INSTITUTIONAL INNOVATIONS

EU Policy and Constitutional Sovereignty: a Road Map

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The challenge of the EU crisis: How to boost European integration by way of different national needs?

The last Trio, with the current Hungarian Presidency, was the first to experiment with the application of the Lisbon Treaty (LT) in a very insecure economic context. During this 18-month period, attention has been drawn to the practical operation of the new institutional architecture and mainly to the need to reinforce the Council Presidency's stability within it.

Even though the Trio had to pursue the common programme – based on issues and legislation that were already on the table, the eurozone crisis affected the official agenda considerably by putting forward new issues of high politics, thus progressively transforming policy discourse and action. By way of illustration, Hungary was obliged to set aside two original priorities – water management and cultural diversity – because of more pressing issues on the economic front, namely the need to secure treaty change in order to accommodate the euro's bailout mechanism and dealing with the first EU semester of economic governance.

Undoubtedly, we enter a phase where there will be an intense debate on policy action in the context of European integration. The transfer of some law-making power to the EU-level, under the Lisbon Treaty, offers new possibilities for EU legislative activism. But, at the same time, the Lisbon Treaty already provokes national constitutional issues. Some Member States may decide to set limits on the penetration of EU law into the domestic constitutional order. Three cases of Constitutional Court dissensus are to be identified.

Firstly, the Lisbon Treaty extends Community competence to new policy areas. Some new competences have been transferred and some existing have become subject to qualified majority voting in Council. But the legal base remains small. In case of activation of the *passerelle* clauses, which allow the switch from unanimity to majority voting, much room for interpretation will be left to EU and national actors – and national Constitutional Courts (CCs) – who implement the Treaty.

Secondly, any treaty change under the simplified procedure for revision (Article 48, Section 6 of the Lisbon Treaty) can bring significant changes in a particular policy domain, provoking strong reactions from the CCs. The European Council of December 2010 agreed on a limited amendment to Article 136 of the Lisbon Treaty – the European Commission issued a favourable opinion last February – so that the permanent European Stability Mechanism (ESM), which is largely intergovernmental in nature, will be put in place, coming into effect in 2013.

Thirdly, using the enhanced cooperation mechanism in some sensitive policy areas may result in an increase in such reactions. CCs can react to the use of the communitarised procedure to authorise enhanced cooperation itself, as well as to Member States' decision, once the cooperation is launched, to transform unanimity into Qualified Majority Voting (QMV) and to introduce the ordinary legislative procedure in cases where special legislative procedures are foreseen. Furthermore, even in the case of policy areas that function only on the basis of institutionalized intergovernmental cooperation, the involvement of EU institutions in the adoption of policy instruments could provoke more reactions from the Constitutional Courts than ever before[1].

In all the above cases, emphasis is placed on transferring to the EU powers or extending competences at European level towards European institutions and (new) established agencies. In such cases, CCs can defer the time for the constitution to be amended (less extensive changes in one or more of its provisions), require a revision of the constitution (substantial changes to the entire Constitution), involve national parliaments more directly in all above procedures. New EU powers, which are normally inherent to the exercise of national sovereignty, can also trigger a referendum in some Member States (binding or facultative, depending on national constitutional traditions). By opening up the possibility of national constitutional constraints to EU law, political decisions concerning the extension of EU powers can be delayed or even blocked and, consequently, the spill-over mechanism would cease to operate or at least slow down seriously.

The eurozone crisis brought a new issue to the surface, an issue of political ethics. How to reconcile two parallel, but opposing tendencies: a functional necessity for extending integration in certain policy areas and a national distrust against EU acting as a proxy for conducting common policies. The next Trio Presidency (Poland, Denmark and Cyprus) starting in July 2011 will have to complete a number of proposals already launched, as well as develop a number of initiatives currently under discussion. During this next Trio period, legislative issues brought forward by the agenda-setting actors, the European Commission and the President of the European Council will probably provoke reactions from the CCs of some Member States. How

1. Before the communitarisation of the justice and home affairs (JHA) domain, the EU institutions have been active and have adopted instruments provoking reactions from the CCs or other highest courts in the Member States (see also note 3). As a matter of fact, the Lisbon Treaty's depillarisation of JHA cooperation is not problem-free, either. The construction of a European area of freedom, security and justice comes up against national reticence because it infringes on aspects of sovereignty, particularly internal security issues. Actually, the special competences of the EU in the coordination of economic and employment policies (Art.5 TFEU of the Lisbon Treaty) can spark the same kind of concerns

should the governments of Member States composing the next Trio Presidency deal with this increasingly important issue? What position should they adopt in this two-level game, where they must respect the institutional autonomy of Member States, as well as preserve their own mission as representatives of all EU Member States?

