Analysis

Future EU Treaty Reform? Economic Governance and Democratic Accountability

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Introduction

When the Treaty of Lisbon was being negotiated and ratified, it was generally assumed that there would be no further significant amendments to the European Union (EU) Treaties for the foreseeable future. However, at least some Member States now support the idea of considering further Treaty amendments, mainly to reform the rules governing the coordination of Member States' economic policy (the 'economic governance' rules) in light of the difficulties faced by the EU's single currency, the euro, due to the size of the financial deficits of some Member States. In particular, the German Foreign Minister has put forward a specific proposed timetable for negotiating Treaty amendments.

Any significant Treaty amendments relating to economic governance would – among other things – raise fundamental questions about the extent to which the EU should intervene in Member States' economic decision-making, especially regarding the accountability of Member States' governments to their parliaments and electorates for the conduct of economic policy. This analysis examines the issues that might arise in the event that the EU considers Treaty amendments relating to economic governance, particularly the question of how to ensure democratic accountability if the EU gains further powers over national economic decision-making. But this analysis does not take a view as to whether or not such Treaty amendments are likely or would be desirable, necessary or politically feasible.

It is possible that any initiative to amend the Treaties would, in practice, also end up addressing other issues besides economic governance. Also, if a Member State leaves the euro or the entire single currency project ends in the meantime, the Treaties would have to be amended in consequence, as they does not provide for either eventuality – assuming that the European Union in its present form would even survive such developments. But since these scenarios are hypothetical for now, the focus of this analysis is on economic governance issues.

The Treaty amendment process

The process for amending the Treaties, as amended by the Treaty of Lisbon, is set out in Article 48 of the Treaty on European Union (TEU). There are several amendment procedures, but only the 'ordinary revision procedure', set out in Article 48(2) to (5), could be applicable to major changes to the economic governance rules.

This procedure starts with an official proposal for Treaty amendments, which could come from a Member State, the European Commission, or the European Parliament. So far, no formal proposal for Treaty amendments has been tabled. Once a proposal is made, it must first of all be sent to the

General Affairs Council (consisting of Member States' foreign ministers and/or European affairs ministers), which then forwards it to the European Council (the body made up of EU Member States' prime ministers and presidents). At this point, national parliaments are formally notified of the proposed amendments.

The European Council then decides whether to launch a Treaty amendment process, after consulting the European Parliament (EP), the Commission, and (if the changes concern monetary issues) the European Central Bank. On this issue, the European Council votes by a simple majority (ie it is sufficient that any 14 of the current 27 Member States are in favour). At present, along with Germany, press reports have indicated that Italy, Belgium and Greece, along with (probably) France and the Netherlands, would favour some Treaty amendments, while Ireland is clearly opposed and newer Member States which have not yet joined the euro-zone have voiced misgivings. The UK has expressed support in principle if the changes to the Treaty solely concern the euro-zone – although it might demand a broader renegotiation of the UK's position in the EU as a condition of its support.

In principle, since the Treaty of Lisbon, the Treaty amendment process must begin with the holding of a 'Convention', which is 'composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission'. This body must consider the proposals for amendments and then agree on a 'recommendation' by a 'consensus' to an intergovernmental conference (IGC) made up of Member States' representatives.

The European Council can decide to skip the stage of a Convention, if it believes that that a Convention is unjustified in light of 'the extent of the proposed amendments'. However, the EP has to agree to skip the holding of a Convention. In practice, it could not seriously be argued that a Convention should be skipped if major changes to the Treaty rules on economic governance were under discussion, and the European Parliament would very unlikely to consent to skipping a Convention is such a case. The German proposals in fact assume that a Convention would have to be held – for a year, ending in mid-2013.

Before the Treaty of Lisbon, two such Conventions were held. The first one drafted the original version of the EU's Charter of Fundamental Rights (1999-2000), while the second one drafted an initial version of the EU's Constitutional Treaty (2002-03). Each of these prior Conventions had the same basic composition which future Conventions must have, according to Article 48(2) of the Treaty; it should be noted that there were two representatives from each national parliament (in practice, from the government and opposition parties). The 2002-03 Convention also included observers from applicant and candidate countries, including Turkey. If the same template is followed, a Convention in 2012-13 should include observers from Croatia, Turkey, Iceland, the former Yugoslav Republic of Macedonia, Montenegro and (assuming it is granted candidate status, as the Commission has proposed) Serbia. The previous Conventions also received information and held hearings with civil society. It might also be expected that the European Central Bank would have observer status at a Convention focussing on economic governance.

