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SYMPOSIUM ON NEXT GENERATION EU, CRISIS BUDGETING, AND THE EMPOWERMENT OF SUPRANATIONAL INSTITUTIONS

THE EU TREATIES AS A LIVING CONSTITUTION OF THE UNION IN TIMES OF CRISIS

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Since 2009, the European Union has undergone a succession of crises. It is even said to be in a sort of permacrisis: the financial crisis; the debt and euro crisis; the migration crisis; the rule of law crisis afflicting some of its member states; the process of withdrawal of the UK from the Union; the pandemic crisis; and the war in Ukraine.

The Union has addressed these crises without modifying its treaties. Between the 1980s and 2009, there was a proliferation of new treaties (a revision was undertaken on average every five and a half years). But since the Treaty of Lisbon, already fifteen years ago, no such amendment has taken place.

At first sight, the treaties seem ill-equipped for addressing those crises. They do not specifically provide for instruments to address situations where a euro area country becomes insolvent and threatens the very existence of the euro. The same goes for failing banks, whose bankruptcy threaten sovereigns and hence the common currency. The treaties also do not provide for a treasury or a fiscal stabilization mechanism capable of addressing major economic shocks such as the one provoked by the pandemic. Further, the instruments to address the rule of law crisis in some member states have proven dysfunctional, and the treaties probably do not contain "ready to wear" provisions to address the many different consequences of the war at the gates of Europe.

This context frames the idea of the EU treaties as a living constitution. In the absence of revisions, an evolutive reading of the treaties is necessary to avoid a stasis that could compromise the very future of the EU project. This has led to an overall teleological reading of the treaties. The response to the crisis has consisted in a continuous exercise of constitutional audacity.

This essay will offer a cartography of how the treaties have evolved through crisis.

A Broad Interpretation of EU Treaties: The Case of TFEU Article 114

The Union has made extensive use of some of its competences, most notably Treaty on the Functioning of the European Union (TFEU) Article 114, a core internal market provision. This provision empowers the EU legislator to adopt measures toward the approximation of the national laws of the member states, which concern the establishment and functioning of the internal market. Its function is analogous to the commerce clause in the U.S. Constitution, which grants Congress the power to regulate commerce among the states.

The use of TFEU Article 114 has extended beyond the approximation of the laws of member states to establish centralized decision-making mechanisms. TFEU Article 114 has become an effective federalization tool for the establishment of the internal market. For instance, recourse to it was made during the banking crisis, when the EU established a banking union that aims to supervise and resolve banks through entities like the Single Resolution

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Board. More recently, the EU has used TFEU Article 114 to regulate digital services providers under the Digital Services and Digital Markets Act (DMA and DSA), and the development and deployment of artificial intelligence (AI) through the Artificial Intelligence Act (the very first Regulation of AI in the world). All three regulations grant important market regulatory and supervisory powers to the Commission.

The Use of the EU Budget as an Instrument of Further Integration

Next Generation EU (NGEU) was the financial response to the dramatic economic consequences of the pandemic on the continent. It is endowed with €750 billion. For the first time, the Union went to the markets to borrow for spending—€338 of the €750 billion was granted as subsidies. Some (too) enthusiastically qualified the establishment of the instrument as the EU's Hamiltonian moment, namely the creation of an EU Treasury.

This unprecedented step had to be compatible with fundamental rules at the core of the economic constitution of the Union. These included, most notably, the principle of budgetary balance laid down in TFEU Article 310, under which the EU budget cannot run a deficit and must be in balance at the end of each year. Further, NGEU had to remain within the principle of integrity of the own resources system laid down in TFEU Article 311, whereby the EU budget is to be financed wholly from own resources. These own resources are in turn transferred by member states. Proceeds from borrowing on the financial markets are not considered own resources.

Union institutions applied a broad and evolutive interpretation of these provisions when they set up NGEU. NGEU is accompanied by a definitive, irrevocable, earmarked, and enforceable commitment of payment by member states, which ensures the budget neutrality of the operation and hence guarantees that a deficit will not arise. It is a temporary facility, available until the end of 2026. It is also an exceptional facility that will not be consolidated and continued indefinitely. Therefore, it does not constitute a new budgetary paradigm of the Union and cannot be seen as deconstructing the integrity of the own resources system.

Finally, in the midst of the rule of law crisis, the Union has established the so-called budgetary conditionality rule of law mechanism, enshrined in Regulation 2020/2092 ("the conditionality rule of law Regulation"). It relies on TFEU Article 322(1)(a), which allows for the adoption of financial rules during the procedure of establishing and implementing the budget. It aims to protect the EU budget in case of breaches of the principles of the rule of law in the member states. It is based on the idea that member states can ensure the sound financial management of EU money only if their public authorities act in accordance with the law.

