XXVIIth FIDE Congress

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Doctoral Student Conference

The Fédération Internationale pour le de Droit Européenn (FIDE) has existed for more than 50 years and has evolved into a remarkable institution within the field of the study of European (Union) law. Pursuant to Article 1 of FIDE's statutes its objective is formulated as:

'The International Federation for European Law is set up, bringing together the national associations created in the Member States of the European Community, the activity of which is devoted to the study and development of the law and institutions of the European Community.'

This objective is largely seen as fulfilled by organising the biennial congresses including the important publications of the proceedings. The congresses enjoy the support of the European Court of Justice, indeed, several judges and advocate generals attend the events. The European Parliament, the Council and the Commission are also represented; interpretation is provided in three languages by staff interpreters of the EU. The Curia of Hungary and the Péter Pázmány Catholic University have the honour to organize the next, FIDE XXVIIth FIDE Congress, which will take place in Hotel Kempinski, Budapest. Congresses are organised under the patronage of the highest dignitaries of the hosts states; the patron of the is János Áder, the President of Hungary.

Pázmány Péter Catholic University
Faculty of Law and Political Sciences

Purpose, place and date of the Doctoral Student Conference

The congresses of the FIDE have evolved gradually, there are events and side events of the congress that are traditionally organized by the hosts. One such preliminary event is the FIDE Doctoral Student Conference which gives young scholars an opportunity to actively prepare for and to present their own research relating to the main topics of the congress in the framework of a half-day event.

The organisers of the XXVIIth FIDE Congress intend to continue in this tradition and host a Doctoral Student Conference on the day preceding the main events of the Congress. The Doctoral Student Section will take place in Budapest (HUN) Pázmány Péter Catholic University, Faculty of Law and Political Sciences (St. John Paul II Ceremonial Hall), on the 18th of May, 2016.

Sections of the Doctoral Student Conference

The Doctoral Student Conference follows the topics and the structure of the Congress, including a key note by an esteemed young scholar, Dr. Matthias Goldmann.

Doctoral students will present their papers in two sections chaired by the three University professors compiling the XXVIIth FIDE Congress proceedings. The two planned sections are:

1) *The banking union,*
2) *The division of regulatory competences between the Union and the Member State* and *Private enforcement in European competition law.*

Programme

FIDE XXVII CONGRESS
WEDNESDAY 18 MAY 2016
(venue: Pázmány Péter Catholic University / Kempinski Hotel Corvinus)

- **OPENING/KEY SPEECH OF THE DOCTORAL STUDENT CONFERENCE (13:30-13:40; 13:40-13:50; 13:50-14:15, 14:15-14:30)**

Opened by: András Varga Zs., Dean of the Faculty of Law, Péter Pázmány Catholic University

Greeting speech of Frank Spengler, Director of the Konrad Adenauer Stiftung's Budapest Office

Key-note by Matthias Goldman, Scholar of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

DISCUSSION

- **Coffee break (14:30-14:50)**

- **PARALLEL SECTIONS (14:50-17:30/17:50)**

SECTION I: EUROPEAN BANKING UNION

Chaired by Dr. habil. Anna HALUSTYIK, DSc.

14:50-15:10 Menelaos Markakis

15:10-15:30 Gianni Lo Schiavo

15:30-15:50 Napoleon Xanthoulis

15:50-16:10 DISCUSSION

16:10-16:30 Coffee break

16:30-16:50 Anastasia Karatzia

16:50-17:10 Ildikó Szabó

17:10-17:30 Olivier Voordeckers

17:30-17:50 DISCUSSION

Section II: DIVISION OF COMPETENCES AND REGULATORY POWERS BETWEEN THE EU AND THE MEMBER STATES

AND

PRIVATE ENFORCEMENT AND COLLECTIVE REDRESS IN EUROPEAN COMPETITION LAW

Chaired by Dr. Marcel SZABÓ, PhD. and Dr. Tihamér TÓTH, PhD.

