Union shall not be liable for or assume the commitments of a member state; the same is valid in the relation between member states. The primary finality of this provision is to increase the budgetary discipline within the monetary union[1]. The basis of the concept is the trust into the capital market mechanism which gives the necessary incentives to a member state with a too high debt level or budgetary deficit to remedy, by modification of the budgetary policy and by structural reforms of the own system and practice, existing difficulties in obtaining capital under good economic conditions[2].

Article 136 has particular importance because its new paragraph 3 has been introduced recently in order to expressly permit a permanent financial support system[3]. This new provision enables the European Union to install a stability mechanism in order to "safeguard the stability of the euro area as a whole".

b) The principle of solidarity as the leading concept

The European Union is based on a trustful cooperation of all the members of the union. This idea is inherent in an association of various states which have to fulfill tasks of common interest. The treaty has established, since the beginnings, the principle of loyalty (now in article 4, paragraph 3 EU Treaty) which obliges all the members of the union, member states as well as European Union as such, to respect and to support each other for the fulfilling of their tasks. This comprises active support and the omission of all measures and attitudes which could be detrimental to this common goal. Solidarity is closely related

---

[1] Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, C.H. Beck, Online-Kommentar, EL 44, May 2011, Art. 125/1

[2] Ibidem.

[3] Bruno de Witte, The European Treaty Amendment for the Creation of a Financial Stability Mechanism, http://www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf

to loyalty but not identical with it. This principle is mentioned in specific EU law clauses and also directly expressed as a general aim by article 3, paragraph 3 EU Treaty. As this provision says, solidarity between the member states shall be promoted by the European Union. The conceptual basis of this aim is the general principle of solidarity which already exists even if it is not expressed in such clear words as the principle of loyalty. It seems to be complementary to loyalty. While loyalty refers to the implementation of the active policies of the EU, solidarity covers emergency situations. The good functioning of the union, requires the existence of normal situations of all the union's members. If there is a threat to this good functioning, in an institutional or in substantive policy-related sense, the support of the other union members is indispensable. Solidarity is a necessary ideological basis for restoring the normal situation for one or more member states as well as for safeguarding the union as a whole. Supporting a member state means supporting the union as such. There cannot be any doubt about the implicit normative existence of the principle of solidarity in the whole set of EU law, which deploys its effects in particular in the field of finance related matters.

Solidarity is a basic general principle of EU law and functions also as an interpretation rule.[4] Restrictive provisions such as the no bailout clause have to be interpreted in the light of solidarity. No specific provision of EU law can be regarded as an exception from solidarity but must be conceived as far as possible as compatible with it.

c) The no bailout clause

This provision of the TrFEU only forbids a compulsory system of bail out but not voluntary financial supports from the member states. The notion of bail out must be understood in a juridical – technical sense of taking over formally the liability for legal obligations of the member state. However this is clearly different from financial support as it has been practised through various national and EU support measures in the crisis situations. Article 125 cannot be seen as all over prohibition of financial support for a member state in financial crisis. The principle of solidarity obliges to help for avoiding an economic and financial collapse of one or more member states what would threaten the whole construction of the European Union. Specific support measures as foreseen by EU primary law , for example by article 143 for countries with difficulties as to their balances of payment, do not exclude a narrow interpretation of article 125 which leaves space for a voluntary and solidarity based financial supports. It shall also be mentioned that the new paragraph 3 of article 136 speaks of "the granting of any required financial assistance" in the framework of a European stability mechanism. The finality is, as already pointed out, to safeguard the stability of the Eurozone as a whole if this appears indispensable. Financial assistance is "subject to a strict conditionality", which means restricted to cases of a manifest threat to the Eurozone stability. This corresponds to a stability oriented interpretation of article 125 paragraph 1, and could also be seen as a *lex specialis* to this provision if the prohibition of bail out would be extended in principle also to voluntary financial support of a member state.