The tension between the acceleration of Europeanisation of domestic policies and the preservation of national constitutional democracies

Nowadays, more than ever, Member States are asked to show mutual trust in their relationship with the European Union, while at the same time national Constitutional Courts are committed to preserving the constitutional integrity of their country. Since the LT entered into force, an increasing tension has been observed between the process of Europeanisation of domestic policies and the distrust stance of some national CCs. This tension could be explained by Member States' fear of losing control of their constitutional agendas.

In this context, CCs assume a more active role in defining the boundaries between national constitutional order and European legal order. Lately we have witnessed some Member States that raised a national constitutional matter showing resistance against any top-down pressure[2]. With increased EU powers under the LT, since police and criminal justice cooperation are subject to the community method, the strengthening of the JHA domain is intended to work in favour of the good functioning of the common market. Several CCs – Spanish, German, Czech, Latvian, French, etc.[3] – have dealt with the transfer of competences related to the JHA in the context of the Lisbon Treaty, trying to set limits to this transfer of powers. Some of the new EU members remain strict and hold particularly reserved positions due to sensitivities towards sovereignty. Polish and Lithuanian courts serve as examples.[4] Furthermore, the United Kingdom's (UK) intensely discussed EU Bill, enforceable by the British Courts, is indicative of the same tendency. It contains a sovereignty clause aiming to reaffirm the supremacy of the British Parliament and a referendum lock seeking to identify and control any extension of EU powers over any area of policy or any treaty change that hands over powers to the EU.[5] Besides, the issue of UK's 2014 opt out on EU police and justice laws and the plan to give the British Parliament a vote on opting into new EU justice and immigration laws illustrate a quite new practice seeking to increase (direct) national democratic control.

2. Much attention has been paid to developments in constitutional courts in Member States when they concern EU law, such as for instance replies by constitutional courts to questions concerning the compatibility of the Lisbon Treaty with the national constitution in the course of the ratification process of the Treaty (for example, cases in the German CC or the Czech CC) or questions to the national CCs on the compatibility with the national constitution of some transposition measures of EU Directives into national law (for instance cases in the German constitutional court on the transposition in German law of the European arrest warrant or of the Directive on data retention in the telecommunications sector)
3. Czech Constitutional Court, Judgment PLUS 29/09 of 3 November 2009; Latvian Constitutional Court, Judgment no. 2008-35-01, 7 April 2009; French Constitutional Court, decision no.2007-560 DC, 20 December 2007
4. Poland's Membership in the European Union, Polish Constitutional Court Judgment of 11 May 2005, K 18/04; Lithuanian Constitutional Court, Case No. 17/02-24/02-06/03-22/04 of 14 March 2006
5. Since, the UK's EU Bill creates strict safeguards against the simplified procedure for revision and the *passerelle* clauses, these two legal instruments run the risk of becoming obsolete

More cases of national resistance can be expected given the fact that the Lisbon Treaty (Treaty on the Functioning of the European Union – TFEU) has brought significant changes in a number of policy fields. Actually, the running of the Council Presidency by the next Trio will focus on issues, such as better coordination of macro-economic and employment policies, broader and enhanced surveillance of fiscal policies at EU level, and strengthening the Stability and Growth Pact and its implementation. Such issues of major significance are also addressed in the Commission's annual programme of 2011. Given the mere fact that in the current eurozone debt crisis EU governing structures are definitively summoned to materialize new possibilities for the development of policy instruments, enforcement mechanisms and legislative frameworks, seeking new forms of cooperation on economic, fiscal and social policy emerges as a high-stakes issue for the next Trio Presidency. Some examples, such as the harmonisation of national budget-making[6], salary indexation, tax, social security and pension schemes (following the Green Paper of July 2010 on pensions), are already under discussion. In that respect, the use of the mechanism of enhanced cooperation could be envisaged, allowing a group of Member States to move further.

Nevertheless, several Member States confront the dilemma of broadening the scope of cooperation on new policy areas. Some of them show reluctance to embrace new regulatory policies expressing concern about the impact on the hard core of their national sovereignty. For instance, fiscal sovereignty, as monetary at other times, is considered to be a traditional element of statehood. The UK expressed vehement opposition to the proposed Directive on national budgetary frameworks, thus seeking a guarantee from the Commission so as to opt-out. Sweden, among other countries, took a stand against the harmonisation of salary indexation, tax, social security and pension systems, insisting these are matters of national sovereignty. Even when the option of institutionalised intergovernmental cooperation is put forward, which means that governments will have to consult national parliaments, there is no guarantee regarding the nature of subsequent reactions in Member States. For instance, the Franco-German plan for a Competitiveness pact (renamed the "Euro-Plus Pact"[7]) proposed at the last EU summit on 4 February 2011 – addressed to the 17 eurozone countries, but to others outside the eurozone as well – could include calls for putting debt limits in national constitutions, raising retirement ages, and getting rid of salary increases tied to inflation.

