

FIDE 2014

Questionnaire general topic 1

The economic and monetary union: constitutional and institutional aspects of the economic governance within the EU



Prof. Dr. Fabian Amtenbrink

Erasmus School of Law,
Erasmus University Rotterdam

All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.

Introduction

The global economic and financial crisis and the subsequent euro area debt crisis have triggered ad hoc measures and permanent reform efforts that have a profound impact on the rules, processes and behavior that determine the way economic policy is exercised at the national and European level in the European Union (EU).¹ Economic governance in the Economic and Monetary Union (EMU) has undergone a major transformation, which, moreover, is far from complete. This development does not only result in an amendment of the substantive legal regime governing the EMU laid down in primary and secondary Union law and, moreover, intergovernmental treaties. At a somewhat more elevated level it also affects the constitutional and institutional structure of the European Union and its Member States as such. In general terms, the balance of power between the EU and its Member States shifts in favour of the former, especially within the euro area. Also the distribution of powers between Union institutions is altered. At the level of the Member States, the new approach to economic governance raises (constitutional) legal questions inter alia with regard to the leeway of national governments to determine economic policy autonomously and the position of national parliaments.

¹ This definition of governance is based on European Commission, *European Governance. A White Paper*, COM(2001) 428 final. It is presently readily acknowledged that this is far from being the only possible definition of governance.

With the gradual shift of focus from crisis response to the medium and long term perspective of the EMU, the constitutional and institutional implications of economic governance come increasingly to the forefront. Mapping the emerging new economic governance in the EMU, its consequences for the Union and national legal orders, and in particular its strengths and weaknesses, are a vital precondition for building sustainable economic governance structures in the medium to long term.

Correspondingly the aim of this questionnaire is to stimulate reports from the countries represented in FIDE and from the Union institutions on major constitutional and institutional issues related to the emerging new system economic governance in the EU. These reports will become the basis for the general report aimed at providing an in-depth and – to the extent possible – comparative analysis of the main challenges that economic governance faces in this regard both in the national and European legal order. The questionnaire is divided into two main parts, which are linked to the two main policy fields of the EMU, which are economic policy and monetary policy. This is not to say, however, that these two policy fields can be viewed in isolation, as the euro area debt crisis has highlighted the close interconnectedness of both policy fields in a single currency area.

Considering the focus of the questions that are developed for each of these main pillars, a further subdivision can be made based on whether they relate to the constitutional and institutional situation in the domestic legal order of the Member States or the Union legal order. This subdivision has been introduced for reasons of structure and accessibility of the questionnaire and thus is not meant to suggest that developments in the national legal order can be considered in isolation from developments at the Union level and vice versa.

It is readily admitted that not all legal issues pertaining to economic governance in the EMU are reflected in the questionnaire. Moreover, given the high volatility of EU economic governance it is likely that subsequent to the distribution of this questionnaire developments raise new legal questions that have not been anticipated at the time of drafting of this document. It is for this reason that the questionnaire closes with a general open question (Question 15).

Economic policy

EU legal order

Question 1

To what extent does primary Union law allow for the adoption of the EU and non-EU instruments that have been agreed upon in response to the euro area debt crisis?

Rapporteurs are invited to inter alia consider:

- Scope of Articles 121 (6), 122 (2), 126 (14) and 136 TFEU as legal bases for economic governance reform measures

- Scope of Articles 123-125 TFEU
- Scope of Article 127(6) TFEU in the context of the proposed Banking Union²
- Use of non-EU instruments to regulate EMU matters
- Compatibility with Union law of the provisions of the Treaty on Stability, Co-ordination, and Governance (e.g. conferral of new functions upon Union institutions, use of existing Union powers in the context of that treaty, role of the Court of Justice of the European Union, option(s) to adopt provisions of that treaty within the EU legal framework)
- Compatibility with Union law of the Treaty establishing the European Stability Mechanism
- Necessity for amendment of the TEU/TFEU, either by using the ordinary revision procedure or the simplified revision procedure

Question 2

What are the constitutional and institutional implications at the European level of the use of supranational (e.g. Six Pack³, Two Pack⁴), intergovernmental (e.g. Treaty on Stability, Co-ordination, and Governance), private law (European Financial Stabilization Facility) and ‘soft-law’ (e.g. Euro Plus Pact, Europe 2020) instruments in reforming economic governance in the EMU?

Rapporteurs are invited to inter alia consider:

- Distribution of competences as laid down in primary Union law
- Basic governance mode for economic policy laid down in Articles 120-126 TFEU
- Relevant case law of the Court of Justice of the European Union
- Coherence and complexity of the general Union legal framework
- Coherence and complexity of the Union legal framework pertaining to economic governance in the EMU
- Enforceability of the Union legal framework
- Effects on Community/Union method
- Utilisation of Union institutions inside/outside Union framework
- Variable geometry Europe/Europe of different speeds (considering the position of Member States outside the euro area)
- Integrity of the internal market regime that applies to all EU Member States

² See also Question 12.

³ Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L 306/8; Regulation 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25; Council Regulation 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2011 L 306/33; Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41.

⁴ At the time of writing of this questionnaire; the European Commission, Proposal for a regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, COM(2011) 821 final; the European Commission, Proposal for a regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, COM(2011) 819 final.

Question 3

In ‘A blueprint for a deep and genuine economic and monetary union’⁵ the European Commission argues for a stepwise approach in, ultimately, ensuring a full fiscal, economic and political union, including e.g. the establishment of a stronger fiscal capacity for the euro area. In the Four Presidents Report ‘Towards a Genuine Economic and Monetary Union’ the plans towards a European fiscal capacity and more integrated economic decision making are further developed and – to some extent – concretised. To what extent and in what ways do these plans call for an amendment of national and (primary and secondary) Union law?

Rapporteurs are invited to inter alia consider:

- A new contractual approach to the implementation of structural reform measures, including an EU financial instrument to support re-balancing and adjustment of the euro area economies
- Increased ex ante coordination of major structural reform measures
- Deeper policy coordination in specific economic policy fields, such as taxation and employment
- Centralising of debt issuing in the euro area (redemption fund & euro bills) and namely the compatibility of the collectivisation of debt with primary Union law
- Deeper policy coordination in the fiscal/budgetary sphere, including a possible EU veto right for national budgets
- Establishment of an autonomous euro area budget (for stabilisation purposes)
- Other measures for a further political integration of the EU or the euro area, including changes to the institutional structure/balance at the Union level

Question 4

What legal modifications (if any) are required at the EU level to ensure democratic legitimacy and accountability of economic governance in Economic and Monetary Union?

Rapporteurs are invited to inter alia consider:

- Effects of the shift of power (e.g. reinforced position of the European Commission, European Council as informal agenda setter, role of the ECB) on current mechanisms providing democratic legitimacy and accountability of economic policy
- Role of Union institutions and bodies, e.g. the European Parliament (e.g. trend towards legislation packaging, economic dialogue) and the Court of Justice of the European Union (interpretation of EU and non-EU instruments) (institutional balance)
- Role of Euro Group
- Foreseeing a role for national parliaments
- Role of Civil Society

⁵ Communication from the European Commission, *A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Brussels, 28 November 2012, COM(2012) 777 final/2, 11 et seq. See also President of the European Council, *Towards a Genuine Economic and Monetary Union*, 5 December 2012.

Question 5

What legal challenges (if any) does the EU face with regard to financial market regulation and supervision?

Rapporteurs are invited to inter alia consider:

- Impact of the European system of financial market regulation and supervision on economic and monetary policy
- Need for additional financial market regulations (areas?)
- Need for a (further) revision of financial market supervision in the EU and/or the euro area
- Need for differentiation between euro area Member States and other Member States?
- Need for a more centralised supervisory system (i.e. Single Supervisory Mechanism)
- Need for a Single Resolution Mechanism, including a common (fiscal) backstop
- Need for more harmonised and/or centralised deposit guarantee schemes

Legal orders of the Member States

Question 6

What legal challenges do euro area Member States, Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency face with regard to their national fiscal rules and the applicable budgetary processes as a result of the various European ad hoc (e.g. European Financial Stabilisation Mechanism, European Financial Stabilisation Facility) and long term reform measures (e.g. Six Pack, Two Pack, Treaty on Stability, Co-ordination, and Governance in the European Union, Treaty establishing the European Stability Mechanism)?

Rapporteurs are invited to inter alia consider

- Impact of obligations arising from EU and non-EU instruments (e.g. in the context of the European Semester, budgetary frameworks for Member States, macroeconomic imbalances procedure, possibility of (non) interest bearing deposits, balanced budget and debt break rule, implementation of financial adjustment programmes (conditionality) under EFSM/EFSF/ESM) on domestic legal orders
- Impact of the obligations arising from EU and non-EU instruments on autonomous decision-making in the area of economic policy
- Role of national parliaments (including the role of the different chambers in bicameral parliamentary systems)
- Role of central and regional governments
- Impact of the Treaty establishing the European Stability Mechanism inter alia on the role of national parliaments in the budgetary process (namely in case of the application of Article 4 (4) of said Treaty) for euro area Member States and Member States in the antechamber to the euro
- Impact of the Euro Plus Pact and Europe 2020

Question 7

What changes (if any) have to be made at the level of the Member States to ensure democratic legitimacy and accountability of economic governance in the Economic and Monetary Union?