14:50-15:10 Louise Fromont, Tilen Čuk

15:10-15:30 Márta Delbó

15:30-15:50 Petra Weingerl

15:50-16:10 DISCUSSION

16:10-16:30 Coffee break

16:30-16:50 Plarent Ruka

16:50-17:10 Miriam Buiten

17:10-17:30 DISCUSSION

- **17:50 CLOSING REMARKS**

Lajos Vékás, Vice-President of the Hungarian Academy of Sciences

- **17.00 – 19.00 Registration at Kempinski Hotel Corvinus**

- **19.00 – 21.00 Welcome reception at Kempinski Hotel Corvinus**

Venue

Accomodation

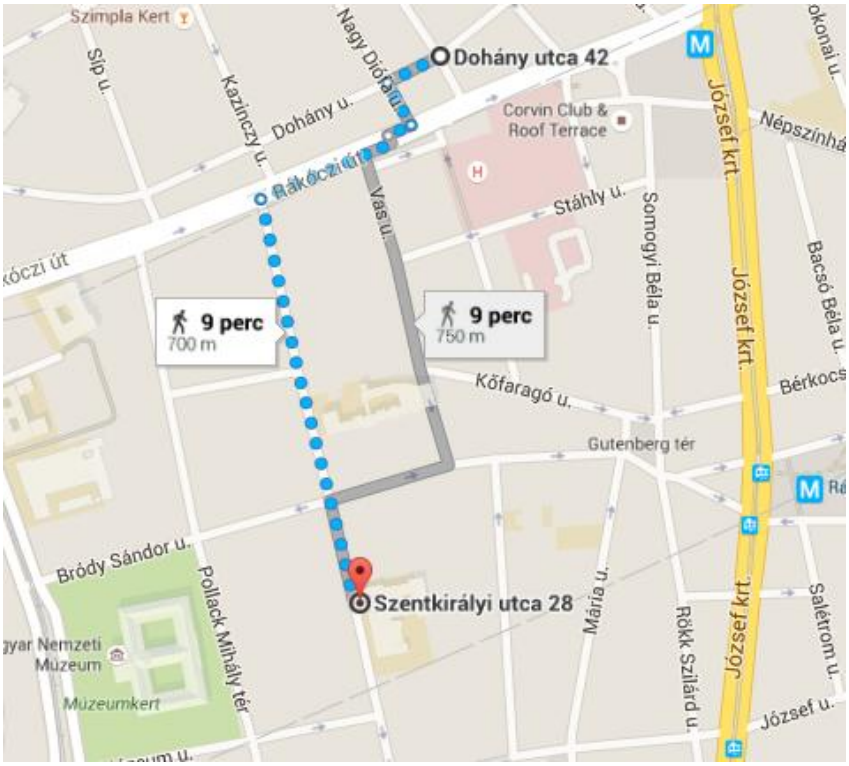
Hotel Continental Zara
Dohány utca 42.
1074 Budapest - Hungary

Tel +36 1 815 1000
Fax: +36 1 815 1001
Email Address: continentalinfo@zeinahotel.com

Conference venue

Faculty of Law and Political Sciences
Pázmány Péter Catholic University
Room Pope John Paul II
Szentkirályi u. 28.
1088 Budapest – Hungary

How to get from the hotel to the conference venue (9 min. walk)



Key note lecture

MATTHIAS GOLDMAN

Constitutional Pluralism as Mutually Assured Discretion: The ECJ, the BVerfG, and the ECB

The key note analyzes the standard of review applied by the ECJ in the Gauweiler case concerning the ECB's OMT policy. It argues that the ECJ's focus on rationality and proportionality checks bears great potential for constitutional pluralism in the European Union. Both standards are relatively vague. This allows each actor to use these standards to keep other actors in check. Their particular virtue lies in the fact that they induce self-restraint in other actors because of their vagueness and because all actors have an interest in keeping the Union intact, or at least in avoiding responsibility for causing serious cracks.

Questions of hierarchy and the ultimate say can therefore remain undecided. The Federal Constitutional Court pursued exactly this strategy in its Solange judgments and the Honeywell decision. If it continues following this line of reasoning, the OMT case would lead to a more robust form of constitutional pluralism in the EU. Under this framework, the ECB would have the possibility to decide, in the frame of its discretion, whether to participate in a sovereign debt restructuring.

Abstracts

SECTION I.

European Banking Union

1. MENELAOS MARKAKIS

University of Oxford

Political and Legal Accountability in the European Banking Union: A First Assessment

The Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) Regulations so far form the main building blocks of the European Banking Union (EBU). The newly-enacted rules impose constraints on national regulatory choice and have led to increased centralisation of authority at EU level. More specifically, these Regulations have conferred significant supervisory, investigatory, sanctioning and resolution powers on the ECB, the Single Resolution Board (SRB), the Council, and the Commission. It is axiomatic that any shift of supervisory or resolution powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements. Moreover, supervisory measures or resolution actions could potentially have a massive impact on public finances, the credit institution concerned, its customers and employees, and the markets in the Member State concerned.

This paper looks at political and legal accountability in the EBU. The discussion begins with the role of the European Parliament and the Council (or Eurogroup) within the framework of the SSM and the SRM. The focus then shifts to the role of national parliaments in the participating Member States in the EBU governance framework. It will be shown that the accountability requirements laid down in the SSM and the SRM Regulations are fairly similar to the ones set out in the ‘six pack’ and ‘two pack’ of EU legislation, the main institutional novelty being that the European Parliament’s approval is required for the appointment of the

Chair and the Vice-Chair of the Supervisory Board and for the appointment of the Chair, the Vice-Chair and the four full-time members of the SRB. The European Parliament and the Council may further change the legal framework of the SSM and of the SRM to ‘sanction’ the Supervisory Board of the ECB and the SRB for the performance of their tasks. The penultimate section of the article focuses on internal administrative review of supervisory measures and resolution actions, which is carried out by the Administrative Board of Review and the Appeal Panel respectively. The final section of this paper considers review by the CJEU and national courts. It will be shown that there are various limitations to judicial review, the bulk of whichis built into the Bank Recovery and Resolution Directive. The problems facing litigants are further aggravated by the complex division of competence between the EU and national authorities in the EBU’s governance structures, as well as restrictive rules on standing and access to documents.