The previous Conventions did not take a very strict view of the obligation to reach a 'consensus' on their final recommendation, as in 2003 there were clearly some members who disagreed with aspects of the final text. The mandate of any future Convention would be set by the European Council, in light of the Treaty rule that the Convention had to focus on the proposed Treaty amendments.

Also, the two previous Conventions were presided over by well-known retired politicians, namely the ex-Presidents of Germany and France in turn. Perhaps this time around, Tony Blair would like another chance at a major European job – or Gordon Brown would like another chance to save the world economy?

Following the conclusion of the Convention, an IGC would be held. Article 48(4) TEU requires that the IGC must be convened by the President of the Council, ie the Member State holding the rotating *Council* Presidency, as distinct from the President of the *European Council*, which is held by a single individual since the Treaty of Lisbon. This could be awkward, since the Council Presidency is due to be held by Ireland in the first half of 2013, Lithuania in the second half of 2013 and Greece in the first half of 2014. As noted above, Ireland is an opponent of Treaty amendment, while Lithuania has not joined the Eurozone and the economic problems of Greece triggered the current concern about the functioning of economic and monetary union in the first place. It is possible that Germany considers the Lithuanian Presidency the least bad of these three options, and that the German foreign minister's suggested timetable for the Treaty amendment process is in particular intended to avoid the prospect of the Irish government presiding over the IGC – since, pursuant to the German proposal, the Convention would not be over until the Irish Council Presidency was finished.

The IGC must reach an agreement by the 'common accord', ie the positive agreement, of all Member States. Any Treaty amendment would then have to be ratified by all Member States. It would be up to each Member State to decide whether a referendum or a vote of a national parliament would be required; this would include Croatia, if (as planned) it joins the EU as of 1 July 2013. Recent Treaty amendments have come into force just under two years after they were signed. If the IGC is short and successful, and a Treaty amendment (the 'Treaty of Vilnius'?) is agreed at the end of 2013, it would be signed in early 2014 and (if the usual timetable applies, and if it is ratified at all) come into force in late 2015 or early 2016.

The existing rules

Treaty rules

The existing rules on economic and monetary union appear primarily in Title VIII of Part Three of the Treaty on Functioning of European Union (TFEU) – Articles 119-144. There are also relevant rules in Articles 219 and 282-4 of that Treaty (regarding, respectively, monetary treaties and the functioning and composition of the European Central Bank) and in eight Protocols to the Treaties: Protocol 4 on the Statute of the European Central Bank; Protocol 12 on the excessive deficit procedure; Protocol 13 on the convergence criteria; Protocol 14 on the Euro-group; Protocol 15 giving the UK an opt-out; Protocol 16 giving Denmark an opt-out; and Protocols 17 and 18 concerning specific issues relating to Denmark and France.

The key TFEU provisions concerning economic governance are:

a) Article 121, which provides for a 'surveillance procedure' for national budgets; measures on this issue are adopted by means of the 'ordinary legislative procedure' (ie co-decision of the EP and the Council);

b) Article 122, which permits EU financial assistance, with contributions from all Member States, to be given to any Member State which 'is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control';

c) Article 125, which is the so-called 'no bail-out' rule, banning the EU or Member States from taking over the debt of another Member State;

d) Article 126, which sets out the basic rules for the procedure for avoiding 'excessive deficits'; Article 126(14) provides (in its second sub-paragraph) for the Protocol on this issue to be replaced, by means of a 'special legislative procedure' (unanimous voting in Council, consultation of the EP) and (in its third sub-paragraph) for 'detailed rules and definitions' for applying the Protocol to be adopted as a non-legislative act (consultation of the EP, qualified majority voting in Council);

e) Article 136, which since the Treaty of Lisbon, provides for the adoption of surveillance and excessive deficit rules specifically for euro-zone Member States, with only euro-zone Member States voting; it does not apply to Article 126(14);

