

## Legal and Institutional Design of EMU October 2015 EUI

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#### Legal design and legal constraints: the New E in EMU

You will find the Commission website a useful place to look:

[http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/legal\\_texts/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/legal_texts/index_en.htm)

#### A. Understanding the Sources

Reconstructing the sources is a formidable task in this area but essential for any further analysis and assessment. Below are some tips to help you navigate the sources. The sources broadly concern *fiscal discipline* and *economic policy co-ordination*.

Start with the three key Treaty bases: Articles 121, 126 and 136 TFEU. What does each empower the EU institutions and legislature to do? How would you characterise each of these Treaty provisions? Note that Article 136 TFEU was added to EU law in the Lisbon Treaty. Note also that Protocol 12 fleshes out Article 126 TFEU.

The only crisis amendment of EMU Treaty provisions was to legitimate the ESM by adding Article 136(3). We will not focus in this session on the loan instruments and mechanisms, such as the ESM, except to note how they interact with the ‘main’ EMU package.

#### Add relevant secondary EU law sources

The central secondary law sources on *fiscal discipline* form part of a legislative package called the Stability and Growth Pact. The SGP was introduced in 1997. It consists of two Regulations and a Resolution. Regulation 1466/97 develops Article 121 TFEU while Regulation 1467/97 develops Article 126 TFEU. The SGP was amended in 2005 following the case taken by the Commission against the Council and the European Parliament for placing in abeyance the excessive deficit procedure: C-27/04, [2004] ECR I-6649. The crisis amendments therefore create its third iteration.

The SGP crisis amendments were carried out through two key legislative packages. These are the ‘Six-Pack’: a set of 5 Regulations and one Directive introduced in 2011 to overhaul economic governance as a result of the crisis and the ‘Two-Pack’: two Regulations introduced in 2013.

Six-Pack (OJ 2011 L 301/1)

Directive 2011/85 on requirements for budgetary frameworks of the Member States  
Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro-area

Regulation 1175/2011 amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary policies and the surveillance and co-ordination of economic policies  
Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

Regulation 1176/2011 on the prevention and correction of macro-economic imbalances  
Regulation 1174/2011 on enforcement measures to correct excessive macro-economic imbalances

Two-Pack (OJ 2013 L 140/1)

Regulation 472/2013 of 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

Regulation 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area

A key feature of the crisis iterations is to use Article 136 TFEU alongside Article 121/126 TFEU to *expand* and *deepen* the applicable rules in a number of ways for euro-area states. However, it is important to look at, and analyse, the different legal bases for each of the components of the Six and Two-Pack.

The major expansion is to introduce a Macro-Economic Imbalance Procedure (MIP). It is modelled on the fiscal discipline regime with a preventive stage and an excessive imbalance stage (Regulation 1176/2011).

The deepening entails eg changing the enforcement and sanctions applied in preventive and corrective fiscal discipline (Regulation 1173/2011) and in the MIP (Regulation 1174/2011).

For the seminar you should try to get as good and clear a sense as you can of the main changes introduced by these sources. Think in particular about the questions raised under B. and C. below.

The central sources on *economic policy co-ordination* are the Broad Economic Policy Guidelines. The crisis amendments change again their governance, bringing them within the European Semester, and the contents of the Guidelines, but they remain based on Recommendations adopted under Article 121 TFEU.

See the European Semester chart on the reading to give you an idea of stages and sources in economic/fiscal policy governance.

Finally, consider what other relevant non-EU law sources add

The major source to consider is the Fiscal Compact Treaty/Treaty on Stability, Co-ordination and Governance. Signed on March 2, 2012, 25 contracting parties eventually decided to sign the Treaty (not the UK or the Czech Republic). After ratification by the twelfth Eurozone member state (Finland) in December 2012, the Fiscal Compact entered into force on 1 January 2013. (<http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>)

What are the key new elements this Treaty adds to the regimes of fiscal discipline and economic policy co-ordination?

A significant soft-law intergovernmental source created during the crisis is the 2011 Euro-Plus Pact. You will see that this may be an important prelude to hard law in the 5 President's Report.

## **B. Examining Potential Legal Constraints**

Develop and assess, taking examples from the new package, the persuasiveness of the following arguments challenging the legality of the new EMU package. Can you think of any further arguments?

