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Blocked for Good by the Threat of Treaty Change?

Perspectives for Reform in the European Union

Nicolai von Ondarza

The European Union faces a fundamental dilemma. On the one hand, pressure to reform its structures is growing. The hard negotiations with Greece in summer 2015 have revived the debate on deepening the Eurozone, while at the same time London is pushing to roll back integration, at least for itself. On the other hand, national governments reject any moves that would require a treaty change (such as transfer of powers) as politically impossible. Legal options for evading the dilemma and developing the Union by “covert integration” do exist, but these require unanimous political agreement among all the national governments – and would in the medium term require treaty changes to restore transparency and democratic legitimacy.

The traumatic process of negotiating and ratifying the EU Constitutional Treaty and the Treaty of Lisbon has left deep marks. Ever since, national governments have consistently avoided initiating significant treaty amendments, including at the height of the euro crisis. Even in projects such as the banking union, they have instead turned to treaties outside the EU framework.

Despite this reservation – or perhaps precisely because of it – pressure to tackle reform of primary law is growing. Momentum for a treaty amendment comes from three sides: Firstly, reform of the Eurozone remains on the agenda. Although individual crisis-hit countries like Ireland have made progress and the Eurozone has

bought itself some time for reform, the volatile negotiations with Greece in summer 2015 again spotlighted the persistence of grave deficits in its economic and political structures. In response, France in summer 2015 proposed strengthening the Eurozone with a finance minister with a budget and a parliament of its own. Concurrently, in June 2015 the presidents of five European institutions (Commission, Council, ECB, Eurogroup and European Parliament) published their conclusions on completing the economic and monetary union. While recommending short-term reforms under secondary law, in the longer term they also suggest creating a European finance ministry. If this were to involve transferring new

powers to the Eurozone within the framework of the EU – such as rights to control or even intervene in national budgets, or new transfer mechanisms – regular treaty amendments would be required, under the principle of conferred powers that explicitly guarantees that only member states may transfer new powers to the Union.

Secondly, British Prime Minister David Cameron is pursuing – in parallel to but not independently of the above – a reform serving British interests to convince his electorate and above all his party base to vote to remain in the European Union in the referendum planned for 2016 or 2017. The British demands also amount to reforms on a treaty-amending scale: exemption from the objective of an “ever closer Union”, greater rights for national parliaments, and safeguards for non-euro states in the process of closer integration of the Eurozone. Not least, Cameron is seeking to reduce the incentives for intra-EU migration to the United Kingdom. While not calling into question the principle of freedom of movement, this could require – depending on the specific interpretation of European law – amendments to the treaty provisions on free movement of persons or non-discrimination of EU citizens. Before the British referendum is held, the other member states will thus have to decide whether and to what extent they are willing to concede treaty-changing reforms.

Thirdly, twenty-six of the twenty-eight member states have already agreed to seek a treaty amendment by 2017, having committed themselves to incorporate the provisions of the Fiscal Compact into the EU treaties within five years of its coming into effect, in other words by January 2018 (Article 16 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union). Given that this obligation is binding only on the signatories, the corresponding treaty amendment is no foregone conclusion, because the two uninvolved states, the United Kingdom and Croatia, would also have to be persuaded to give their consent.

Comprehensive Treaty Amendment Remains Out of Reach

In all three areas, however, national governments appear to recoil from seeking treaty change. The reasons for this are complex and stem from more than just fear of referendums. Fundamentally, the rejection of treaty amendments can be explained in terms of the interaction of six factors:

Firstly, the greatest obstacle is that under Article 48 of the Treaty on European Union (TEU) any form of treaty amendment must be agreed unanimously. This provision guarantees that the member states retain control over the EU treaties. And this is the reason why disagreements over treaty negotiations have frequently led to the adoption of special arrangements and opt-outs to accommodate individual member states. Now the differences between national governments are larger than ever. Whereas the Eurozone is at least debating a further deepening, London would prefer to curtail or even reverse integration. The gap, however, is especially wide when it comes to ideas about the future of the Eurozone. These range from demands for greater sharing of risks (European unemployment insurance scheme, Eurozone budget) through further transfers of sovereignty (enhanced budget controls, binding reform programmes) to a return to market-driven reforms and a strengthening of the no-bailout clause. Acrimony between European states over the refugee crisis has further worsened the political climate within the Union.