In this emerging policy environment, key actors within the EU should raise awareness regarding the increasingly involved role of national CCs. Since CCs have the exclusive competence to review EU law for compatibility with the national constitution, they develop an expertise on the constitutionality of EU law. As a matter of fact, this trend is accentuated by the inclusion of the national constitutional identity clause in the Treaty (article 4.2 LT). The clause contains a mention about the formal recognition of the role and importance of national

6. The proposed Directive on national budgetary frameworks includes new rules on public accounting systems, statistics, forecasting practices and many other stages in the budgetary process
7. European Council, Conclusions, EUCO 10/11, 24-25 March 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf

constitutions. To the extent that the Lisbon Treaty focuses on state structures, there is a shift in emphasis from national identity as such to constitutional identity. Some CCs read it as an implicit limit to the primacy of European law whenever that law would affect national constitutions. Actually, the fact that primacy of EU law is consigned to Declaration 17 attached to the Lisbon Treaty should not be neglected[8].

National parliaments' decreased control of governmental activity could explain why the CCs are more inclined to affirm their role as guardians of national sovereignty and, consequently, preserve the policy autonomy of Member States[9]. The further development of the competences of the European Parliament, as well as the new role of national Parliaments under the LT, can reduce but not eliminate the structural democratic deficit of the EU, i.e. the gap between the substantial and steady extension of EU competences and action, and the internal EU decision-making and appointment procedures analogous to international law. More than ever, national CCs are able to cope with the legal and political demands of European integration.

Roadmap proposals

Member States do not have a unified vision of the EU, which can seriously weaken their willingness to undertake joint responsibility for its further development. The next Trio Presidency should not disregard the fact that the increasingly involving role of national CCs will certainly exacerbate the tension between the pursuit of national agendas by Member States and the need for directional leadership at the EU level. In this sense, the issue of compatibility of EU law with the national constitutions is not just a technocratic judicial matter, but it becomes a political matter of great importance for the process of European integration. How can situations where progressing integration impelling Member States to establish significant constitutional constraints be prevented? How can the unwillingness to change or even slightly amend the constitutions, by state legislatures or referenda, be avoided?

Especially within a system of dispersed power, multiple actors and polycentric opportunity structures, more advanced methods should be identified in order to tackle this issue:

- Establishing a preventive mechanism where the Council Legal Service will be actively involved. The main functions of such mechanism will include monitoring and evaluating the stances of Member States towards important and sensitive EU policy issues in relation to their constitutional framework. The Council Legal Service could play a key advisory role in providing legal opinions to the Committee of Permanent Representatives (Coreper) and the General Affairs Council (GAC) on national constitutional issues relating to the EU, which may be raised in the course of the Council's work.
- Granting to the GAC a special competence on extension of EU powers. Given its focus on the general coordination of the EU's sector policies and institutional concerns, the GAC could contribute significantly towards a better management of the Kompetenz-Kompetenz problem – this problem concerns the question of which court decides the boundaries of the EU's legislative competence.
- Urging a relationship of cooperation between national CCs and the European Court of Justice (ECJ), the first to determine the constitutional identity, the latter to determine the meaning of the relevant European law.
- Broadening the role of the so-called trialogues – the informal inter-institutional negotiations between the Council of Ministers, represented by the rotating president, the European Commission and the European Parliament. The Trio Presidency could substantially invest in a good working relationship with the European Commission and the European Parliament, in order not only to supersede early inter-institutional compromises on co-decision matters, but also to consider more broadly the political and legal implications at national level of the extension of the use of the community method on important policy issues.
- Encouraging the European role of national Parliaments in order not only to participate in the mechanism for monitoring respect for the principle of subsidiarity by EU institutions, but also generally to shift their attention to the scrutiny of the content of European policies, raising or not a subsidiarity issue.

8. The primacy of EC law would have become a treaty provision if the Treaty establishing a Constitution for Europe had been ratified (Art.I-6 Constitutional Treaty)
9. The German Constitutional Court in Karlsruhe published a radical verdict on the relations between the national parliaments and European integration (Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009)