2. GIANNI LO SCHIAVO

PhD researcher, King's College; Legal Counsel, European Central Bank

How the European Banking Union is shaping the new foundational objective of financial stability in EU law and policy?

The financial crisis in Europe has witnessed what European primary law lacks: a codified “financial stability policy" in the EU Treaties to prevent and manage financial crisis in the post-Lisbon Treaty era. As shown by the establishment of the European Banking Union (EBU) to overcome the financial crisis, a number of legal developments in the field of banking supervision and resolution have tentatively attained to shape a de facto “financial stability objective” in Europe.

My first attempt is to show how the Lisbon Treaty maintained a status quo as it did not establish any new primary law rules to foster financial stability in Europe and that the EBU has de facto changed the lack of expressed competence. The reasons for that were mainly that the Lisbon Treaty was negotiated before the outbreak of the banking and sovereign crisis. The absence of such development urged the EU legislators and executives to find other ways to cope with the daunting effects of the financial crisis. These were mainly State aid control, the use of contested or unexplored Treaty legal bases, the exercise of strong regulatory powers.

Against this background, the EBU as a sui generis legal experiment in EU law which fosters financial stability in EU law and policy. Firstly, it is demonstrated that financial stability has acquired a leading role in EU law and policymaking as the overarching de facto objective of the EBU. I intend to provide a definition of the contested concept of "financial stability" under European law by framing it in the context of the EBU and to demonstrate what its normative components are. This can be seen in the formation of a new regulatory, supervisory

and resolution environment for credit institutions in Europe. Questions open to debate relate to the definition of financial stability in the European discourse, the nature of financial stability in the banking framework as a de facto or implied doctrine in the EU, the topicality of financial stability as a driver for banking regulation reform.

Secondly, I intend to explore the renewed institutional balance arising from the de facto financial stability policy in the EU. Firstly, it is clear that the ECB, the Commission and EU agencies are playing a new role that was not warranted before the establishment of the EBU. The Commission has acted as promoter of new EU legislation and as executor of Treaty-based powers, the ECB has been playing a leading role as the new EU supervisor of significant credit institutions in the SSM, EU agencies have been conferred powers to regulate banking markets and even to resolve credit institutions in Europe. In sum, the conferral of new powers to EU institutions and agencies shows that a new balance of powers is taking place in Europe.

My research paper proposal intends to show that the EBU has been shaped to promote a financially "stable" Europe. De jure condendo, this would require a clearer redefinition of competences, tasks and powers in EU primary law.

3. NAPOLEON XANTHOULIS

PhD Researcher King's College London,
Dickson Poon School of Law

European Central Bank, Emergency Liquidity Assistance and the competence-related taboo

The European Central Bank's (ECB) non-standard monetary policy tools are increasingly influential over the Member States' policy making.[1] Focusing on the Emergency Liquidity Assistance (ELA) this paper suggests that the traditional view[2] of ELA provision being an exclusive competence of the National Central Banks (NCBs) is put into question in light of the transformation of the ECB's function within the Eurozone. While the literature has identified the ambiguous role of the ECB in the ELA provision[3] and the controversial use of ELA in the context of the ECB's interference with national policy making,[4] it lacks a systematic analysis of their implications under EU law.

The aim of the proposed paper is threefold, and it is structured as follows. First, the paper examines whether the responsibility for ELA-related acts can extend to the ECB. To this end, a black-letter law analysis of the relevant normative framework is conducted, while suggesting that the NCBs' assumed exclusive competence is overshadowed by the determinative role of the ECB. The power to prevent NCBs from granting ELA by virtue of Article 14.4 ESCB/ECB Statute makes the ECB the ultimate decision-maker on ELA

[1] Thomas Beukers, 'The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention', 50 Common Market Law Review (2013), pp. 1579-1620, 1593; Karl Whelan, 'The ECB's Collateral Policy and Its Future as Lender of Last Resort', Report to European Parliament, Policy Department A: Economic and Scientific Policy, November 2014, pp. 13-17.
[2] Rosa M. Lastra, 'Central Bank Independence and Financial Stability', 18 Revista de Estabilidad Financiera (2010), pp. 51-66, 65; ECB, 'Emergency liquidity assistance and monetary policy', ECB's official website.
[3] Hal S. Scot, 'The Federal Reserve: The Weakest Lender of Last Resort Among Its Peers', International Finance (2015), pp 1-22, 6.
[4] See e.g. Ian Jack, Tom Cassels, 'Cyprus: an analysis of the impact of the resolution methodology on stakeholders' claims including the emergency liquidity assistance', 8(4) Capital Markets Law Journal (2013), pp. 450-463, 459-460.

provision. Moreover, the analysis is contextualised within the broader debate on the legal nature and reviewability of ECB's nonstandard monetary policy measures,[5] with reference to the OMT programme. It is suggested that the ECB's involvement, whether by objecting or not to the ELA provision, constitutes an act of an EU institution which produces binding legal effects and therefore, can be subject to judicial review by the CJEU.