The Use of the Emergency Clause of the Treaties, TFEU Article 122

During crises, the Union has frequently had recourse to TFEU Article 122. This provision, which corresponds to the TFEU title on economic and monetary policy, is certainly the most important crisis clause of the EU Treaties. It grants the Union a very wide power to adopt measures in case of major EU domestic emergencies.

This clause was a kind of "sleeping beauty" provision. It has existed since the inception of the European Community in the 1950s, but was hardly used before the succession of crises since 2010. Since then, the Union has relied on this legal basis on several occasions: in the debt crisis, during the pandemic (to establish the NGEU), and to address the energy crisis.

Crisis clauses exist in most constitutions. Typically, they allow for prompt action by the executive, which can rely on wide powers with limited parliamentary control under simplified, less burdensome procedures. Yet, although recourse to crisis clauses is legitimate, their use must rely on principles of proportionality and necessity. Otherwise, they risk becoming a vehicle that may erode a constitutional order for reasons of political convenience and opportunity. These limits also apply to the use of TFEU Article 122. The bar is very high. The gravity of the situation

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must be especially serious and of a systemic nature. Moreover, recourse to TFEU Article 122 must be temporary. Finally, the objective and the content of measures adopted under it must be economic in nature.

The Intergovernmental Method

In those instances of crisis where the treaties did not provide a suitable legal basis and/or where the budgetary availabilities of the Union were not sufficient, recourse has been had to the intergovernmental method, where the member states conclude agreements of international public law. Intergovernmentalism has allowed the EU to overcome the rigidity of the EU Treaties amendment process during particularly challenging economic and financial conditions when time was a scarce resource. It has also been a way to channel the desire for integration of a majority of member states despite persistent reticence of a few (this was markedly the case when the UK was still a member of the Union).[1]

The treaty establishing the European Stability Mechanism (the ESM), an international financial organization that can mobilize up to €500 billion in loan assistance under strict conditionality, is an example of the intergovernmental method. It was used to assist Greece. The Treaty on Stability, Convergence and Growth (also called the Fiscal Compact), a treaty of international public law concluded in 2012 by all member states, is another example. This treaty aims to reinforce the Stability and Growth Pact through the establishment of enhanced budgetary obligations. A final example of intergovernmental mechanisms supplementing the budget of the Union was the Facility on the Refugees in Turkey during the migration crisis, through which member states pooled €6 billion outside the EU budget.

But the fact that crisis instruments have been created outside the EU Treaties does not mean that they are completely unrelated to the law of the Union. Contrary to the fears of many, intergovernmentalism has not led to an actual deconstruction of the EU legal order. It has allowed the achievement of EU objectives though a legal architecture that anchors intergovernmental instruments in the law of the Union. Agreements between member states have incorporated clauses of consistency by virtue of which measures laid down on their basis must be compatible with and subsidiary to EU law. Moreover, those instruments make extensive use of EU institutions such as the Commission and the Court of Justice on which they confer powers of execution and jurisdictional control, respectively, and thus root the intergovernmental instruments in the EU legal order.

Crises and EU Institutional Shifts

Crises and the responses to them have changed the institutional landscape of the Union.

The European Council, which gathers the heads of state and government of the twenty-seven member states, has emerged as the main decision-making body in the EU. Integration during crises has followed from growing coordination in the European Council. It is logical that each of the existential decisions made at the occasion of the different crises, those which evolved the treaties, have been agreed upon by the institution that unites the national leaders.

This preponderant role of the European Council, which directly decides on initiatives and actions, enters into competition with the power of initiative of the Commission. An interesting question is how to reconcile the European Council's power to define the general political directions and priorities of the Union (as laid down in Treaty on European Union (TEU) Article 15(1)) and the Commission's power to "promote the general interest of the Union and take appropriate initiatives to that end" (TEU Article 17).

The European Council has also "funneled" the powers of the European Parliament and the Council as co-legislators, marking their tempos and, in some way, guiding their legislative choices. Again, here a very interesting issue

[1] Jean-Claude Piris, The Future of Europe: Towards a Two-Speed EU? (2011).

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arises, namely, how to reconcile the European Council's influence on legislative processes with the Treaty rule that this institution "shall not exercise legislative functions" (TEU Article 15(1)). It is not surprising that the European Parliament has been especially sensitive and vigilant to the possible intrusions of the European Council on legislative functions.

In any event, the role of the Commission as a vector of integration and treaty evolution has been remarkable and even reinforced during crises. This is especially true in relation to the latest two Commission mandates, under Presidents Juncker and von der Leyen. The Commission has had a protagonist role in putting forward crisis initiatives and in implementing them in a coordinated manner. Crises require joint responses—not national ones—and the Commission is best placed for actions that presuppose centralization. The evolution of the treaties during crises has entailed a federalization effect that has in turn grown the role of the Commission as the institution that best safeguards the common interest of the Union and its member states. It is the institution that coordinated the major responses to the pandemic crisis; it has pushed through and executed restrictive measures against Russia; it has coordinated the European Peace Facility for the supply of munitions to Ukraine; and it has managed Next Generation EU—both borrowing on the markets and spending in the member states. Even when acting in an intergovernmental manner, as stated earlier, member states have decided to entrust the Commission with tasks of coordination and management. In the landscape of EU institutions, the Commission has thus become the crisis manager par excellence. This has had consequences for the functioning of the Commission itself, which has shifted to a more presidential and centrally managed model from a (traditional) collegial one.

