Briefing
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Constitutional problems of multi-tier governance in the EU

Differentiated integration – where some Member States are not yet ready or are unwilling to participate in new developments – is a fact of today's European Union. Nonetheless, the route chosen by the Member States to move forward has a major impact both on the legal certainty around any new instruments and on their democratic oversight. Recent developments in the field of economic and monetary union illustrate very well the difficulties which arise.

Differentiated integration

Dealing with "multi-tier" governance in the EU has become essential and complex, with the growing number of cases in which Member States (MS) have agreed that not all will pursue identical goals. (Distinct from "multi-speed" governance, where all MS plan to, but not all yet participate in a given policy field.)

MS wishing to move ahead have sometimes chosen intergovernmental agreements formally outside the EU framework (e.g. Schengen in 1985, Prüm in 2005). Such agreements were however open to all other MS, and explicitly intended to be fully incorporated into the EU legal framework in the future. An alternative approach has been to amend the EU Treaties to allow working together in new policy fields, but granting specific "opt-out" arrangements to particular MS. This is the situation with Denmark and the UK on the euro, and with Denmark, Ireland and the UK on the common Freedom Security and Justice Area (FSJA). For Schengen governance, the agreement was later incorporated into the Treaties, but with specific arrangements for Ireland and the UK.

The Treaties now enable developments without all MS, in particular through the enhanced cooperation mechanism. This has been used for divorce and the unitary patent, and is now the basis for a financial transaction tax, currently under discussion.

Economic governance

The financial crisis has seen the need for significant initiatives to ensure the single currency was not jeopardised. Since the existing Treaty provisions did not explicitly provide for the actions judged necessary, but no unanimity could be found to agree on Treaty changes, the response to the crisis has seen a leap in the complexity of governance in the economic and monetary field.

Monetary policy in the Euro Area is an exclusive EU competence, and indeed Article 136 allows the EU institutions to adopt measures specific to those countries (the "two pack" is one example). Moreover, the Euro Area MS agreed the European Stability Mechanism (ESM) outside the Treaty framework.

However, in the crisis response, it was also necessary to implicate MS "with a derogation", i.e. not yet using the euro, in the additional actions. Outside the EU framework, the non-binding Euro Plus Pact and subsequently the binding "Fiscal Compact", aimed in particular at increasing budgetary discipline, have been adopted by most MS. The "European Semester", part based on EU law (the revised Stability and Growth Pact) and part on these agreements, gives the Commission strong powers to evaluate national measures.

Political legitimacy

Whilst these intergovernmental arrangements do implicate the EU institutions, notably the Commission, the European Parliament has had a minimal role, both in their agreement and now in their implementation. Moreover, the varying institutional architecture and decision-making processes leads to a lack of transparency, legal complexity and a "democratic deficit", with neither the EP nor national parliaments able to exercise effective oversight.

The report from the Constitutional Affairs Committee (rapporteurs Roberto Gualtieri, S&D Italy and Rafał Trzaskowski, EPP, Poland) underlines the importance of using all the options within the Treaties in preference to the intergovernmental approach, and thus preserving the Community method. Moreover, whilst the EP has gained a decisive role in the adoption of much legislation, it needs to become more involved in supervising its implementation and in oversight of the institutions involved, in particular the European Central Bank, the ESM and the "Troika".

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