Second, the paper argues that the ECB's criteria in determining the continuation (or not) of the ELA blur the division of competences between the ECB and the NCBs[6] in light of the former's involvement in the design and adoption of EU/IMF programmes. This is for two reasons. First, a financial institution's insolvency is directly linked to the prospects of an EU/IMF programme. Second, the prospects of an EU/IMF programme per se depend on the parties agreeing to the accompanying conditionality. Yet, the possibility, as well as the timing, and conditionality of such programmes are co-negotiated and co-decided by the ECB in its capacity as a member of the Troika and its participation in the Euro Group. The ECB's dual role in this respect transfers the attribution of ELA-related acts from the national level to the Union level. The paper explores three case studies (Ireland, Greece and Cyprus) to show how the ECB threatened to cut-off ELA, unless the respective governments agreed to specific economic policy measures and structural reforms in the context of an EU/IMF programme.

Third, the paper analyses how the CJEU may respond if confronted with the question of legality of ELA-related acts. We discuss the possible impact of the recent Gauweiler judgment[7] thereon, particularly regarding the determination of the scope of the ECB's mandate under the Treaties and the applicable standard of review of monetary policy decisions.

[5] Fabian Amtenbrink, 'General Report on Topic 1: The Economic and Monetary Union - Constitutional and Institutional Aspects of the Economic Governance within the EU' in Ulla Neergaard, Catherine Jacqueson & Jens Hartig Danielsen (eds.) The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol. 1, pp. 170-173.

[6] Rosa M. Lastra, 'The Division of Responsibilities Between the European Central Bank and the National Central Banks within the European System of Central Banks', 6 Columbia Journal of European Law (2000), pp. 170-180, 172- 173.

[7] Case C-62/14, Gauweiler, EU:C:2015:400.

4. ANASTASIA KARATZIA (presenter)
Doctoral Candidate, University of Surrey, and Lecturer, Erasmus University Rotterdam

& **THEODORE KONSTADINIDES**,
Senior Lecturer, School of Law, University of Surrey

Who is responsible? The issue of liability in the context of EU macroeconomic adjustment programmes and austerity measures

Structural changes in the form of macroeconomic adjustment programmes undertaken in defaulting EU Member States in order to receive condition-based loans from the European Central Bank (ECB) have exacerbated conditions of high unemployment rates, poverty, and discrimination. It is also generally perceived that the framework of responsibility for democratic and fundamental rights has not been properly clarified with regard to certain crisis management mechanisms that were established during the financial crisis. This paper explores the relevance of fundamental rights in EU monetary policy and explores in particular the issue of liability for the imposition of austerity measures.

In doing so, the paper reflects on whether measures adopted to safeguard EU economic stability constitute an encroachment of fundamental rights and, if so, whether such an intrusion can be sanctioned, and what remedies are available. A number of cases were brought before national courts challenging governments vis-à-vis the legality of austerity measures at home. Such litigation in various national courts presents evident similarities but also notable differences. Instead of presenting a separate account of litigation from each Member State, the discussion will revolve around the common aspects and the noticeable divergences characterising the saga of litigation against austerity measures. These cases were largely dismissed by national courts, whilst some were referred to the European Courts. The paper will look into the effect of fundamental rights in claims litigated by private individuals both at national level (against states) and at the EU level (against EU Institutions).

It is observed that not only these cases were largely dismissed by national courts, which protected their governments from liability, but that Luxembourg judges also denied to sanction Member States for passing extreme adjustment measures or to transfer responsibility

to the EU Institutions. The CJEU and the General Court treated fundamental rights challenges emerging out of austerity measures as consequences or side-effects of the sovereign decision of defaulting Member States to implement macroeconomic adjustment programmes in order to be bailed out/in.

Since a number of the relevant cases have been refused admissibility before the CJEU, a further knock-on effect on fundamental rights is revealed, namely the right of access to justice. Therefore, the paper subsequently focuses on the relevance of procedural rights at the national and supranational level and how these rights affect individuals' challenges to crisis-related financial measures taken at the EU level. In light of our conclusions, we will finally discuss whether there could be any liability of the ECB or other EU Institutions in future litigation. This is especially pertinent as it examines whether and to what extent the measures that are subject to the challenges can be attributed to actors other than national governments.

5. ILDIKÓ SZABÓ

PhD student at the Pázmány Péter Catholic University Faculty of Law and Political Sciences; tax administrative officer at the Ministry for National Economy

The resolution regulation with outlook of the Hungarian National Bank's resolution activities

In my presentation I would like to describe the Hungarian resolution regulation: its concepts, its general objective, the resolution authority and its framework.

The concept of resolution refers to the restructuring, out of public interest and through the use of official force, of a distressed financial institution or group due to insolvency, in order to maintain financial stability and ensure the protection of clients.