- Going outside the Treaties is problematic arguments: the FCT
- The complexity of the new EMU package is such that it fails to comply with Rule of Law values
- The first argument from competence – the legal *pedigree* of the measures. Take the examples of sanctions and R-QMV to test this.
- The second argument from competence – the new *substance* of the measures does not match the legal basis and indeed the content is excluded by other legal bases in the Treaties. The Macro-Economic Imbalance procedure (MIP) is probably the most productive example.
- The general clauses of the Treaties do not permit some of the new instruments/new contents: eg the commitment to a social market economy, respect for national identity.
- Fundamental Rights are breached by the new EMU
- Variable enforcement breaches the principle of equality between Member States

To test especially the last four of these arguments, and to get a fuller sense of the operation of the system in practice, we take the examples of France and Spain in 2015. Read and assess the Council Recommendations to France and Spain for 2015 on your reading.

## **C. Assessing Normativity, Effectiveness and Developments**

Critically assess the following statement from Lenaerts in the article cited below:

The euro crisis called into question the original assumptions and arrangements underpinning EMU. Neither the preventive nor the corrective arm of the SGP appeared to be effective. The co-ordination of national economic policies had an insufficient impact on the euro area as the OMC was too weak to prevent macro-economic divergences between Member States. In addition, Member States in financial difficulties had to be rescued. Otherwise the stability of the euro area as a whole, and possibly the survival of the European Union as a political project, might have been jeopardised. The euro crisis has thus demonstrated that EMU requires some degree of financial solidarity. Given that neither the EU rules on fiscal discipline nor the EU guidelines on socio-economic co-ordination were sufficient to provide an effective response to the crisis, Member States decided that the time was right to modify the original structure of EMU.

And see Amttenbrink's remark that in the new E in EMU: 'the room for the conduct of a self-determined economic policy is considerably restricted, if and to the extent that the new framework is fully applied in practice'.

(‘New Economic Governance in the EU: Another Constitutional Battleground’ in K. Purnhagen/P. Roth (eds) *Varieties of European Economic Law and Regulation* (Springer, 2014).

How are the various elements of the new regime designed to operate and interact? What goals does the new EMU package aim to achieve? How likely in your view is it that those goals will be achieved? Are any problems you can identify primarily to do with (a) the goals to be achieved (b) the measures themselves or (c) with the enforcement of those measures? How might the measures be developed to better achieve goals?

Consider again the examples of France and Spain in 2015. What do they tell you about how the new Semester system is operating in practice? You should also read the 5 President's Report (June, 2015): *Completing Europe's Economic and Monetary Union*. While all of this is relevant to the overall seminar, and it's not long (just over 20 pages), focus especially for this session on the issues relating to economic co-ordination and fiscal discipline.

### **Further Reading**

The most important reading is the primary sources detailed above under A, B and C.

However, the following pieces valuably contribute either to understanding the content and design of some of these sources or to assessing some of the potential legal constraints.

K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP: 2014) 105-116 [overview of crisis changes]; 169-171 [questioning the uses of Article 136 TFEU for the 6 and 2-Packs], 171-80 [questioning the constitutionality of the FCT/TCSG]

A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP: 2015) 29-40

A. De Streel, 'EU Fiscal Governance and the Effectiveness of its Reform' in M. Adams, F. Fabbrini and P. Larouche (eds) *Constitutionalization of European Budgetary Constraints: Comparative and Interdisciplinary Perspectives* (Hart, 2014) 85-104, available also at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2448653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448653) (good descriptive overview of the euro-crisis changes to fiscal discipline synthesising changes in 6-Pack, 2-Pack and Fiscal Compact and consideration of possible reforms).

P. Leino and J. Salminen, 'Going "Belt and Braces" – Domestic Effects of Euro-Crisis Law' EUI Working paper 2015/15.

B. De Witte, *Using International Law in the Euro-Crisis: Causes and Consequences* <http://www.sv.uio.no/arena/english/research/publications/arenapublications/workingpapers/working-papers2013/wp4-13.pdf> (mainly focused on assessing the going outside the Treaties arguments in relation *inter alia* to the FCT/TSCG). See on this in particular pp 8-12.

K. Lenaerts, 'EMU and the EU's constitutional framework' 39:6 *ELRev* (2014) 753-769 (for our purposes mainly focused on (a) going outside the Treaties in FCT/TSCG and ESM where he adopts the characterisation of 'semi-intergovernmentalism' and (b) principles on which further EMU reform should be based).

P. Craig, 'The Stability, Co-ordination and Governance Treaty: Principle, Politics and Pragmatism' 37 *ELRev* (2012) 231.

S. Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics' *EuConst* (2012) 404.

