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LEGALLY RECOGNISING THE AUTHORITY OF THE EUROGROUP

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SUMMARY

The current "semi-intergovernmental" (Keppenne 2014) and legally indeterminate (Takis 2019) form in which power is exercised in Europe's economic governance structure – an outcome of the Eurozone (EZ) crisis – poses serious challenges to the legitimacy of a social order that is purportedly based on legally-constituted authority, as expressed in the division of powers at national and supranational scales and the principles of rule-of-law and legal certainty in the EU Treaties.

In what follows, the focal point of this problem is pinpointed as well as its background and context. Then, the research objective and methodology used to investigate the conditions of how this legal arrangement developed during the crisis are briefly outlined. Finally, the findings are presented, followed by recommendations.

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INTRODUCTION

The policy issue

The Eurogroup played a key role during the EZ crisis in negotiating policy conditionality and its imposition on EZ member states in need of financial assistance, and yet it is recognised only as informal group in the Treaties, and cannot be held accountable for any of its decisions. Moreover, their double role as the Board of Governors on the European Stability Mechanism (ESM), an international financial institution based on international law, means that the extent of their power is not clear as it falls between two legal structures (see also Kilpatrick 2017). Furthermore, the path to this institutional arrangement reflects the instrumental use of law to achieve short-term political and financial goals based on the more powerful Northern member states' preferences, which is justifiable under urgent crisis conditions, but need to at some point be reconciled with principles of rule of law and legal certainty the basis on which EU authority structures, which encompass the Eurogroup, depend for their conferred power, even when that power is de facto and not yet de jure (Craig 2017). This poses a legitimacy problem for the EU and must be rectified by having the Eurogroup formally recognised in the Treaties.

Background and context

In 2010, the Eurozone (EZ) crisis erupted in the European Union (EU) and continues to raise critical questions about the macro-economic governance structure of the EU. Key changes have been the creation of various financial mechanisms which are anchored in hybrid legal arrangements as well as the reconstruction of Europe's sovereign debt markets in a bid to avoid future bailouts. Finally, countless citizens in Southern Europe have

suffered under austerity measures imposed on the basis of policy conditionality.

Prior to the crisis, EU law has been relatively absent in the area of economic governance, mainly because economic policy has been left to the member states with the aim of economic coordination while state-financing has been left to financial markets. With the advent of the Eurozone crisis in 2010, the lack of institutional tools and expertise needed to deal with issues of economic policy and sovereign debt gave rise to an intense expansion of a novel and complex economic institutional structure in the form of various legal mechanisms and regulations. Financial assistance was based on the European Financial Stability Facility (EFSF), European Financial Stability Mechanism (EFSM), the European Stability Mechanism (ESM), while debt and deficit discipline was based on the Fiscal Compact, EU legislation in the form of Six-pack, Two-pack, and upgrading the Stability & Growth Pact, and finally the financial system saw the creation of Banking Union, European Banking Agency (EBA) and the ECB's use of 'unconventional' monetary policy tools, notably, the Outright Monetary Transactions (OMT) and the Public Sector Purchase Programme (PSPP).

The political narrative and media coverage of the sovereign debt crisis purported that the cause of the crisis was high debt and deficit levels of Southern EZ member states, and thus austerity in the form of structural reforms (policy conditionality) was imposed on these states. However, the plethora of laws and mechanisms indicates that there were multiple issues with the economic and monetary union, much more than simply high debt and deficit levels. Thus, these institutional outcomes cannot be explained by their 'functional need', but are rather the translation and ordering of political struggles between power elites – their preferences – by legal and policy professionals in the execution of their legal practices. Moreover, the now contested and problematic nature of these institutional outcomes is becoming clear in legal terms, and are posing a problem of legitimate authority in the broader institutional structure of EU economic governance.

Research objective and methodology

The main objective of my research was to investigate how legal and policy professionals legitimated the EZ crisis policy response and thereby explain the institutional outcomes of this response. I hypothesised that the way this policy response was legitimated – a rational-legal mode reflected in the practices of the legal and policy professionals during the crisis – would directly shape the institutional outcomes, i.e. the economic governance structure in the long term. A further hypothesis is that these practices are partially done for self-legitimating purposes, i.e. part of governing is legitimating the exercise of one's power to oneself in order to reproduce one's powerful position, especially when it is highly intrusive. This becomes more critical when it is not clear whether or not intrusive acts are in line with the broader framework in which they occur, in this case the EU legal order, especially if that order is not to be undermined by the excessive use of intrusive power, such as the imposition of austerity policies. This hypothesis is based on a sociological approach using Bourdieusian (Bourdieu 1996) and Weberian perspectives of legitimate authority and government (Barker 2001), elite professionals (Dezalay and Garth 2002; Vauchez 2011), and power (Kauppi & Madsen 2014; Weber 1978).