The general objective of resolution is to provide enhanced protection for depositors, maintain financial stability, ensure the continuous availability of critical functions provided by the financial sector, efficiently manage institutional crises and minimise the use of taxpayer funds for crisis management purposes. To that end, resolution establishes the framework necessary for the administrative restructuring of distressed financial institutions.

In the wake of the financial crisis of 2007-2008, it has become clear that, in the absence of an effective framework for managing the distress of financial institutions, only conventional insolvency proceedings (e.g. liquidation) are available. Under such circumstances, institutional distress may spark other processes that can put financial stability at risk, which can then only be averted at the expense of significant taxpayer-funded bailouts. As an alternative approach to crisis management, resolution serves to prevent these scenarios.

In the field of financial stability and crisis management, the resolution framework represents an international best practice. The pertaining EU Directive — which is also intended to promote the harmonisation of resolution law — was passed in April 2014. Contents of the Hungarian act are aligned to that of the Directive and are aimed at transposing its concepts into Hungarian law. The Hungarian National Bank shall act as the resolution authority.

The resolution framework will primarily apply to credit institutions and investment enterprises headquartered in Hungary, as well as to financial undertakings subject to consolidated supervision. Furthermore, the legislation will also apply to financial and mixed holding companies headquartered in Hungary, as well as the Hungarian affiliates of institutions based in a third country.

Resolution may commence if all of the following three conditions are met:

a) actual or foreseeable insolvency,

b) no other means are available to restore solvency,

c) it is of public interest.

Crisis management by way of resolution provides the authority with more powers than supervision itself: not only can managerial rights be revoked but the owners' power of disposal may also be suspended and their decisions are made by the resolution authority during the procedure. With the introduction of resolution, the range of options available for crisis management is now expanded, allowing for its use at certain types of institutions if supervisory crisis management ends in vain. This way, the MNB can guarantee that critical functions remain unaffected (for instance, deposits remain available and do not get ‘frozen’, thus warding off the need for indemnification by the OBA).

At least, I would present a Hungarian resolution case (MKB Bank Zrt.) in briefly.

6. OLIVIER VOORDECKERS

PhD researcher at the University of Luxembourg

Within the Single Supervisory Mechanism ('SSM'), the European Central Bank has the power to apply national law, in order to ensure that supervised banks comply with national banking regulation implementing the Capital Requirements Directive IV.[8] The SSM therefore introduces an unprecedented executive interaction between European and national legal orders, as it is the first time that a European institution is charged with the direct application of national law.[9] The ECB's early supervisory practice suggests that this new executive interaction will simultaneously challenge the normative interaction between European and national legal orders. This hypothesis is based on the combination of three main observations.

Firstly, banking regulation is still partially national because the European legislature lacked the Treaty basis to adopt a Regulation, which forced it to leave certain rules to the national sphere by adopting a Directive.[10] In other words, the Treaty did not allow for full harmonisation of certain rules. However, in order to promote supervisory convergence, CRD IV empowers the European Banking Authority to issue non-binding guidelines to national banking supervisors, providing guidance on topics such as sound remuneration policies[11] and the assessment of qualifying holdings[12] as well as the suitability of members of the bank's management body[13].

[8] Council Regulation 1024/2013 of 15 October 2013, OJ L 287/63, Article 4(3).
[9] Andreas Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?' (2014) 21 Maastricht Journal 89.
[10] Council of the European Union (Opinion of the Legal Service), Interinstitutional Files 2012/0242 (CNS) and 2012/0244 (COD), ST14752/12 (Brussels, 9 October 2012), para 19.
[11] EBA Guidelines on sound remuneration policies, Final Report of 21 December 2015, EBA/GL/2015/22.
[12] Draft Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, Joint Consultation Paper of 3 July 2015, JC/CP/2015/003; CEBS Guidelines on the prudential

Secondly, national banking supervisors previously enjoyed discretion in the application of national rules, although subject to non-binding EBA guidelines. Within the SSM, the ECB can determine how national prudential regulation will be applied, potentially rendering EBA guidelines binding in practice. The ECB can furthermore enforce its position on the interpretation and application of national rules through the broad supervisory powers conferred on it by Article 16 of the SSM Regulation. These powers make it possible to impose binding decisions directly on supervised banks. The ECB can thereupon enforce those decisions independently through the ECB-specific sanctioning regime foreseen by Article 18(7) of the SSM Regulation.

Thirdly, as the Court of Justice of the European Union is exclusively competent to review ECB acts, the above-described direct enforcement of national banking law by the ECB seems to happen outside the control of the national judiciary.

The aforementioned observations suggest that even though there is no Treaty basis for further harmonisation through legislation, the Single Supervisory Mechanism might give rise to "harmonisation through enforcement". How can this phenomenon be understood, conceptualised and framed in the landscape of European law?

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assessment of acquisitions and increases of qualifying holdings in the financial sector required by Directive 2007/44/EC, CEBS/2008/214.

[13] EBA Guidelines on the assessment of the suitability of members of the management body and key function holders, 22 November 2012, EBA/GL/2012/06.