Secondly, this also means that as soon as treaty reform comes onto the table in any of the European Union’s many pressing issues, the other questions almost automatically have to be debated and clarified too. For example, the United Kingdom would certainly exploit any treaty reform initiated by the euro states to force a deal on its own issues, using its veto to add weight to its demands. The Union is thus unable to resolve any of its problems in isolation by the route of reform of primary law, but would be forced to tackle them as a whole. This naturally makes a solution considerably harder to find.

Thirdly, the situation is complicated by the fact that in a Union of twenty-eight member states there is almost always an important national election looming in one or another, which reduces the scope of the (larger) member states in negotiations. The debates about a political union in 2012 were accompanied by warnings about that no treaty change was possible before the German Bundestag elections in 2013, in 2013 it was the 2014 European elections, and then the British elections in 2015. And now, with German parliamentary and French presidential elections scheduled for 2017, there are again milestones before which treaty reforms are excluded. As these examples underline, national elections represent a structural rather than temporary obstacle, because many national governments believe that excessive willingness to compromise at the EU level reduces their prospects of re-election.

Fourthly, the European Parliament must also be involved in any significant treaty change. While it would not be expected to fundamentally hinder any development of the Eurozone, there are certainly greater concerns about the British demands. Under Article 48 (3) of the TEU, simplified Treaty revisions are possible without a convention, but this shortcut requires the consent of the Parliament. Because a Convention grants considerably greater influence to the European Parliament (and national parliaments), it is quite likely that the Parliament would press for a Convention even for less significant treaty amendments.

Also for that reason, fifthly, the ordinary revision procedure suits neither the timetable of the British strategy nor that of the Eurozone. The experience with the Treaty of Lisbon shows that more than half a decade may pass between the first talks (early 2002) and entry into force (end of 2009). Even for the latest “simple” treaty amendment – adding just one paragraph to Article 136 of the Treaty on the Functioning of the European Union (TFEU) to ensure the validity of the European Stability Mechanism (ESM) – the member states required

more than two years for ratification alone.

Finally, every EU treaty amendment must be ratified by all member states. Plebiscites are not automatically necessary, but for political reasons a referendum is planned in the United Kingdom, and depending on the extent of transfer of sovereignty may also be required in Ireland, and on matters affecting non-euro states also Denmark. In the event of more significant treaty amendments referendums could also be demanded in France, the Netherlands and elsewhere, following the precedent of the EU Constitutional Treaty. Even parliamentary ratification is likely to be more difficult than for the Treaty of Lisbon, because electoral successes for EU-critical parties across Europe have boosted their representation in national parliaments.

Option Covert Integration?

The EU member states are in a bind: The Eurozone must be adapted and developed but the required major treaty amendments appear impossible. During the debt crisis the European Union therefore incrementally developed a way around this problem that could be described as “covert integration”.

The model is characterised by two mutually complementary features. Firstly, national governments delegate substantive political decision-making powers that are not explicitly defined in the EU treaties to the EU level. This transfer of powers is then concealed, either by creating structures that can take decisions that might not be legally enforceable, but are politically binding. Alternatively, the competences are directly transferred to structures outside of the EU legal framework. The Fiscal Compact adopted in 2012, for example, did not represent any formal alteration to the EU treaties. But the member states nonetheless agreed to include stricter budget rules in their national constitutions (or an equivalent constitutional level) and introduced new monitoring and penalty systems. The possibilities for Brussels to influence na-

tional budgetary policy were thus strengthened de facto – albeit not de jure.

Secondly, these covert integration moves sidestep the processes required for a regular treaty amendment. The instruments applied here include generous interpretation of the EU treaties, separate treaties under international law, and inter-governmental coordination. One example of this is the banking union, which only became possible through a combination of secondary legislation under a broad interpretation of the EU treaties and a supplementary treaty. Covert integration thus stands in contradiction to the purist line under which treaties should only be altered by a Convention with the greatest possible legal security, transparency and democratic legitimacy.