f) Article 137, which refers to the Protocol on the 'euro group', added by the Treaty of Lisbon, which provides for the Member States which have adopted the euro to meet informally (this confirmed a practice established in 1998), and which provides for those Member States to appoint a president for a two-and-a-half year period;

g) Article 138, which concerns the external representation of the euro-area, but which is not applied in practice;

h) Article 139, which specifies which provisions of the Treaties do not apply to 'Member States with a derogation', ie Member States which do not apply the euro;

i) The Protocol on Denmark, which gives Denmark the right not to join monetary union; the Danish public have voted against joining and no further referendum is now planned; Denmark is therefore treated as a Member State with a derogation; and

j) The Protocol on the UK, which gives the UK the right not to join monetary union; a referendum would be required to join under UK law and the current government does not intend to hold one; the UK is exempt from more relevant provisions of the Treaties than Member States with a derogation are, but some provisions (such as the surveillance procedure and aspects of the excessive deficit rules) do apply.

While the remaining eight Member States which have not joined the euro-zone (Sweden, Latvia, Lithuania, Poland, the Czech Republic, Hungary, Romania and Bulgaria), as well as Croatia when it joins the EU, are in principle obliged to join it, Sweden has made no effort to do so since a negative referendum vote on joining, and most or all of the other Member States have in recent months indicated that they are very reluctant to join. But the Commission has made no effort to enforce these Member States' underlying obligation to join.

There are also side agreements between the euro-zone Member States only, relating to the functioning of the euro: the current treaty establishing a European financial stabilisation mechanism, adopted in 2010 and amended in 2011 to provide for significant financial assistance to Greece, and subsequently Ireland and Portugal; and a treaty establishing a European Stabilisation Mechanism, signed in July 2011 but not yet in force. It should be noted that the latter Treaty is underpinned by an amendment to the TFEU adopted by the European Council in March 2011, adding a new Article 136(3) TFEU, which all Member States have to approve before it can enter into force; none have yet done so.

On the other hand, the Treaty establishing the European Stabilisation Mechanism will *not* need the ratification of all Euro-zone Member States to enter into force (see Article 43); it can enter into force among those States which have ratified it when States making 95% of the subscriptions to the mechanism have done so. Only five States (Germany, Spain, Italy, France and the Netherlands) make more than 5% of the contributions, and so only those States can individually veto the treaty from being ratified. But since those five States will have only 80% of the capital between them, they will need most of the smaller States – but not all of them – to ratify the treaty before it can come into force. For instance, Slovakia, with less than 1% of the capital, cannot prevent the treaty coming into force; in fact, it would have to be joined by at least two other small euro-zone States to block ratification. Also, it should be noted that this treaty confers special jurisdiction on the Court of Justice to interpret it in the event of a dispute between Member States (Article 32), pursuant to Article 273 TFEU, which allows Member States to confer special jurisdiction of this nature on the Court by means of a separate treaty. The treaty also confers tasks on the Commission and the European Central Bank.

Secondary EU legislation

Further rules on economic governance are set out in EU secondary legislation. Regulations governing the process of economic surveillance and the excessive deficit procedure were first adopted in 1997, and both amended in 2005. Both measures will be amended again in the near future, to strengthen the level of EU control over Member States' economic policies, by two of the legislative measures which form part of the so-called 'six-pack' of economic governance legislation recently agreed by the EP and the Council.

The 'six-pack' is likely to be adopted formally sometime before the end of November, and will mostly apply from late 2011. The other four measures in the 'six-pack' are:

a) a Regulation providing for a new early warning procedure to detect 'macro-economic imbalances', as part of the surveillance process;

b) a Regulation (based on Article 136 TFEU) which provides for a more stringent application of this early warning procedure for the euro-zone Member States;

c) a Regulation (also based on Article 136 TFEU) which provides for a more stringent application of the revised procedures for surveillance and excessive deficit control for the euro-zone Member States; and

d) a Directive which provides for further technical definitions relating to the excessive deficit procedure.

While, in practice, sanctions have not been applied to Member States which breach EU economic governance rules in the past, it is more likely that such sanctions will be applied once the six-pack is in force.