Section II.

DIVISION OF COMPETENCES AND REGULATORY POWERS BETWEEN THE EU AND THE MEMBER STATES

AND

PRIVATE ENFORCEMENT AND COLLECTIVE REDRESS IN EUROPEAN COMPETITION LAW

7. LOUISE FROMONT

Aspirante F.R.S. – F.N.R.S. at the Perelman Centre of legal philosophy of the Free University of Brussels (ULB)

TILEN ČUK

PhD Student at the Perelman Centre of legal philosophy of the Free University of Brussels (ULB)

The ECB, the non-conventional measures and the confusion of competences between European Union and its Member States

In order to respond to the sovereign debt crisis, a wide range of measures have been adopted within the framework of the European Union (the six-pack, the two-pack, …) or outside the European Union (the Treaty establishing the European Stability Mechanism (TESM), the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, called the Fiscal Compact, …)[14]. In particular the six-pack, the two-pack and the Fiscal Compact have tightened European control over the Member States budgetary policies[15]. These measures may have partly corrected EMU asymmetry[16]. But, by strengthening the

[14] L CLÉMENT-WILZ, « Les mesures anti-crise et la transformation des compétences de l'Union en matière économique » (2014) 134 *Réformer l'Europe* 103-104 ; F ALLEMAND and F. MARTUCCI, « La nouvelle gouvernance économique européenne » (2012) 1 *Cahiers de droit européen* 17 ff.

[15] P CRAIG, « The financial Crisis, the EU Institutional Order and Constitutional Responsibility » *in* F FABBRINI, E HIRSCH BALLIN and H SOMSEN (eds), *What form of government for the European Union and the Eurozone ?* (Oxford, Hart Publishing, 2015) 17, 26-27.

[16] The EMU asymmetry has been denounced over the last decade. Indeed, wihtin the primary law Framework of the EMU (put into place by the Treaty of Maastricht), the monetary policy have been communitarised (Articles 127 *et seq* TFEU) whereas the Member States can only coordinate their economic policies within the Council framework (Articles 120 *et seq* TFEU) ; see C CALLIESS, « The governance Framework of the Eurozone and

interactions between the monetary and budgetary policies it have led to their confusion and therefore to the confusion of competences between European Union and its Member States. Although the legal issues are most often formulated in terms of EU constitutional organisation, little or none has been said of the underlying basics of economic policy that provided elements for such distribution of competences.

Monetary and budgetary policies are two faces of the same coin. The only difference is in the distribution channels through which the government affects the economy. However, non-conventional monetary policy uses similar channels to budgetary policy. In fact, there is little or no difference for any individual actor to either be granted a State aid for some investment or have her existing debt bought off by the central bank. Accordingly, such non-conventional monetary policy, by its nature primarily intended for the purposes of economic stabilization, encroaches on the budgetary policy having much stronger redistributive and allocative effects. Outright economic nature of monetary policy affects the social rights, fundamental rights etc. Despite the huge consequences of these anti-crisis measures, the distribution of competences in the primary law between the European Union and its Member States remains the same.

The purpose of this paper is double. Firstly, it hopes to demonstrate that through non-conventional measures and outright monetary transactions modern central banks push monetary policy into the domain of budgetary policy and identifies some oppositions : EU vs. Member States, ECB and European Stability Mechanism institutions vs. Member States, Eurozone vs. all EU Member States, ECB vs. investors (i.e. individuals). Secondly, this paper proposes to analyse, given the consequences of this shift on the possibility for the Member States to exercise other competences (social, fiscal, …), the issues due to the nature and the legal applicability of acts of the ECB (ECB accountability, democratic control, …). In order to show the conflicts in economic theories underlying the present EU constitutional organisation, the institutional and constitutional issues and hopefully provide some elements of answer to the debate, the analysis will take place under economic and legal perspectives. The guiding lights of this demonstration will be the recent ECJ case law, in particular the Gauweiler and Accorinti affairs[17] which deal respectively with the Outright Monetary Transactions and the liability of the ECB in connection with the restructuring of Greek public debt.

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the Need for a Treaty Reform » *in* F FABBRINI, E HIRSCH BALLIN and H SOMSEN (eds), *What form of government for the European Union and the Eurozone ?* (Oxford, Hart Publishing, 2015) 35, 35 ff and the scholars referred to therein ; N DE SADELEER, « L'architecture de l'Union économique et monétaire : le génie du baroque » *in* S DE LA ROSA, F MARTUCCI and E DUBOUT (eds), *L'Union européenne et le fédéralisme économique* (Bruxelles, Bruylant, 2015) 143, 144.

[17] Case C-62/14 *Gauweiler e.a*. (2015) EU:C:2015:400 ; case T-79/13 *Accorinti e.a. / BCE* (2015) EU:T:2015:756.

8. MÁRTA PÉTER-DELBÓ

The role of local authorities within the European Union

Nowadays there is no question that the EU takes effect on local governments. The main question is how strong and in what way is realized this influence.