This leads to another interesting institutional change, which concerns the European Parliament. The successive treaty reforms have considerably increased the powers of this institution, which has now become co-legislator together with the Council in most EU policies. Yet, if this guarantees the participation of the Parliament as a legislative body, the same cannot be said in relation to many crisis decisions, where its involvement has been limited by comparison to its legislative role. It has no role in relation to the emergency measures adopted under TFEU Article 122, it has not been involved in the intergovernmental mechanisms referred to above, and it has had a limited participation in the measures to face the migratory crisis of 2015, such as the activation of quota mechanisms among member states. In other words, while the European Parliament is a powerful regulatory institution, it cannot yet be regarded as a crisis manager. This means that it has had a limited say in the evolution of the treaties as living documents. For some, this limited role of the European Parliament raises questions about the democratic legitimacy of the crisis decisions adopted by the Union. For others, to the extent that those decisions are of a rather constitutional nature, the involvement of member states through the European Council or through intergovernmental methods is the highest democratic guarantee, because they are ultimately scrutinized by national legislatures.

The final institutional point refers to non-political institutions of the Union, specifically the European Court of Justice (ECJ) and the European Central Bank (ECB). These institutions have a mandate rooted in their independence and insulation from political considerations. Yet, they have been instrumental in addressing crises.

To shore up the euro, the ECB took recourse to unconventional monetary instruments that went to the very limits of its monetary mandate under the treaties, such as outright monetary transactions (OMT) and quantitative easing.

The ECJ had to deal with almost each of the crisis responses through judgements such as *Pringle* (concerning the ESM),[2] *Gauweiler*,[3] and *Weiss*[4] (both concerning the legality of ECB unconventional monetary operations), and its

[2] Pringle v. Gov. of Ireland, C-370/12, ECLI:EU:C:2012:756, Judgment (Nov. 27, 2012).

[3] Gauweiler v. Deutscher Bundestag, C-62/14, ECLI:EU:C:2015:400, Judgment (June 16, 2015).

[4] Weiss v. Bundesregierung, C-493/17, ECLI:EU:C:2018:1000, Judgment (Dec. 11, 2018).

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rule of law case law, including the rule of law conditionality decisions (concerning the suspension of the EU budget for countries that fail to respect their budgetary obligations).[5] There will be case law on the conditions for having recourse to Article 122 (with cases *sub iudice* where Poland has contested TFEU Article 122 measures adopted during the energy crisis). ECJ interventions in times of crisis have given rise to seminal jurisprudence that has underscored and developed the constitutional audacity of the political EU institutions.

Some criticize that political EU institutions are too reliant on non-political institutions to solve the problems raised by crises. According to these views, the ECB's recourse to the OMT program under Draghi alleviated tensions in the euro area but forestalled a discussion of effective budgetary discipline or fiscal capacity. Similarly, political EU institutions might find it comfortable to rely on the ECJ to deal with the crisis of the rule of law in some member states instead of decisively applying the political mechanisms laid down in the treaties (TEU Article 7).

Yet, one cannot expect non-political institutions to carry the main responsibility for addressing preponderantly political crises. This may entail a big reputational cost for those institutions, take their mandates to the limit, and cause constitutional tensions between the Union and member states (including with their constitutional courts, as in the *Weiss* saga—where the mandates of the ECB and the ECJ were contested—shows).

Looking to the Future

It seems the fate of the Union to undergo crises. They will probably not end in the medium term. At the same time, the likelihood of treaty reform is quite small given the political situation. Any process of revision might face difficulties such as the ratification by all twenty-seven member states, the uncertain results of referenda in some member states, and the risk of a re-nationalization of policies and competences.

This means that recourse to constitutional audacity appears unavoidable in the coming years. There are probably two major challenges to the constitutional fabric of the Union that will test this audacity again. The first one is the adequacy of the treaties and their decision-making processes, where unanimity is still required for a number of paramount decisions, for an enlarged EU with more than thirty member states. The second is the further development of the common defense policy of the Union, which also entails a fundamental financing dimension.

[5] Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, C-64/16, ECLI:EU:C:2018:117, Judgment (Feb. 27, 2018); Hungary v. European Parliament & Council of the European Union, C-156/21, ECLI:EU:C:2022:97, Judgment (Feb. 16, 2022); Republic of Poland v. European Parliament & Council of the European Union, C-157/21, ECLI:EU:C:2022:98, Judgment (Feb. 16, 2022).

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