There may be further secondary legislative measures in the near future. The Commission has announced plans in its recent 'road-map for stability and growth' (COM (2011) 669) to propose measures for euro-zone Member States, based on Article 136 TFEU, which would a) strengthen the economic and budgetary surveillance of those Member States receiving financial assistance; and b) monitor the national budget policies of those Member States which have an excessive deficit, by means of a 'procedure which would enable the Commission/Council to intervene, for example to examine national draft budgets ex-ante, to request a second reading in serious cases, to suggest amendments in the course of the year and to monitor budgetary execution'. The Commission suggests that if there is difficulty agreeing such proposals, 'enhanced cooperation' (the process of agreeing EU measures which apply to some Member States, but not others) could be used.

Some possible changes

The German government has raised two particular issues for potential Treaty reform: the creation of a Commissioner for the stability pact and the role of the Court of Justice as regards the excessive deficit procedure. A number of other issues which might potentially be discussed if the Treaty is amended are discussed below.

Commissioner for the Stability Pact

Of course, the Commission already has a Commissioner with responsibility for the Stability Pact – the Economic and Financial Affairs Commissioner. Presumably the suggestion of having a special Commissioner with responsibility for the Stability Pact (a 'Stability Pact Commissioner') instead envisages that a particular Commissioner would have special powers concerning the enforcement of the Stability Pact, and that this Commissioner would be, to some extent, institutionally distinct from the rest of the Commission (otherwise, there would be no point in talking about a Stability Pact Commissioner as distinct from the Commission as a whole).

Currently, the Commission has power to issue warnings to Member States in the context of the economic governance procedures, but it cannot then make a determination that a Member State has broken the rules relating to surveillance or run an excessive deficit, or impose sanctions relating to that determination. That determination must be made by the Council, following a proposal or recommendation from the Commission. (The difference between a proposal and a recommendation is that it is easier for the Council to amend the latter than the former). In practice, this has meant that the Council is (rightly or wrongly) unwilling to impose sanctions upon Member States. However, the new six-pack of economic governance legislation is intended to make the imposition of sanctions more likely, and in particular to make it harder for the Council not to accept a Commission proposal or recommendation. Also, as noted above, the Commission is planning to propose further legislation on these issues. So it could be argued – depending on how the new legislation works in practice – that there is no need to go any further.

However, it is possible that some Member States will wish to go further, and give the Commission some or all of the powers now vested in the Council, ie to determine whether a Member State has broken the rules relating to surveillance or run an excessive deficit, and to impose sanctions relating to that determination. Some might even wish to give the Commission power to go further, and to require at least some Member States (ie those running an excessive deficit, or in receipt of financial assistance) to make specific changes in their national budget plans.

The trade-off for giving such far-reaching powers to the Commission might be to ensure that there is still a degree of control over the 'Stability Pact Commissioner' by Member States. This would change the normal rule that Commissioners must be independent of governments or other EU institutions, but could be justified on the grounds that this Commissioner would be given powers previously held by the Council.

There is an obvious precedent for this approach – the creation by the Lisbon Treaty of the 'High Representative' for the EU's Common Foreign and Security Policy (CFSP), a post which combined the roles of the previous High Representative (who was the Secretary-General of the Council, and had less power on paper than the new version), with the role of EU External Relations Commissioner and also the CFSP powers of the Council's rotating Presidency (see Articles 17 and 18 TEU). The post-Lisbon High Representative chairs the Foreign Affairs Council and represents the EU for CFSP purposes, and also has a role as one of the Vice-Presidents of the Commission. But as regards her CFSP role, she acts on a mandate from the Council. Also, she is also appointed (and can be removed) by a separate procedure – a qualified majority vote of the European Council, with the consent of the President of the Commission. In the event that the EP exercises its power to dismiss the entire Commission, she would retain the intergovernmental aspect of her job; and the EP can only vote on her appointment along with the rest of the Commission. It should be noted, however, that in practice the EP has been able to 'target' individual nominees for the Commission for rejection in 2004 and 2009.