[4] See also Michael Potacs, Die Eruopäische Wirtschafts- und Währungsunion und das Solidaritätsprinzip, Europarecht 2013, 133 -146.

d) The Pringle decision of the Court of Justice of the European Union (27th of November 2012)

This judgment[5] confirms the validity of the decision of the European Council of 25 March 2011 amending article 136 of the TrFEU with regard to stability mechanism for member states whose currency is the euro.[6] The Court clearly supports the narrow interpretation of article 125 based on solidarity as it has been explained above. The Court's argumentation is clear and convincing and ends up in the result:

" However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy."[7]

Furthermore, the Court confirms the competence of the member states to conclude an international treaty establishing the European Stability Mechanism (ESM). It is important to know that a group of member states can use the form of international agreements to regulate matters which have been left open by the primary EU law. Seen under the bail out prohibition financial assistance measures with the finality of the ESM are allowed from side of the member states, of a group of member states or of the European Union as such. It has also been clarified that financial support in this context is not currency policy (with a finality to assure the stability of the euro) but economy policy (with a finality to back the Eurozone as such).

An issue of specific concern, especially for the German Federal Constitutional Court (FCC), is the question whether the European Central Bank (ECB) acts against article 123, which prohibits to the ECB the "direct purchase" of debt instruments. This corresponds to the basic prohibition for the ECB and the national central banks to grant overdraft facilities for any other type of credit facility to public authorities and public bodies of the Union as well as of the member states[8]. While the activity of the ECB is subject to a constitutional review by the FCC, the Pringle decision dealt with the question whether the financial assistance system of the ESM is incompatible with the idea of this provision. The Court clearly points out that the mentioned prohibition is addressed to the ECB and the national central banks but not to the member states nor to the ESM. Therefore, the Court does not state any problem in this respect.

As a summary it can be said that the Pringle decision upholds the nucleus of the financial assistance as foreseen by this new mechanism based on an international treaty of most of the member states.

e) The practice of the ECB in the light of article 123

This issue which is strongly debated in Germany in preparation of the *in merito* decision of the FCC on the ESM, expected for September 2013 (hearing in June), concerns the current practice of the ECB to purchase, on the secondary capital market, state loans of the Eurozone members in financial difficulties. The opinions are divided: the promoters of this practice which has significantly appeased the critical financial situation of some of the member states referred to the explicit wordings of article 123 forbidding the "direct purchase" of debt instruments of the member states or public authorities. In their view, the purchase on the secondary capital market is not covered by the prohibition while others

---

[5] C 370/12. Text: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0370&lang1=de&type=NOT&ancre=

[6] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:091:0001:0002:EN:PDF

[7] § 137 of the decision. For further argumentation to this issue see §§ 129 – 147.

[8] § 123 of the decision

qualify this practice as a circumvention of the prohibition, such as the President of the German central bank. It seems that the Court of Justice of the EU should be involved by a preliminary question to be made, for the first time, by the German FCC.

f) Conclusion

Support for Eurozone members in difficulties has been given in an efficient way on the initiative of the European Union as well as of the member states. European Union primary law either foresees the legal basis for such support measures or is open for member states assistance activities. The ESM, the most recent assistance mechanism, has been established, in accordance with EU law, by an international treaty. A new legal basis has been introduced in form of article 136 § 3 TrFEU. Furthermore, the Fiscal Treaty is also conform to EU law. It has the finality to institutionalize a new level of budgetary discipline. This is also in connection with the assistance measures which require the readiness of the concerned member states for a stricter budgetary policy and structural reforms. The projects on introducing a system of banking supervision, which cannot be taken into consideration here, have also a positive effect for overcoming the financial crisis.

3. Financial crisis and Constitutional Law

a) The constitutional dimension of the issue

The complex, transnational nature of financial crises require to take into consideration also the constitutional dimension of the problem. The Constitution of each member state of the European Union can decide autonomously on the ways to face it. As the financial crisis is essentially a debt level crisis of the states, constitutional law is strongly involved. Some constitutions, such as the new article 115 of the German basic law, have introduced limits for the State to finance State tasks by credits. This is no longer a purely national matter. The Fiscal Treaty has transnationalized the requirement to anchor debt limits in the Constitutions of the signatory states.[9]

b) The example of Germany: budgetary autonomy and constitutional identity.

The jurisprudence of the FCC has dealt with the main issues of the EU measures facing the financial crisis. Two major questions have been considered: Is the financial assistance offered by Germany compatible with German constitutional identity, in particular with the budgetary autonomy? Is the Fiscal Treaty conform with the Constitution? The latter question did not raise serious problems because it contains the obligation to introduce credit limits what has already been made in Germany by constitutional reform.