Another relevant instrument is differentiated integration, without which no new integration move would have been agreed since the outbreak of the European debt crisis. In fact, every step involving less than the full twenty-eight members turns the Eurozone into the core of European integration (see SWP Research Paper 2/2013). Alongside the Fiscal Compact and the banking union, this also includes the new euro structures such as the Euro Summit with its own president and the European Stability Mechanism. Meanwhile, the Union's actual supranational institutions, the Parliament and the Commission, on the other hand, are only peripherally involved.

From the perspective of national governments, this concealment of transfer of powers has decisive advantages, and allows most of the obstacles to treaty amendments to be overcome in practice. Although all the named procedures still require unanimity, with differentiated integration it is sufficient if all the *participating* member states agree. This also reduces the interdependency of the various reform initiatives, for example when the Eurozone avoids treaty amendments and thus divests London of the veto it could use to press its demands. Above all, this approach allows the timeframe for reform projects to be significantly com-

pressed, by shortening the negotiations, and in particular the ratification process. The Fiscal Compact, for example, was negotiated within three months, and was fast-tracked into effect within nine months (even before all the parties had ratified). That was at least a year faster than any major EU treaty amendment since Maastricht. Additionally, the lack of any formal transfer of sovereignty meant that national ratification referendums were avoided, with the sole exception of the Irish plebiscite on the Fiscal Compact.

However, the disadvantages of covert integration are equally weighty. It violates important principles, whose observance the regular treaty amendment procedure with its high European and national hurdles is designed to guarantee. These are, firstly, transparency and democratic consultation guaranteed by a Convention, which foresees participation by the interested public alongside the European and national parliaments. Although integration steps such as the banking union and Fiscal Compact were not accomplished entirely behind closed doors, they permitted considerably less transparency and participation than a new Convention.

Secondly, the referendums that are required in certain member states to approve transfer of sovereignty lend a treaty amendment additional democratic legitimacy in the eyes of the public. Although it can be debated whether referenda are the right tool for deciding matters such as EU treaty revisions in the representative democracies of the European Union, the precedents mean that the legitimacy of any future major treaty revision will surely be measured by its popular approval, at least in certain states. Nobody has forgotten that citizens voted no in five of the fourteen national referendums on EU treaties since Maastricht.

Thirdly, in the longer term the present processes endanger legal clarity within the European Union as a community of laws whose legitimacy and stability also depend on the observance of principles such as that

of conferred powers. But if existing EU law is overloaded with contradictions created by a plethora of ancillary agreements or distorted by over-generous interpretations to push through integration steps, these practices will in the long term undermine the Union itself.

Possibilities and Limits of Covert Integration

Despite these reservations, national governments appear to regard the arguments against major treaty revisions as so weighty that – at least for the foreseeable future – reforms will be possible only via the diversion of covert integration, if at all. In both neuralgic issues, namely the Eurozone and the United Kingdom, it is therefore necessary to consider which options are possible under these preconditions, where their limits lie, and how they can in the longer term pave the way to a legally and above all politically viable reform.

Options for the Eurozone

It will certainly not be possible to overcome the complex political and economic challenges within the Eurozone solely or even largely through institutional reforms. Nonetheless, all reform proposals that imply any transfer of new powers to the Union formally require a regular alteration of primary law. But in most cases a solution by the route of covert integration is conceivable, at least for a time, as long as a political consensus can be reached beforehand. This can be illustrated with four proposals that are under discussion.

Firstly, there are various ideas for strengthening economic governance within the Eurozone in order to reduce structural divergences in the economic performance and competitiveness of the member states. These reform initiatives start from the diagnosis that the European debt crisis resulted from the weakness of individual member states. The five presidents' report on *Completing Europe's Economic and Monetary Union* pro-

poses setting up national competitiveness authorities (requiring no treaty amendment) and strengthening coordination of economic and fiscal policies between Eurozone states. In the same vein, some political leaders have contemplated granting a strengthened Commissioner for the Euro a veto over national budgets. Such a direct transfer of sovereignty would fundamentally require a treaty amendment, but binding bilateral treaties between the euro states and the Commission would be legally possible at any juncture.

