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The Lisbon Treaty and EMU

Introduction

Since the adoption of the Treaty of Rome in 1957, almost all the subsequent treaties adopted to amend and widen its scope of application had an impact on the legal provisions relating to the economic and monetary union (EMU). The Lisbon Treaty is not an exception. If ratified by all Member States according to the time framework, it will enter into force on 1 January 2009.

Unlike the ill-fated EU Constitution, which was to amend, replace and codify all the pre-existing treaties, the aim of the Lisbon Treaty is limited to amend the EC Treaty and the EU Treaty (TEU) respectively. Since the EC Treaty does not contain any significant provisions relating to EMU except merely requiring Member States to endeavour to coordinate their economic and monetary policies, this paper will focus on the TEU provisions on EMU with the aim of ascertaining the extent to which such rules have been amended and widened by the Lisbon Treaty.

Lisbon Treaty provisions on EMU

Article 3.4 TEU declares the establishment of the EMU as one of the objectives of the Union. The EMU covers a package of rules covering the free movement of capital and payments, economic union and monetary union. The original rules relating to the free movement of capital, which was in force for more than three decades was repealed and with effect from 1 January 1994 was replaced by a new set of rules by TEU in order to facilitate the establishment of the EMU. The rules relating to economic union are drafted in a more cautious manner but more clear and binding rules are incorporated to establish the monetary union. All these three segments of EMU are subject to different degrees of amendments by Lisbon Treaty.

Free movement of capital and payments

The liberalization of the free movement of capital is treated as the first stage in the three stage process of establishing the EMU. Unlike the legal provisions on the free movement of goods, services, establishment and workers, the capital freedom are liberalized not only within the Union but globally. The substantive rules and the globalised approach to capital movements remain intact in the Lisbon Treaty.

There are certain changes introduced to the rules on capital and payments in the Lisbon Treaty. The procedural rules relating to invoke Article 57.2 TEU dealing with external movements of capital has been amended. The competence to adopt measures to liberalize movement of capital to or from third countries, which was ex-

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clusively vested on the Council, should be shared in the future with the European Parliament. The original rules vesting exclusive competence on the Council to adopt measures unanimously if it constitutes a step back as regards such capital movements is retained in a new provision, which reads as Article 64.3 (57.3) in the Treaty of the Functioning of the European Union (TFEU).

A direct link is established between the operation of Articles 64 and 65 (57 and 58) TFEU respectively. The aim of this amendment is to further enhance the tax competence of Member States in relation to third countries. A new paragraph Article 65 (58) TFEU provides that if no measures are adopted in terms of Article 64.3 (57.3) TFEU or in the event that the Commission does not act within three months on a request from a Member State, the Council may decide unanimously that restrictive tax measures adopted by such a Member State against any third countries are justified and compatible with the internal market.

The safeguard measures in Article 59 TEU renumbered as Article 66 TFEU are retained and could be invoked in case of threat or serious difficulties for the operation of EMU. Since not all Member States have joined the EMU, there had been an element of doubt as to whether it applies only to the Euroland or the Union as a whole. It is a missed opportunity for the Lisbon Treaty to precisely clarify its scope of application.

The current system of a two-tiered decision-making procedure to invoke Article 60 TEU in order to interrupt economic and financial relations with third countries is retained and renumbered as Article 75 (61H) TFEU. The latter provision is transferred from the chapter on capital and payments and integrated with the general objectives set out in Article 67 (61) TFEU which declares that the Union shall constitute an Area of Freedom, Security and Justice with respect for fundamental rights and the different legal systems and traditions of the Member States. In addition to widening the scope of the meaning of Article 75 (61H) TFEU, a new procedure is prescribed for its implementation. In the future the Council should act together with the European Parliament to adopt regulations in order to define a framework for administrative measures with regard to capital movements and payments such as the freezing of funds, financial assets or economic gains belonging to or owned or held by natural or legal persons, groups or non State entities.