It seems that the most important decision of the FCC was that of 7 September 2011, when the basic question of the compatibility of financial assistance measures (guarantees in high amounts) with constitutional identity, in particular with the autonomy of budgetary policy, was examined.[10] Financial assistance for other countries, in form of guarantees or in other forms, can have a serious impact on the own financial possibilities. Politics fulfilling public tasks need money to act. Without financial means no politics are possible. Financial autonomy is therefore an important aspect of the constitutional identity of the State. The basic decisions on financial matters concerning taxes and the budget of a State are in the hands of Parliament. Democracy and budgetary autonomy are closely interconnected. Budgetary autonomy can be limited by internal and external obligations. An example for internal limitations is the above-mentioned article 115 prohibiting in principle the financing of State tasks by credits. External limits are international treaties, in the context

[9] Text: http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf

[10] http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf

of financial support for other EU member states, which have been approved by Parliament. Limitations of this type are conform to the Constitution. However, if the budgetary autonomy of the national Parliament is completely eliminated or to a high degree limited, so that politics in substance are no longer possible, the Constitution is violated. How far this limitation by the guarantee promises will go and in particular which amounts will be reserved for the financial assistance of other countries is a matter of politics and not under review by the Constitutional Court. Only if the extreme limit of a full or essential elimination of budgetary autonomy is reached, the Constitutional Court could stop for violation of the principle of democracy as established by article 20 of the Basic Law. In the September case concerning the support for Greece and the so-called euro rescue "umbrella", the Court did not challenge the political choice for the guarantees even in consideration of the high amounts of money involved.

c) *ESM and Fiscal Treaty - interim measures with high impact on the political situation*

The arguments of the September 2011 decision have become basic also for the subsequent jurisprudence in this context. Of high importance was - one year later - the decision of the FCC of 12 September 2012 on the compatibility of the ESM Treaty and the Fiscal Treaty with the Basic Law[11]. This decision answered a demand for interim measures against the ratification of the two mentioned treaties. The FCC rejected the demands but delivered a profoundly reflected text on the question whether to ratify or not the treaties. This question was crucial because after the ratification Germany is obliged by international law to comply with the treaties. Again, budgetary autonomy as an element of German constitutional identity is in the center of the reflection. Will the ESM Treaty bind Germany for ever (as this mechanism shall be a permanent one) or has Germany the possibility to retire from the treaty? Will there be a threat for the substance of budgetary autonomy? The FCC finally stated the compatibility with the German Constitution, on the basis of a sophisticated argumentation.

It has to be added that the Court did not decide on all the questions in discussion. A particular issue has remained unresolved: Is the ECB authorized to purchase debt instruments from the member states on the secondary capital market or is this a circumvention of the prohibition foreseen by the TrFEU? The debate on this is going on currently. The representatives of the ECB and of the German central bank will be heard before the Constitutional Court in June. The issue is important because this practice of the ECB has considerably contributed to the amelioration of the financial situation of the Eurozone countries in difficulty. It seems that the FCC has to make a preliminary ruling question to the Court of Justice of the European Union for the interpretation of article 123 TrFEU, a step which the Court never did before.

The further decisions of the FCC concerned the information of the German Parliament about the negotiations on the Fiscal and ESM Treaties as well as the institutional question whether a small committee of the German Parliament could decide on matters of financial help. In both cases the Constitutional Court

[11] http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf

criticized the government and the legislator for not being in conformity with the Constitution[12].

d) Conclusion

As a conclusion it can be said that Federal Constitutional Court of Germany has upheld the various forms of financial assistance for Eurozone countries in difficulty. It pointed out, what seems to be the most important, that budgetary autonomy is an important element of constitutional identity of a State and is the basis of democracy. Limitations of the budgetary autonomy are possible but are not allowed to eliminate or seriously affect this autonomy. The Court upheld the various instruments of financial assistance destined to help other countries but indicated the limits. Some questions, such as the interpretation of article 123 TrFEU, have been left open. In this context, the FCC strengthened the power of the German Parliament, which has to give its consent to increase the amount of financial help. In total, the Court seems to accept the integration steps made by politics, accepts a margin of appreciation on the side of the legislator, and tries to conciliate integration policy with the Constitution.

12 http://www.bundesverfassungsgericht.de/entscheidungen/es20120619_2bve000411.html?Suchbegriff=finanzhilfen
http://www.bundesverfassungsgericht.de/entscheidungen/es20120228_2bve000811.html?Suchbegriff=finanzhilfen