Rapporteurs are invited to inter alia consider:

- Current mechanisms providing democratic legitimacy and accountability of economic policy
- Effects of the implementation of the financial adjustment programmes under the ESM Treaty (conditionality) on national constitutional law
- Role of national and regional governments & parliaments and any other public institutions/bodies
- Role of Civil Society

Question 8

How have the duties arising from the Treaty on Stability, Co-ordination, and Governance in the European Union, namely those set out in Articles 3 (1), 4, 5 and 6, been accommodated for in the national legal order?

Rapporteurs are invited to inter alia consider

- Nature and scope of legal instruments applied by euro area Member States to implement requirements
- Interpretation given to the obligations arising under Articles 3 (1), 4, 5 and 6
- Impact of the treaty on Member States outside the euro area (e.g. implementation of rules in anticipation of euro area membership)
- Compatibility with any previously existing national rules on a sound (balanced) budgetary position (debt break)

Question 9

Have the EU or non-EU instruments employed in addressing the euro area debt crisis been challenged before national (highest or constitutional) courts? If so, on which grounds and with what outcome?

Rapporteurs are invited to inter alia consider:

- Challenges to bilateral loans to Greece, Regulation 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism (EFSF), the Framework Agreement with the European Financial Stability Facility (EFSF) or any national legislative act providing the legal basis for financial assistance under the EFSF
- Challenges to the five regulations and one directive as part of the Six Pack
- Challenges to the two regulations as part of the Two Pack
- Challenges to the Treaty on Stability, Co-ordination, and Governance or national ratification instruments
- Challenges to the Treaty establishing the European Stability Mechanism or any national implementing act

Question 10

What are the specific legal challenges for Member States outside the euro area, that is Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency, of the emergence (mainly subject to Articles 121(6), 126(14), 136 TFEU and intergovernmental treaties) of an ever more detailed economic governance regime for euro area Member States?

Rapporteurs are invited to inter alia consider:

- Influence of Member States outside the euro area on the new legal regime that is/has been adopted
- Influence of Member States outside the euro area on policy making and decision making pertaining to the new economic governance regime
- Pressure to adhere to standards that de jure are only applicable to euro area Member States
- Implications of new economic governance regime (e.g. macroeconomic imbalances procedure, Treaty on Stability, Co-ordination, and Governance in the European Union) for the scope/validity of the convergence criteria (Art. 140(1) TFEU)
- Implications of new financial regulatory and supervisory system on internal market rules (and any other EU policy areas) applicable to all EU Member States

Monetary policy

Question 11

Has the European Central Bank acted in accordance with its legal mandate laid down in primary Union law in responding to the euro area debt crisis?

Rapporteurs are invited to inter alia consider:

- Primary and secondary objective of the ECB
- Prohibition of monetary financing (Article 123 TFEU & 7th recital of the preamble of Council Regulation No. 3603/93 of 13 December 1993, Article 18.1 Statute ESCB and ECB)
- Statutory independence of the ECB
- ECB monetary policy measures during the crisis (e.g. rules on collateral, long-term refinance operations, Securities Market Programme, Outright Monetary Transactions)
- Legal requirements for providing emergency liquidity
- Statutory rules for the distribution of risks and losses within the Eurosystem

Question 12

Considering its primary objective laid down in Article 127(1) TFEU, what precisely can the role of the ECB be from a legal point of view in prudential supervision of credit institutions (micro-prudential supervision) and how can this be linked to a role in contributing to the stability of the financial system (macro-prudential supervision)?

Rapporteurs are invited to inter alia consider:

- European Commission proposal for a single supervisory mechanism for banks (Banking Union) and namely the proposals for conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions⁶
- Scope of Article 127(6) TFEU
- Constraints in relation to Member States outside the euro area
- Compatibility of different tasks and objectives of the ECB (monetary policy, macro- and micro-prudential)
- Potential for conflicts of interest and other risks attached to a pooling of competences
- Relationship between ECB and national central banks
- Lessons to be learned from competence allocation in other policy fields (e.g. EU competition law)
- Accountability issues

Question 13

How can the statutory objectives of the ECB be redefined?

Rapporteurs are invited to inter alia consider:

- Single or multiple objectives (consider e.g. Article 2A of the Federal Reserve Act)
- Role of ECB as single monetary policy authority in euro area
- Role of ECB in macro- and micro-prudential supervision
- Lender of last resort function

Question 14

What (if any) can the role of the Court of Justice of the European Union be in the interpretation and application of the primary and secondary EU law pertaining to monetary policy?

Rapporteurs are invited to inter alia consider:

- Judicial review of monetary policy decisions
- Judicial review of open market operations

⁶ Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012) 511 final). See also Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No.../... conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012) 512 final).

Open question

Question 15

What are other main legal concerns at the EU or national level regarding constitutional and institutional aspects of economic governance in the EMU that are not covered by any of the previous questions?