In the current Treaty framework, Article 60 TEU should be read together with the chapter on Common Foreign and Security Policy (CFSP) to interrupt or impose financial embargoes on third countries. After Lisbon Treaty, its scope of application should be ascertained by reference to the chapter on Freedom, Security and Justice, which has replaced the TEU provisions on visa and immigration. The positive effect in shifting Article 60 TEU to this chapter is that it would be easier to adopt measures by means of ordinary legislative procedure provided in Article 251 TEU. The current procedure prescribed to implement Article 60 TEU is more complex and requires unanimity voting in Council due to its linkage to CFSP.

Economic policy

The rules on economic policy are enumerated in Articles 120-126 (98-104) TFEU respectively. The Member States and the Union have shared competence in the field of economic policy and the status quo would remain the same even after the Lisbon Treaty. This is evident in the new Title 1, Article 2.3 (2A.3) TFEU which requires Member States to coordinate their economic and employment policies and also recognizes the competence of the Union in such coordination.

The competence of the Commission has been enhanced in relation to the enforcement of Articles 121 and 126 (99 and 104) TFEU respectively. In terms of Article 121 (99) TFEU the Council drafts broad guidelines of the economic policies of the Member States and of the Union. It also prescribes a system of multilateral surveillance of economic policies conducted by the Member States. The Council shall have the competence to address a first warning to Member States in case of deviation from the economic guidelines and after the Lisbon Treaty this competence will be shifted to the Commission.

Article 126 (104) TFEU expressly prohibits Member States to run excessive government deficits. An elaborate procedure is set out to monitor and establish such excessive deficits. The Council shall establish the existence of an excessive deficit based on a recommendation of the Commission. After the Lisbon Treaty, the Council shall exercise such powers based not on a recommendation but a mere proposal from the Commission. In the future Member States running an excessive deficit will be given an opportunity to present their case in the Council but are deprived of the right to vote in such proceedings.

Under the Lisbon Treaty the Commission and not the Council shall have the competence to address an opinion to the Member State with an excessive deficit. In terms of Article 126.7 (104.7) TFEU, on the basis of a recommendation by the Commission, the Council “without undue delay” adopts its recommendations in relation to the Member State concerned. The addition of the phrase “without undue delay” is significant as it acknowledges that there had been undue delays in the Council to enforce the Stability and Growth Pact.

Monetary policy

Articles 127–133 (105–111a) TFEU deals with monetary policy and the Lisbon Treaty expressly declares and reiterates at Article 3.1.c (2B.c) TFEU that the Union shall have exclusive competence in this field. The chapter on monetary policy deals inter alia with the powers and functions of the European System of Central Banks (ESCB).

There are certain changes introduced to the chapter on monetary policy in the form of amendments and deletions necessitated by the introduction of the euro. After the introduction of the euro, the TEU even after its subsequent amendments refers to the single currency as the Ecu. The use of such words is rectified by the Lisbon Treaty in its appropriate contexts. There are also other similar amendments made which are of trivial nature as they are unlikely to produce any adverse legal consequences such as the reference to the European Monetary System is replaced by exchange rate mechanism, European Monetary Institute replaced by European Central Bank, etc. Council Regulations No 1103/97 and No 974/98 provide a clear legal framework for the smooth introduction and switch over from the national currencies to the euro. It is however a useful exercise to make the necessary changes in the Treaty framework itself.

European System of Central Banks

Article 282 (245a) TFEU defines the ESCB as constituting the European Central Bank (ECB) and the national central banks of all the Member States. The ECB together with the national central banks of the Member States whose currency is the euro shall constitute the Eurosystem, which shall have the exclusive competence to conduct the monetary policy of the Union.

An element of legal inconsistency could be detected by a comparison of the Lisbon Treaty provisions on ESCB and the Statute of the ESCB and ECB. The Lisbon Treaty rightly refers to the Eurosystem as the competent body to conduct monetary policy of the Union. On the other hand the Statute of the ESCB refers to the ESCB as having similar competence.