If we examine the public administration system of the EU countries, it can be ascertained that there are local authorities in every country; however their systems are not uniform. The difference lies in the variant historico-political traditions of the countries, and these elements determine the structure and the legal status of the local governments. For example in some countries there is a two-level (local and regional) system, but the larger states typically operate a multi-level system. The functions and the tasks of the local governments are varied as well.

Nevertheless similarities are also realized in the local government systems, because there are general principles, which are present in every European legal system. For example, the main goal in every country is that the public affairs of local interest should be managed close to the clients. Also a general feature is that the system of local governments is regulated and controllable.

Most European countries have a problem because their municipalities system is fragmented. In this case it is very difficult to provide an effective public service mission. The maintenance of the local offices is very expensive as well.

The disposal of these difficulties differ by countries, however the unifying effect of the EU is noticeable too. Of course the member states have sole jurisdiction in areas related to the establishment of the local government system, but there are regulations of acquis communautaire which affect the operating of the local authorities. Besides the local governments and their international organizations have a part in the decision-making process of the EU. In the Community legislation the Committee of Regions represent the local and regional interests as well. The other main goal of CoR is to connect the EU institutions and other bodies with the citizenship of the Member States.

Beyond all questions the local authorities is an important democratic value without it Europe cannot be in existence. In this disintegrating world the main mission of the EU is to find the right solution of the allocation of power in order to keep the local collectivities's creative power and provide the unity in diversity.

9. PETRA WEINGERL

University of Oxford

The CJEU and the Effective Private Enforcement under Competition Law: Interpretative Principles as Vehicles for a Further Development

The paper will deal with private enforcement under competition law and the role of the Court of Justice of the EU (CJEU) in building the architecture for the effective private enforcement through the interpretative principles. The paper will consist of three parts.

First, it will set out the current legal framework for private enforcement of EU competition law, with a special emphasis on actions for damages, and address flaws in this structure. In this context, the EU law approach towards the nature and functions of damages actions will be briefly sketched, discussing the interpretative approaches chosen by the CJEU in its case law and the Commission's policy choices made (focusing on the Directive 2014/104 on antitrust damages actions (Directive 2014/104)). In this part, the EU acquis before and in the aftermath of the Courage decision will be examined, showing that damages in the EU competition law are the result of jurisprudential innovations and legislative developments.

Second, against this background, the CJEU's role of the motor of Europeanization of private liability rules through interpretative principles will be assessed. The right to damages articulated in Courage (and now codified with the Directive 2014/104) is remarkably extensive in principle. However, certain aspects are left to be governed by the national laws under the so-called national procedural autonomy. Still, such national rules shall comply with the twin principles of effectiveness and equivalence and are subject to the CJEU's scrutiny. In some recent cases, the CJEU has demonstrated how far the principle of effectiveness can be stretched. In this context, this principle can be seen as a potential vehicle for further judicial development of effective remedies in EU competition law, or even EU law generally. The CJEU's interpretation enables to break through the established concepts of national private liability rules (such as a causal relationship or a causal link in the case of Kone) through reliance on the anxiety to achieve the effective enforcement of EU law rights. In so doing, the CJEU's balancing of the twin principles seems problematic, as the CJEU tends to put more emphasis on the principle of effectiveness, while it almost disregards or at least suppresses the

principle of equivalence in assessing the national rules' compliance with these two principles. However, the equivalence element is essential to the test for compliance by Member States with their duty to ensure the effet utile of EU law under Article 4(3) TFEU. The paper will dwell on these issues and on their ramifications for the domestic legal systems.

Such an ambitious exercise of 'judicial Europeanization' of remedies in private enforcement under competition law is loaded with constitutional issues, such as competence and legitimacy, which will be accentuated in the third part of the paper.

10. PLARENT RUKA

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The limitations of the common commercial policy as an exclusive competence of the European Union

The division of competences between the European Union (EU, or Union) and its Member States is characterized by a dynamic equilibrium. This equilibrium has significant implications on the internal and external affairs of the EU polity. While the shared competences attract more interest due to the uncertainties related with their exercise, the definition of the exclusive competences also raises significant theoretical problems of practical relevance. For example, although the common commercial policy is determined in the EU Treaties as an exclusive competence of the EU, its exercise is inextricably linked with attributes of the Member States, which are rooted in their residual (sovereign) powers. Hence, the category of exclusive powers of the Union is only virtually recognized as such. In reality, the Member States play a determinant role for their exercise.

As a matter of illustration of this constitutional problem, one could mention the fact that although the EU is exclusively competent to conduct the common commercial policy, the Member States still withhold significant attributes for pursuing their own trade and investment policy. Although the WTO Agreement could be conceptualized within the realm of the common commercial policy of the Union, the Member States still cannot be substituted from the Union, inasmuch as they retain powers that cannot be absorbed within the scope of the exclusive competence, such as the public health and public moral. Similarly, the Treaties do not allow the EU to enter into international investment agreements that affect the attributes of the Member States without the unanimous consent of these latter (Article 207(4) TFEU). Moreover, often the Member States conclude jointly with the EU certain international

agreements that exceed the scope of common commercial policy or even the scope of the conferred competences of the Union. These examples justify the construction of these international agreements as mixed agreements, where the EU and its Member States enter with their powers and complement each other.

