

Impact of the Financial Crisis on the European Constitutional System*

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*Kaarlo Tuori – Klaus Tuori:
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The authors would like to make the reader see the crisis as more than just a financial calamity affecting government debt and the banking sector. They place the issue in a broader context and urge us to view the crisis from a broader public order and constitutional perspective, encompassing European integration as a whole. This is because the euro-area crisis had a massive effect on the entire European constitutional system. The authors thus argue that the problem can only be analysed taking into account the common European values guaranteed by the Treaties. In line with this, the authors undertake not only to paint a comprehensive picture of the economic reasons behind the crisis and the crisis-management solutions employed, but also to present a historical and conceptual analysis of the EU Treaties in the light of the crisis.

The book lists the economic causes of the crisis, such as the collapse of the US mortgage market, which suddenly turned the highly interconnected nature of the financial market, which had been regarded as beneficial in the EU, into a predicament, creating a multitude of contagion channels that enabled the rapid spread of the crisis. In addition to these, the book also pays special attention to abstract causes such as the fact that financial risk-taking and responsibility for those risks have not always been in direct proportion. The authors believe that in many cases, this could occur because governments intervened in the system by providing state guarantees, which is in large part attributable to the fact that household debt management remained within the purview of the Member States. The other shortcoming of the EU presented in the book is that the Member States disregarded the changing conditions on the global market when drafting the current Treaty, especially the rapidly growing clout of Asian countries.

* The views expressed in this paper are those of the author(s) and do not necessarily reflect the official view of the Magyar Nemzeti Bank.

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The most striking example of the lack of consistency between the Treaties and the rescue packages created in response to the crisis can be seen in the “*no-bailout*” clause of the EU Treaties. According to the clause, the EU does not bear the responsibility for the obligations of the Member States in any form. However, this is in stark contrast to the EU’s behaviour during the crisis. The authors believe that this was possible only because the rescue packages were obtained by the recipients under the auspices of the European Stability Mechanism, which is a legal person in international law, separate from the Member States, therefore from a formal law perspective it is uncertain whether it is covered by the “*no-bailout*” clause enshrined in the Treaty. This cunning legal argument was implicitly accepted by the subjects of EU law, since in a teleological approach, the aim of the “*no-bailout*” clause and the rescue packages was the same: maintaining the stability of the euro area. Based on this, we cannot say that in a teleological sense the rescue packages would be in conflict with Article 125(1) of the EU Treaty. The authors argue that the fact that this is not admitted explicitly by major EU institutions is because it would entail serious moral hazard, as in that case Member States could spend without limitation, secure in the knowledge that the EU would come to their rescue if needs be. The other important consequence of the crisis with respect to the EU’s constitutional order is that the issue of Member State sovereignty has become relativised and conditional on the financial assistance provided by the EU or the EU Member States. This relativisation could be best observed in connection with the Greek rescue package where the Member States providing the assistance set out strict conditions for the disbursement of the funds, and these conditions radically affected Greek society.

The authors believe that a straightforward solution to the above-mentioned problems would be to considerably strengthen the direct democratic legitimacy of the EU institutions, which is also part of the recent reform plans of French President Emmanuel Macron. Traditionally, the main institution in this thought experiment is the European Parliament. In order to provide a genuine solution and avoid a situation where Member States would feel that the EU’s economic decisions are imposed upon them, the decision-making mechanism should be reformed as well, since currently the European Parliament plays no role in most major economic decisions and rescue packages. The fact that the European Parliament is so weak is a deeply rooted problem. It is perhaps also attributable to the fact that the development of the European demos, just like the European identity, is in an embryonic stage.

The main crisis management measures were implemented without the substantial engagement of the European Parliament and the EU institutional system subject to the Treaties, within a new framework based on individual intergovernmental agreements. The crisis generated a multitude of official, semi-official and unofficial bodies which do not have formal powers, yet exert significant influence. All of

the bailout packages were developed by organisations such as the Eurogroup, the dedicated working group alongside the president of the European Council, or the Euro Summit. However, in some sense these institutions are not subject to the system of checks and balances in the EU. One good example for this is the transparency guaranteed in the Treaties and the right to access documents, which are generally implemented in the EU institutional system, however, they take hold much less in the case of the mechanisms that are outside of this system, for example in the European Stability Mechanism. One serious problem arising from this is that – due to the fact that the responses to the crisis had no solid legal foundations – the cornerstones of the EU are called into question. One such issue is the question of the rule of law. This is because the rule of law requires that all the elements it comprises be implemented. If an important element such as the right to legal remedy is violated, there is no real rule of law. In the case of the financial rescue packages, judicial control is very much illusory and could not be enforced at all due to the pressure on the Member States.

According to the authors, the deepening of the crisis was halted in 2012, and by that time there was light at the end of the tunnel. The European institutions used the relative tranquillity to analyse whether they were able to provide appropriate responses in the most pressing times and to examine the lessons learnt from the measures taken, and they tried to ascertain how to avoid another crisis in the future. In light of this, a committee was established, headed by Herman Van Rompuy, with the participation of the European Council, the Commission, the Eurogroup and the ECB, to prepare a comprehensive reform plan for the EU's future.

The committee basically had three goals: to deepen economic cooperation, to remedy the democratic deficit caused by the crisis, and to coordinate the two-speed EU. Deepening economic cooperation was mainly to be achieved through harmonisation of the financial intermediary system, and thus they devised the basic idea behind the banking union that has since become clearer and has provided some practical experiences. Two of the originally planned four phases of the banking union plan have already been realised. In addition to the Capital Requirements Regulation (CRR) and the Capital Requirements Directive (CRD IV) pertaining to the operation of the banking system and also containing substantive law norms, the Single Supervisory Mechanism (SSM) overseeing the finances of euro-area countries was also launched in 2014. With regard to the future, the authors believe that everything points towards the other two pillars being fully realised, thereby creating a full-blown common European resolution framework and deposit insurance system.

The special relevance of the work is the authors' conclusion concerning the two-speed integration of the EU, where they assert that this phenomenon has been more pronounced than ever since the crisis. Nevertheless, this is not regarded to

be clearly negative but rather an opportunity in some sense, because they believe that if the goal is to deepen integration, this can be achieved much faster and more efficiently by agreements between the Member States than by amending the EU Treaties covering all countries, since the latter are used, due to the unanimity requirement, by certain Member States for promoting their own interests, thereby obstructing the process. All in all, the authors are pessimistic about the deepening of the EU's integration.