The first stage of my methodological approach was to locate the relevant legal and policy professionals that had been involved in the EZ crisis policy response, and were visible in professionals fora and/or considered by peers as being sufficiently involved in a professional capacity. The data were collected by 1) locating professionals involved in high-profile CJEU court cases on issues related to the EZ crisis policy response; 2) interviewing these respondents, and 3) getting referrals from them of other legal and policy professionals involved. A snowball sampling technique was used to get referrals until a saturation point was reached. This data were used to construct a network based on legal professionals' practices (legal advice, legal drafting, and litigating), i.e. the professionals connections between these actors. The network illustrated the interconnections between the social fields implicated in the key struggles that have defined the institutional outcomes of the EZ policy response.

Theoretically, I conceive of the above-mentioned *social fields* and fields of power in which the politically and financially powerful struggle over the stakes of the crisis; the network of legal and policy professionals tells us about the professional practices that order and rationalise these struggles as said practices legitimate the EZ policy response.

KEY FINDINGS

Accountability

The analysis of the legal practices based on the network found that the process of legitimating can be broken up into three dimensions: enabling, consolidating, and defending/contesting. Legal and policy professionals enabled solutions by strategically interpreting legal rules to accommodate financial and political preferences. At a critical point, it was determined that any financial assistance over a certain threshold (€60 billion) would be a violation of the EU budgetary ceiling, which heralded a shift from the EU legal framework and into another jurisdiction thereby giving the solution a different legal form based on that jurisdiction. Hence the creation of the EFSM under EU law, but then the creation of EFSF under Luxembourgish law, and then the ESM under international public law. Moving between jurisdictions raises issues of legitimacy and accountability, so the EU legal professionals connected these two later solutions to the EU legal framework by explicitly referring to EU jurisdiction and competence, thereby entangling the jurisdictions with each other. These linkages were made to ensure compatibility and consistency between primarily two legal structures, the EU legal order and the ESM legal order, but also has the effect of blurring the boundaries between the jurisdictions; and thus the legally constituted authority of each contaminates the other, making it ambiguous as to the accountability of EU entities operating in the ESM legal order.

Legitimation

These practices which legitimated the EZ policy response illustrate the highly complex nature of the policy response, while also reflecting its dubious justifications. The overall objective of all these mechanisms – primarily ESM – was purportedly to safeguard 'financial stability of the Euro area as a whole' (ESM Treaty Art. 3), and in order to legally validate the ESM, strict conditionality was stated as the way to achieve financial stability. Indeed, this is how CJEU interpreted the ESM Treaty in terms of its compatibility with EU law, particularly Article 125 TFEU. In other words, a legal reality was construed whereby financial assistance from the ESM to a Euro-area member state was compatible with EU law on the condition that strict conditionality would be imposed on said member state.

In empirical reality, financial stability was engendered by ECB President, Mario Draghi's statement, followed shortly thereafter by the announcement of OMT, a sentiment shared by the respondents in my research. This matters because it is not clear how imposing policy conditionality on financially weak member states safeguards 'financial stability of the Euro area as a whole', when financial stability is defined as "a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances" (ECB website)[1]. This of course refers more to the creation of the Banking Union, which is no doubt a key element in making EMU more robust, but not to policy conditionality. Moreover, the notion of financial stability remains a "protean concept, with various manifestations and different understandings of its basic aspects", as noted by Yves Mersch, Member of the Executive Board of the ECB[2]. This means that its legal definition is not clear, and it is difficult to see how it can then be part of legally legitimating strict policy conditionality.

POLICY RECOMMENDATIONS

- The instrumental use of law is politically expedient but comes at the cost of rule-of-law requisites of clarity and predictability (Kilpatrick 2015). Now that the EZ crisis has subsided, the Eurogroup should now be recognised as a formal body of EU law, otherwise the EU legal framework will be seen to lack legal accountability and thereby legitimacy.
- The ESM should be unionised into the EU legal order, as proposed by the European Commission under its European Monetary Fund policy proposal. The ESM is tightly linked to the EU legal order and at this point, now that the EZ crisis has abated, it creates unnecessary ambiguity contra principles of legal certainty, to have it under public international law.

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[1] See at https://www.ecb.europa.eu/pub/financial-stability/html/index.en.html.

[2] See at https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180906.en.html.

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