While a Stability Pact Commissioner could also be subject to a separate nomination and removal procedure, it seems insufficient to leave this procedure in the sole hands of the European Council and the Commission President. Since an enhanced role for this Commissioner would probably entail involvement in powers that were normally held by national parliaments as regards national budgets, it would make sense for not only the European Parliament but also national parliaments to be involved in his or her appointment and removal. For the EP, this control should take the form of the election of a candidate nominated by the European Council, taking account of the results of the EP elections, following the model of the election of the Commission President (see Article 17(7) TEU). There would then be a link between votes cast in the EP elections and the political orientation of the Stability Pact Commissioner. Subsequently the EP should be able to censure the Stability Pact Commissioner individually, following the model of the EP's power to censure the entire Commission (see Article 234 TFEU). National parliaments' power to (at least) insist on the removal of the Stability Pact Commissioner could be based on a stronger version of their power to scrutinize proposed EU legislation, as set out in the Protocol on subsidiary and proportionality (see Article 7 of that Protocol).

The idea that the Stability Pact Commissioner would act on a mandate from the Council would be questionable as far as enforceability of the Stability Pact is concerned – since if the Stability Pact Commissioner were directly controlled by the Council as regards enforcing the Stability Pact, the position would not really be any different from the status quo as far as regards the role of the Council. However, the Commissioner could be subject to a Council mandate as regards some of his or her other tasks, ie those tasks currently held by the Council. For instance, following the model of the CFSP High Representative, he or she could take over the role of chairing the Economic and Financial Affairs Council, along with the roles of the Council Presidency set out in Articles 121(5), 122(2), 126(11), 134(3), 219(1) and 284(1) TFEU and Article 45(2) of the Central Bank Statute. He or she could also take over the role of the president of the euro-zone finance ministers, also chairing their meetings (see the Protocol on the euro group), and roles regarding the external representation of the euro zone (see Articles 138 and 219 TFEU).

An awkward question could arise as regards the position of the ten Member States which have not adopted the euro. It might be argued that they should have a lesser role in the control of the Stability Pact Commissioner, since he or she would have a more limited role in respect of those Member States. But the Stability Pact still applies to some extent to all Member States; the exact extent of the distinctions between the euro-zone and non-euro-zone Member States could well be an issue for discussion if the Treaty is amended.

Court of Justice

Currently, the Treaty rules out the possible use of the 'infringement procedure' (ie where the Commission or another Member State sues another Member State for breaking EU law) in the context of the excessive deficit procedure (Article 126(10) TFEU). If this exclusion is removed, then it would be possible for the Commission to sue a Member State for having an excessive deficit (Article 258 TFEU). If the Member State loses that case, but still arguably is in breach of EU law, it can then be used again by the Commission (Article 260 TFEU), which can then ask the Court of Justice to impose fines on the Member State concerned.

It would be possible to remove this exclusion, but to provide for special rules for the Court's jurisdiction. For instance, it would be possible to apply the rule in Article 260(3) TFEU, which allows the Commission to ask the Court to impose a fine in the first set of Court proceedings, where a Member State has allegedly entirely failed to transpose a Directive into national law.

But still, it could be questioned whether there is any point providing for the prospect of Court judgments and/or fines against a Member State with an excessive deficit, if a political procedure for dealing with that deficit exists, given that this procedure will in principle (rightly or wrongly) be made more effective once the 'six-pack' legislation applies. This change would be even more questionable if the future Treaty amendment made further changes which were (rightly or wrongly) designed to make the political procedure for the enforcement of the excessive deficit rules more effective. It should be borne in mind that any Court procedure is likely to take longer than the political process of imposing such sanctions. Also, it would hardly be appropriate to give the Court the powers to intervene directly in the national budget process, if the EU takes that path.

Democratic control

As well as the specific issue of the democratic accountability of the Stability Pact Commissioner (if such a post is created), there is a case for augmenting the democratic control of the EP and national parliaments as regards measures relating to economic and monetary union.

First of all, currently, as noted already, Article 126(14) TFEU provides for the adoption of two types of measures: acts replacing the Protocol on the excessive deficit procedure (a special legislative procedure – unanimity of the Council, consultation of the EP) and acts which set out detailed rules and definitions for the procedure (non-legislative procedure – qualified majority of the Council, consultation of the EP). At the very least, the former procedure should involve the consent of the EP and the latter procedure should be converted to the ordinary legislative procedure. In any event, if the Treaty were amended to create a separate legal base for measures which *supplement* the Protocol on the excessive deficit procedure (ie the current legislation on the excessive deficit procedure), rather than amend it, such measures should either be subject to the ordinary legislative procedure or (if the unanimity requirement is maintained) at least the consent of the EP.