A second strand of reform initiatives is rooted in the diagnosis that mainly attributes the Eurozone crisis to the fact that the common currency denies its members the possibility to devalue their currency or to borrow extensively in order to make major investments, limiting their ability to respond adequately to economic downturns. Addressing this issue in July 2015, French President François Hollande revived the proposal to give the Eurozone an additional fiscal capacity and a common unemployment insurance. The Eurozone could then lend anti-cyclical support to member states in recession and thus reduce structural divergences. This would transform the character of the currency union, with the euro states sharing risks and assuming greater responsibility for one another. Nevertheless, there are possibilities to achieve this without a treaty amendment: the Eurozone states could, for example, apply the instrument of enhanced cooperation in conjunction with Article 311 TFEU to introduce new own resources – for instance in the form of Eurozone taxes that could then be used for instruments such as unemployment insurance. Even in this case, however, unanimity among the euro member states would be required.

Thirdly, the dramatic negotiations with Greece in summer 2015 have revived open discussion about whether and how a state could leave the euro, at least for a certain period. At first glance this would not appear to be covered by the *aquis*, because the introduction of the euro was “irreversible”.

The predominant opinion among experts in European law is therefore that an orderly exit procedure or an insolvency process for euro states would presuppose a regular treaty amendment. Nevertheless, the talks with Athens were accompanied by discussion as to whether Greece could “temporarily” leave the Eurozone – at its own request and with the consent of all the other EU member states – to restructure its debt. One option considered was to use Article 140 TFEU to revoke the original decision to introduce the euro in Greece. While this alternative was ultimately not used in the talks in July and August 2015, it remains in the air in the longer term.

Fourthly, almost all demands for greater powers for the Eurozone contain at least a declaration of intent to enhance its democratic legitimacy. The five presidents’ report calls for a strengthening of parliamentary control of decisions both on the national and the European level, including participation by the European Parliament in the European Semester. French President Hollande has even called for the creation of a Eurozone parliament. However, this could easily complicate the Union’s structures rather than improving their democratic legitimacy. On the other hand it is easily possible to expand the European Parliament’s role in economic governance with the help of regular EU legislation. Furthermore, its statutes would allow the Parliament to establish a special committee for the economic and monetary union with MEPs from the euro states. Via such a committee the European Parliament could directly represent the citizens of the euro states on matters concerning the euro. The national parliaments, too, could expand their coordination without a treaty amendment, by using the Inter-parliamentary Conference established under the Fiscal Compact.

This brief overview suffices to demonstrate that the necessity for treaty amendments is not absolute. Yet at the same time it reveals how contradictory the reform proposals for the Eurozone continue to be.

Even by the route of covert integration, the monetary union can only be adapted and developed if at least the nineteen euro states can agree on common interests. Politically that would require all of them to make compromises that would be domestically controversial, if not explosive.

A Danish Solution for the United Kingdom

Negotiations with the United Kingdom will be similarly complex. With his target of a referendum by the end of 2017, Prime Minister David Cameron has set himself and the Union a clear deadline that more or less precludes achieving regular treaty change. Yet he still demands that reforms for the United Kingdom must be anchored in a permanent and legally binding form, in other words on the level of primary law.

Thus alongside the substance of the talks with London (see SWP-Studie 4/2014), the EU partners will have to agree whether and how they wish to grant concessions without an immediate major treaty amendment. To this end London is already thinking about a so-called “Danish solution”, orientated on the agreement reached with Denmark in connection with the Treaty on European Union (Maastricht Treaty). The “Danish solution” arose in talks between Copenhagen and the then eleven other EC member states after the Danish electorate rejected the Treaty in 1992. After hard negotiations the heads of state and government – notably under British mediation – concluded an agreement promising Denmark opt-outs. Denmark, like the United Kingdom, was excluded from the third stage of economic and monetary union, and exempted from future EU integration in defence policy and in justice and home affairs.