It is useful to refer to Article 141 (118a) TFEU in this context which shall replace Article 123.3 TEU. This Treaty provision declares that as long as there are Member States with derogation, the General Council of the ESCB shall constitute as the third decision making body of the ECB. This body has no competence to formulate or implement monetary policy except as a meeting point of the Governors of the euro and non euro Member States. It is only a transitional body which will be dissolved when all Member States adopt the euro as their single currency.

The President, Vice President and the members of the Executive Board of the ECB are appointed by common accord of the European Council on a recommendation from the Council in consultation with the European Parliament and the Governing Council of the ECB. In terms of Article 283 (245B) TFEU the unanimity procedure in the European Council will be replaced by qualified majority after the Lisbon Treaty comes into force. This Treaty provision refers to the European Council as a whole which would mean in the composition of both euro and non euro Member States of the Union. On the other hand it is required to consult not the ESCB but the Eurosystem which excludes the Governors of Member States that have not adopted the euro.

In terms of Article 122.2 TEU, the Council has the power to abrogate derogation by qualified majority on a proposal from the Commission. Under the Lisbon Treaty, the Council shall act having received a recommendation of a majority of those among its members representing Member States whose currency is the euro and comprising at least three fifths of that population of those Member States. These members shall act within 6 months of the Council receiving the Commission's proposal to abrogate the derogation.

Provisions specific to Member States whose currency is the euro

A new Chapter 4 (3a) covering Articles 136–138 (115A–115C) TFEU shall apply specifically to Member States that have adopted euro as their single currency. The aim of this chapter may be to shed more clarity and certainty regarding the rules that shall apply exclusively to euro states.

Article 136 (115A) TFEU authorizes the Council to adopt measures necessary to ensure the proper functioning of the EMU and such measures should be adopted in accordance with the procedure prescribed in Articles 121 (99) and 126 (104) TFEU respectively. The voting rights are limited to Member States of the Euroland.

There are also certain transitional provisions set out in Article 139 (116a) TFEU which applies to countries like Sweden referred to as Member States with derogation. This provision shall repeal Article 116 TEU. According to the new legal arrangement, countries referred to as Member States with a derogation are shielded from the application of various Treaty provisions on economic and monetary policy such as certain parts of broad economic policy guidelines; coercive means of remedying excessive deficits; appointments, objectives and tasks relating to the ESCB; rules governing the euro, etc.

Voting system in Council

The changes proposed in the Lisbon Treaty to the voting system in the Council will have a positive impact on the management of the EMU. The existing qualified majority voting system based on the size of the population and strength of the economy of the Member States will be replaced by a system of double majority voting system effective from November 2014. The fate of the proposed voting system beyond March 2017 shall be determined unanimously by the European Council.

The new Article 238 (205) TFEU defines qualified majority as at least 55 per cent of the members of the Council, comprising at least 15 of them and representing Member States comprising at least 65 per cent of the population of the Union. A blocking minority shall include at least the minimum of other Council members representing more than 35 per cent of the population of the participating Member States, plus one member. It would make it impossible for a very small number of the most populous Member States to prevent a decision from being adopted as a blocking minority must comprise at least four Member States. The proposed voting system will equally apply to EMU as well.

The proposed system of voting in the Council should facilitate the effective enforcement of the Stability and Growth Pact. Under the existing system, a handful of large Member States could block the adoption of any measures under the Pact. The proposed definition of what constitutes a blocking minority will not only prevent a few Member States to obstruct the enforcement of the Pact but will also enhance the powers of the smaller Member States in the process of its enforcement.

It is useful to highlight in this context the legal position of the European Council in relation to the management of the EMU. Article 15 (9B.2) TFEU provides that the European Council shall comprise of the Heads of State or Government of the Member States together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security policy shall take part in its work. Article 15 TEU expressly declares that the European Council shall not exercise legislative functions. In view of this provision, the question arises as to the legality of various instruments adopted by the European Council. In the context of EMU, the Resolutions on the Stability and Growth Pact and the ERM-11 were adopted by the European Council and these legal instruments do not specify the legal basis on which they were adopted. In any case, after Lisbon Treaty there will be no legal basis for the European Council to adopt any legal measures even in the field of EMU as it is expressly excluded.