The following changes could also be made:

a) consultation or consent of the EP as regards the broad economic policy guidelines (Article 121(2) TFEU);

b) more information for the EP as regards the surveillance procedure (Article 121(5) TFEU);

c) consultation or consent of the EP as financial assistance (Articles 122(2) and 143(2) TFEU);

d) consent of the EP, or the ordinary legislative procedure, as regards application of the no-bailout rules (Article 125(2) TFEU);

e) consent of the EP as regards supervision powers for the European Central Bank (Article 127(6) TFEU);

f) consent of the EP, or the ordinary legislative procedure, as regards measures relating to coins (Article 128(2) TFEU);

g) consent of the EP, or the ordinary legislative procedure, as regards measures implementing the Statute of the Central Bank (Article 129(4) TFEU and Article 41 of the Statute);

h) reporting to the EP on the workings of the Economic and Financial Committee (Article 134 TFEU);

i) consultation or consent of the EP as regards external aspects of monetary union (Article 138 TFEU);

j) further information for the EP as regards derogations from monetary union (Article 140 TFEU);

k) further information for, or consultation or consent of, the EP as regards balance of payments derogations (Article 144 TFEU);

l) consent of the EP as regards external monetary treaties (Article 219(1) TFEU);

m) information for the EP as regards exchange-rate orientations (Article 219(2) TFEU);

n) consultation or consent of the EP as procedures for negotiating monetary treaties (Article 219(3) TFEU);

o) consent of the EP as regards appointment of the President, et al, of the European Central Bank (Article 282(2) TFEU and Article 11.2 of the Central Bank Statute);

p) consent of the EP as regards amendment of the Protocol on the convergence criteria (Article 6 of that Protocol); and

q) consent of the EP as regards simplified amendment of the Protocol on the Central Bank Statute (Article 40.2 of that Protocol).

Also, wherever the Council or a Member State can request the Commission to make a proposal (see Article 135 TFEU), the European Parliament or any national parliament should be able to make a request also.

As for national parliaments, their role would be enhanced wherever non-legislative procedures are converted to legislative procedures, since the Protocols on national parliaments and on subsidiarity and proportionality would then apply. They could also be given strengthened powers, based on the latter Protocol, to block proposed measures in this area. For instance, it could be provided that a measure could not be adopted in this area if one-third of national parliaments objected to it.

A key issue for national parliaments will be the degree of extra control that the Commission or Council would exercise over national budgets. On this point the Treaty amendments should not give the EU institutions the power to decide on the specific measures (such as tax increases or budget cuts) which are deemed to be necessary to comply with EU economic governance rules. If the EU institutions had such powers, the core principle of democratic accountability would be breached – since the national government or parliament could not be held accountable for national economic policy to the national electorate, whereas the EU institutions are accountable only on an EU-wide basis. Instead, the only increased power that could be considered compatible with democratic accountability would be the power for the EU to require national legislatures or governments to choose from a range of possible options to comply with the economic governance rules – which would have to include tax increases (including progressive tax increases) as well as spending cuts.

New EU powers

Any Treaty amendments in this area are likely to involve some new provisions allowing the EU to act, for instance possibly concerning the issue of 'Eurobonds' (the collective issue of Member States' public debt), or the incorporation of the European stability mechanism more fully into the EU legal framework. Any such new powers should either be subject to the ordinary legislative procedure, or (if unanimity applies) the EP's power of consent, along with enhanced powers for national parliaments as described above. Issues affecting the core of national budgetary sovereignty should be subject to control by each individual national parliament – for example on the model set out in Article 48(7) TEU.

Transparency

Currently, Articles 121 and 126 TFEU provide that Council recommendations to Member States regarding the management of their economies are possibly, or must in principle, be secret. Whether or not the Council's powers in this area are transferred to a Stability Pact Commissioners, this is impossible to defend. The government of the Member State in question ought to be accountable to its electorate for its action (or inaction) in response to the recommendations, and the Council (or Stability Pact Commissioner) ought to be accountable to the general public for making them.