The heart of this solution was an international treaty signed by all the EU member states and annexed to the Treaty on European Union, together with a binding promise to incorporate the substance of the annex in primary law at the next treaty amendment. After their inclusion in the Treaty of Amsterdam, the Danish opt-outs

remain part of the EU treaties to this day. This outcome was achieved without the other EU member states having to undergo a separate ratification process, while the Danish government was able to muster sufficient popular support for membership under the new conditions to win a second referendum. Promises were also made to Ireland in 2008 after its negative referendum on the Treaty of Lisbon, with concessions granted within the scope of the existing treaties (Irish solution). For example the principle of “one commissioner per member state”, which had actually been abolished under the Treaty of Lisbon, was restored by decision of the European Council, permitting smaller states like Ireland to continue to nominate a commissioner. Dublin was also promised that the Common Security and Defence Policy would not violate its neutrality.

A similar solution would be conceivable for the United Kingdom. The now twenty-eight member states would have to make a political declaration and conclude a treaty under international law, defining outcomes to be incorporated in the Treaty on European Union at some point after 2017. This would permit agreement to be reached before the British referendum, while allowing the British question to be tackled separately from reform of the Eurozone. That would also avoid giving London additional negotiating power in the form of a veto over EU treaty reform.

It must be remembered, finally, that there are also limits to such an approach. The Danish and Irish solutions were only possible because all the opt-outs remained within the scope of the existing EU treaties. But as long as the agreement with the United Kingdom does not explicitly contradict the treaty (for example by placing restrictions on freedom of movement), this would open a path to agreement within Cameron’s timeframe without referendums in other EU member states.

A Tricky Balancing Act

A closer look at what are currently the most urgent reform projects reveals that even without major treaty revisions there are certainly legal possibilities for the Union and the Eurozone to move forward and develop substantially.

Yet the essentially political dilemma of EU reform, the neglect of political integration, cannot be resolved in this manner. Firstly, even with these instruments unanimous agreement among the nineteen Eurozone states – and in the case of the United Kingdom the twenty-eight EU member states – remains a necessary condition. Thus even if the hurdles of a major treaty reform, with its referendums and long timeframes, are taken out of the equation, it does not become significantly easier to achieve political agreement on concrete reform projects. Whether with a reform of primary law or without, the biggest political challenge lies first and foremost in persuading the national governments to agree on the necessary reform initiatives.

Secondly, the use of covert integration for substantive reform projects exacerbates the Union’s greatest long-term challenge, namely its lack of democratic legitimacy. If the perception that national governments are implementing integration by the back door without popular participation continues to consolidate, that would be grist to the mill of adversaries like the Front National in France, UKIP in the United Kingdom and others. Without the consent of the people the Union is condemned to failure in the long term. The numerous successes of euro-sceptics in the European elections, and above all the subsequent national elections, have already impaired the functioning of the Union.

In order to resolve this dilemma and reform its structures, the European Union must accomplish a tricky balancing act under the most difficult of circumstances. Unforeseen turns aside, the medium-term political perspective will be dominated by three looming events: German Bundestag elections and French presidential elections

in 2017, and the British referendum in 2016 or 2017. Until then covert integration remains realistically the only means to implement necessary reforms in the Eurozone and achieve agreement with the United Kingdom. The combination of reaching a Danish solution with London and otherwise using the flexibility of the EU treaties as far as possible for the Eurozone could pave the way for actually tackling a treaty revision after 2017: to retrospectively legitimise the reforms introduced by covert integration, integrate extra-treaty elements like the Fiscal Compact into EU law, and complete outstanding expansions of powers.

Germany can and should play a key role in this process. Not only does Berlin occupy at least a leading position in the Eurozone, if not in fact now a semi-hegemonic one. London also orientates its negotiating strategy largely on Germany. If Berlin wishes to advance the Union's development it needs to use these levers, above all to achieve the necessary political agreements in the short and medium term. And in the longer perspective the German government must declare its willingness to tackle the challenge of a regular treaty amendment, including a Convention.

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