Protocol on the Euro Group

One of the drawbacks in relation to the management of the euro is that it does not have a political authority to represent either within the Union or at the global level. This is in contrast with other international currencies where the Minister of Finance or a person holding a similar position acts as its political guardian. The ECB has the responsibility to protect the stability of the euro by pursuing the appropriate monetary policy but this mandate does not extend to act as its political authority.

This deficiency had been addressed and rectified in Article 137 (115B) TFEU. A special protocol on the Euro group is also annexed which provides that the euro Ministers shall elect a President for two and a half years, by a majority of those Member States. The Commission shall be represented as of right at the meetings but the ECB could do so on an express invitation by the Council. The aim of establishing the post of President of Eurogroup of Finance Ministers was not only to fill the political deficiency but also to provide a political counter weight to the ECB.

The creation of this post may contribute to further secure for euro a prominent place in the international monetary system. The currency will no longer exist in political institutional isolation. The Council of euro Finance Ministers could adopt decisions on matters of particular interest for the euro such as a unified representation within the competent international financial institutions and conferences. All matters relating to unified representation in international financial institutions and conferences and on matters of particular interest for EMU within such international financial institutions and conferences shall be decided by the Council on a proposal from the Commission and after consulting the ECB. Such decisions shall be adopted in terms of Article 238 (205) TFEU and the voting rights in Council will be limited to Ministers representing the Euroland.

If the aim of creating this mini-ministerial body is to provide additional protection to the euro in the shape of a political guardian, such a move would have been even more effective if the President of the ECB or his representative also had a right similar to the Commission to attend its meetings. It would have been also a conducive and secure forum for the politicians and central bankers to exchange their views on monetary policy rather than using verbal attacks against each other in the public, thereby causing much harm to the stability of the euro.

Exit clause

The existing Treaties set out the entry requirements to secure membership in the Union but contain no specific provision for a Member State to leave it. Theoretically a Member State may leave the Union by simply repealing its own accession legislation but in practice such an option has never been exercised. Unlike the European Treaties on coal, steel and atomic energy which were ratified for a fixed period of fifty years, the EC Treaty was ratified for an indefinite period of time and the Lisbon Treaty also declares that it is "concluded for an unlimited period". Since the EC Treaty does not contain a specific legal provision to enable a dissatisfied Member State to leave the Community, the effect was that such a country could be condemned to a period of life imprisonment.

In order to fill this gap in the legal framework of the EC Treaty and to further create legal certainty, in Title 111, Article 50 (49A), provisions of the institutions, was incorporated which prescribes a procedure for a Member State to leave the EU, if it so desires. The Lisbon Treaty however does not set out any specific grounds to invoke the exit clause.

There are certain Member States though legally obliged under the existing Treaties but less inclined to adopt the euro. The best example is Sweden where the voters clearly rejected at a referendum to replace the Swedish kronor with the euro. There is thus a conflict in Sweden between the legal obligation to adopt the euro and a hostile public opinion against it. Since the exit clause is incorporated as a general provision in the Lisbon Treaty, it may be invoked as a legal basis for any euro-skeptic Member State to give notice to the European Council to leave the Union.

Sweden and EMU

Sweden did not secure derogation from the EMU obligations in its accession agreement to the EU. In view of this legal situation, Sweden is required to comply with the EMU provisions in the EU Treaty. The legal position of Sweden have to be distinguished with that of the United Kingdom and Denmark, which have expressly secured a EMU derogation in the TEU itself.

Since joining the Union there had been mixed hopes and fears in Sweden of its eventual membership in the Euroland. A cross section of the Swedish population which prefers to have closer links with the Union support the replacement of the Swedish kronor with the euro. The group that is less inclined to move towards closer integration prefers to retain the national currency.

Whatever the public opinion may be, which are likely to fluctuate due to various extraneous factors, from a strictly legal point of view, there is an obligation on Sweden to join the Euroland as soon as it fulfils the EMU convergence rules. The Lisbon Treaty retains and designates the Member States that have not fulfilled the convergence rules as Member States with derogation and Sweden also falls into this category.