All these issues raise a question in terms of the possible limitations of the common commercial policy as an exclusive competence. Such limitations emerge from the Treaties as well as from the constitutional practice in the Union polity.

The proposed paper aims at highlighting the constitutional problem from the perspective of an evolving and quite dynamic nature of powers. This problem raises concerns in terms of the legal stability and certainty of the exercise of exclusive competences in general and common commercial policy in particular. The main research question is then to elaborate the limits of the common commercial policy as an exclusive competence in its way of deepening the European integration. It is because of these limitations that the category of exclusive competences should not be overestimated. The underlying thesis of this paper criticizes the designation of the common commercial policy as an exclusive competence, and argues that this designation does not suffice for endorsing legal certainty in the Union polity.

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Coordinating on the Passing-on Defense: How can Civil Courts in Europe Avoid the American Pitfalls?

In private antitrust damages claims in the European Union, civil courts increasingly face the question which party in the supply chain ultimately suffered the harm of higher prices resulting from anti-competitive conduct. Defendants raise the so-called passing-on defense, arguing that the claimant passed on the harm to downstream customers.[18] Up until recently, the civil law of each Member State determined whether this passing-on defense is allowed, and whether indirect purchasers have standing in civil court. The new EU Directive on antitrust damages actions ("the Directive") now clarifies that the passing-on defense is permitted and that indirect purchasers have standing.[19]

Nevertheless, the Directive leaves it up to national courts to determine in specific cases to what extent harm was passed on. With damages litigation regarding the same antitrust infringement regularly taking place in multiple Member States, the potential problem is for courts to reach different verdicts regarding the amount of passing-on. As a result, defendants may face no damages liability (or, multiple liability) for their anti-competitive conduct. The Directive states that national courts should have "appropriate procedural means" available to avoid inconsistent rulings,[20] but it has been questioned whether the suggested mechanisms - the joinder of cases and guidelines on damages quantification - will be adequate to avoid inconsistent rulings (Büyüksagis (2015), p. 25).

This paper addresses the question which mechanisms may be effective to overcome the coordination problems faced by civil courts regarding the passing-on defense. The paper evaluates four possible coordination mechanisms: harmonizing rules on damages quantification through regulation or via the Court of Justice, consolidating claims in one national civil court, and awarding a single court jurisdiction. The first mechanism aims at preventing conflicting verdicts altogether, whereas the latter focus on creating a single

[18] 1See e.g. the cases English High Court, [2013] EWHC 822 (Ch), HC08C03243 (National Grid/ABB), and District court Arnhem-Leeuwarden, 2 September 2014, ECLI:NL:GHARL:2014:6766 (Tennet/ABB). See also Maier-Rigaud (2014).
[19] Directive on Antitrust Damages Actions OJ L 349, 5/12/2014, Article 14. See http: //eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN.
[20] Directive, preamble no. 44 and Article 15.

decisive authority. The paper assesses to what extent these mechanisms are practically feasible, whether they are in line with procedural justice and if they would be effective to prevent multiple or no liability-outcomes. The paper evaluates the mechanisms in light of the experience in the United States, where varying rules on federal and state levels regarding the passing-on defense and indirect purchaser standing have created an "environment of litigation disorder and forum shopping" (Cengiz (2010), p. 48).[21] Parallel litigation regarding the same case in multiple jurisdictions has resulted in duplication of litigation costs and, at times, in inconsistent rulings leading to multiple or no liability of the defendant. In 2007, the Antitrust Modernization Commission called for reform to address the litigation disorder, proposing to consolidate all actions related to the same conduct before a federal forum.[22]

The American experience as well as the reform may serve as an example for the European Union. Despite the major differences between the two systems, both the United States and the European Union are multi-level polities with diversity in the legal rules of the various jurisdictions. The American experience with the passingon defense may therefore offer valuable lessons in terms of the design of procedural mechanisms to coordinate parallel litigation (Cengiz (2010), p. 51).

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[21] Federal rules do not permit the passing-on defense since the ruling in Hanover Shoe v United Shoe Machinery Corp 392 U.S. 481 (1968) (see paras 493-494), and indirect purchasers have no standing since Illinois Brick Co v Illinois 431 U.S. 720 (1977). At the time, the prohibitions spurred a heated debate regarding the efficiency of antitrust enforcement and compensatory justice. See, for instance, Landes and Posner (1979), Harris and Sullivan (1980), Werden and Schwartz (1984) and Richman and Murray (2007), pp. 70-71). As a response, the majority of American states enacted laws, so-called Illinois Brick Repealers, that permit the passing-on defense and indirect purchaser standing to various degrees, and in varying ways (Cavanagh(2004),p.19).

[22] Antitrust Modernization Commission, 'Report and Recommendations'. April 2007, http: //govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

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