

The Bank, the Court, and the Crises

The last few years of European integration have been marked by crises. Many EU lawyers (or at least this EU lawyer) have been turned into adrenaline junkies, opening their newspapers in the morning both anticipating and dreading the next development. However, when stepping back from the day-to-day cut and thrust, the European responses to the crises may reveal something deeper about the integration project. Take the eurocrisis and the rule of law crisis. At first sight, they seem far apart. Yet there are some lessons to be drawn from a comparison between the two.

First, in both cases the response of the political institutions was or has been somewhat ineffectual. We remember how in the critical weeks and months of the eurocrisis the European Council would regularly meet and come up with new initiatives that calmed the markets for a few days but ultimately achieved little. The overwhelming sense was of too little, too late. In the main, the national politicians looked after the national interests – not the common European interest. In the same manner, in the rule of law crisis the Article 7 TEU process has brought political dialogue and hearings, but little in the way of actually solving the issues. ‘The nuclear option’ metaphor certainly needs to be rethought, unless a nuclear war in reality just involves a lot of inconclusive and slightly uncomfortable meetings.

The ineffectual responses of the political institutions stand in stark contrast to the strategic and effective action by the independent non-political EU institutions: the European Central Bank and the Court of Justice. For the eurocrisis, the decisive moment came when President Draghi promised to do whatever it takes to safeguard the euro and this statement was turned into the OMT programme.¹ The resolve of the ECB convinced the markets where the European Council could not. For the rule of law crisis, it is the Court that has emerged as the key actor. It has acted strategically. In *Juizes Portugueses*,² a case that had nothing to do with the actual rule of law crisis, it weaponised Article 19 TEU, first spending many lengthy paragraphs on the rule of law and its relationship to Article 19 TEU, before finally finishing with a few lines on the issue of the Portuguese judicial salaries at hand. This was important: the use of Article 19 TEU allows the Court to circumvent the awkward limitation in Article 51 CFR, which restricts the Charter’s applicability to situations where Member States are implementing EU law. The Court was then able to apply the provision to Poland in subsequent cases, in particular finding a violation of the independence of the Polish Supreme Court and therefore a breach of Article 19 TEU.³ As with the Bank, the Court’s actions had an immediate impact. The judges that had been forced to retire from the Polish Supreme Court were able to return to work. The ruling party’s attempt to sideline a specific group of judges failed.

The Bank and the Court have not acted alone, however. The effectiveness of their actions has depended on the support of others. In the case of the OMT programme of the Bank, it was the support of the Court that was particularly important. The challenge to the OMT that materialised in the *Gauweiler* case was foreseeable and inevitable.⁴ One of the fundamental limits of EMU is the prohibition of monetary financing that is found in Article 123 TFEU, and many in particular in Germany were convinced that the OMT programme breached it. The Court’s support for the Bank is well known: the Court emphasised the margin of discretion given to the ECB as an expert EU institution and upheld the programme. In the context of the rule of law, it is the Commission’s support for the Court that has been critical. The Court depends on cases

¹ https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html .

² Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117.

³ Case C-619/18 *Commission v Poland* EU:C:2019:531.

⁴ Case 62/14 *Gauweiler* EU:C:2015:400.

being brought to it, and the Commission has obliged. Equally importantly, the Commission's power to initiate follow-on actions under Article 260 TFEU gives teeth to the rulings of the Court. Non-compliance would be extremely costly in the literal sense: significant penalty payments can be imposed and subsequently deducted from the sums that the country receives from the EU budget.

The problem with the powerful action of the independent institutions and the ineffective responses of the political institutions is that the former cannot truly solve the crises, they can only halt them. The OMT programme pressed the pause button, but it did not resolve the problems in the design of the euro that made it so vulnerable in the first place. In the same way, the Court's ruling against Poland got the judges back to work. But when their normal retirement age comes, will their successors be truly independent, or will the ruling party be subtly able to influence the appointments or judicial behaviour to ensure a more compliant Supreme Court?

We should not underestimate the value of gaining time. The political and democratic processes are given another opportunity to take action or to rethink the issues.⁵ The results are not always impressive. In the context of the eurocrisis, we still lack the sizeable euro area budget that President Draghi saw as critical for the common currency.⁶ Instead of an elephant, the EU political process produced a mouse that has been locked in a cage.⁷ However, we do now have a partial Banking Union, and there has even been movement on a European deposit guarantee scheme,⁸ a vital component that has been missing so far. In the context of the rule of law crisis, the Polish voters were afforded an opportunity to rethink, but did not take it at this juncture. However, some progress has been made as a part of the ongoing EU budget negotiations to create a link between the rule of law and the receipt of EU funds. The proposed link is far from a panacea – action can only be taken if generalised rule of law deficiencies threaten the EU's financial interests - but if approved it might give the Commission some scope to tighten the financial screws should the backsliding continue.⁹ Ultimately in a democracy, non-democratic independent institutions cannot take the fundamental decisions on the shape of the economy or the polity, but they can help create and protect the space that the political processes need for making these decisions.

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⁵ A similar pattern can perhaps also be detected for Brexit, where Case 621/18 *Wightman* EU:C:2018:999 provided the UK the option to think again and the decisions of the UK Supreme Court such as *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 safeguarded the power of the Parliament to scrutinise and influence the process.

⁶ <https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp191028~7e8b444d6f.en.html> .

⁷ In the words of Wopke Hoekstra, the Dutch finance minister, reported in J Brunnsden and M Khan, 'EU embarks on sensitive reforms to financial crisis tools' *Financial Times*, 3 December 2018.

⁸ O Scholtz, 'Germany will consider EU-wide bank deposit reinsurance' *Financial Times*, 5 November 2019.

⁹ Commission proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies COM(2018) 324 final.