Since there is a lack of sufficient public support for the euro project as well as lack of dedication and enthusiasm on the part of the political establishment to sell the euro to the public, after the abandonment of the Constitutional Treaty, Sweden could have bargained with its partner states to secure a specific EMU derogation as a precondition to support the Lisbon Treaty, the same way UK and Denmark did as a precondition to support the TEU.

There are several countries which have secured different forms of opt-out in the Lisbon Treaty. The United Kingdom has secured a written guarantee that the Charter of Fundamental Rights cannot be used by the European Court of Justice to alter its labor law or other laws that deal with social rights. It also secured the right to opt in or out of any policies in the entire field of justice and home affairs. Denmark will not only continue with its existing opt-out from justice and home affairs but also secured the right to opt for pick-and-choose system. Italy gained an extra seat in the future European Parliament. Austria secured the right to maintain quotas for foreign students. Bulgaria, which joined the Union only very recently, won the right to call the single currency the EVRO rather than euro. Under strong political pressure from Poland, the number of Advocates-General are increased from the current eight to eleven to ensure that Poland like Germany, France, Italy, Spain and the UK have a permanent Advocate General and no longer need to take part in the rotation system.

Since so many other Member States secured most of their demands as evidenced in the different protocols, the failure of Sweden to demand EMU derogation gives much scope for speculation. One might interpret it as an implicit political commitment to join the Euroland when the public opinion favors the adoption of such a course of action. Another interpretation is that since an exit clause is incorporated into the Lisbon Treaty, there is no need to secure a specific derogation on EMU. Whatever the factor or a combination of factors that contributed Sweden not to secure a specific derogation, the legal position under the Lisbon Treaty would thus remain the same as in the TEU.

Concluding remarks

The single currency could survive under the existing legal framework and not require additional legal protection. They are sufficient to manage the operations of the single currency. The Lisbon Treaty provisions such as those dealing with the replacement of the procedure to abrogate derogation granted in favor of a Member State and the method of selection of the members of the ECB may not have any substantive impact on the stability or management of the euro. The provision on the abrogation of derogation will be superfluous after all Member States join the Euroland and the provisions relating to the appointment of Directors of ECB will be invoked only once in 8 years. Without Lisbon Treaty the monetary institutions of the Union could continue to function smoothly. The ability of the ECB to withstand intense political pressure to soften monetary policy following the constitutional crisis bears testimony to the credibility and sufficiency of the existing legal and institutional rules relating to EMU.

The inclusion of the exit clause will be greeted with regret or relief by Member States depending on their level of commitment to further integration of the Union. The exit clause provides legal certainty to Member States of their right to leave the Union. This provision was incorporated on the presumption that it will never be invoked. This appears to be a rebuttable presumption especially in the wake of the decisive rejection of the draft Constitution in the two founder Member States of the EU. There is also clear evidence of decline in support for the euro in some of the new Member States, especially after the crisis ignited by the breaches of the Stability and Growth Pact and the rejection of the draft Constitution. All these are ominous indications that the exit clause will not be a dead provision in the Lisbon Treaty.

It is a curious legal scenario where a distinct constitutional provision relating to the euro been implemented even without its ratification. The Lisbon Treaty providing for the appointment of a President of the Eurogroup of Finance Ministers has no legal basis in the existing Treaties. Interestingly, the President of the Euro group was appointed by the relevant Ministers and assumed duties in January 2005. On the other hand, if just one of the EU's twenty seven Member States fails to ratify the Lisbon Treaty in accordance with their respective constitutional requirements, it cannot come into force.

The obligation to join the EMU and the public resistance to it has created a legal paradox in Sweden. This tension could have been removed if Sweden had secured EMU derogation in the Lisbon Treaty. It is beyond my comprehension why Sweden failed to do so especially when many other Member States effectively negotiated, bargained and ultimately secured favorable terms as a precondition to support the Lisbon Treaty. ●