The position of the United Kingdom

Several possible changes to the Treaty would in principle trigger a requirement for a referendum under UK law, in particular a shift to qualified majority voting as regards Articles 126(14) or 127(6) TFEU, any new competences of the EU (for instance, relating to the creation of Eurobonds) and (possibly) an increase in the power of the Court of Justice and/or the Commission as regards economic governance. But UK law does not require a referendum if such Treaty changes do not affect the UK. So it is possible that even far-reaching Treaty changes could avoid the current requirement for a UK referendum – if they do not apply to the UK. However, it is always possible for the UK to decide to call a referendum even if the current law does not require it, or conversely to amend its law to waive a current referendum requirement. Furthermore, if a Treaty amendment is not agreed until late 2013 or early 2014, the timing of the next British election – currently due in May 2015 – becomes an issue. The fate of the Treaty amendments could then be influenced by whether the next government is more – or less – pro-EU than the current government.

The Treaty amendment process would also be an opportunity to clarify or amend the exact scope of the UK's monetary union opt-out (there is already a pending case on this issue, before the EU's General Court: Case T-496/11 *UK v ECB*). The UK might be exempted from having to contribute to financial assistance to euro-zone Member States, pursuant to the current Article 122 TFEU. More broadly, the amendment process might be an opportunity to consider the UK's participation in the EU more generally, granting it opt-outs over other areas of EU policy, and perhaps creating a new category of associate membership of the EU for the UK. But as a consequence, it could reasonably be argued that any future Treaty amendments that would not in practice apply to the UK should not require its consent.

The position of other non-euro Member States

For the eight Member States, other than the UK and Denmark, which have not joined the euro-zone – and are not now anxious to join it – but which have an underlying legal obligation to join, there may be some hesitation to sign up to new rules on economic governance that will in principle bind them eventually. There is a strong argument in principle that if the terms of membership of the euro-zone change fundamentally, as they would do if any Treaty amendments significantly strengthen the EU's control over the economic decisions of euro-zone Member States' governments, the current and future Member States which have not yet joined the euro-zone should be released from their obligation to join it. Those States undertook that obligation at a time when the rules governing economic and monetary union were very different to what they would be in the event of further Treaty amendments. Six of those States (all except Romania and Bulgaria) joined the EU after a referendum (Croatia will hold a referendum on membership as well); but would the public have voted the same way if they had known that they were signing up to future more centralised rules on economic governance? Also, pragmatically speaking, those Member States may not be willing to sign up to such Treaty amendments, or may face difficulties ratifying them, if they are not released from their underlying obligation. Of course, any Member State should retain the *right* to join the euro-zone if it meets the necessary conditions.

To a large extent, dropping this obligation would confirm the *status quo*, in that countries (in particular Sweden) have not been compelled to join monetary union against their will. But a formal change in the legal position would end any uncertainty and leave it up to each of the non-euro-zone Member States to decide whether or not they still wish to join monetary union following any Treaty amendments strengthening the rules on economic governance.

Other issues

Other issues which might be raised as part of the

Treaty amendment process are:

a) the possible clarification of the provisions on financial assistance (Article 122 TFEU) and the no-bail out clause (Article 126 TFEU) and their relationship to one another;

b) clarification of the relationship between the rules on economic governance and the general rules on enhanced cooperation; and

c) confirmation of the existing practice of holding summit meetings of euro-zone Member States, chaired by the President of the European Council.

Alternative approaches: Enhanced cooperation or a treaty among euro-zone States?

It has been argued that some or all of the changes to the economic governance rules which some Member States would wish to see can be effected either by means of enhanced cooperation between Member States within the EU legal system, or a treaty among a group of Member States, most likely euro-zone Member States, outside the EU legal system. In the latter scenario, the treaty would still, like the Treaty establishing the European Stability Mechanism, be closely linked to the EU legal system and use the EU institutions to effect the planned changes.

In the first case, there is an underlying question as to whether the enhanced cooperation rules can still be used in an area which is subject to very specific distinct rules on the participation and non-participation of Member States already. Even if they can, the use of enhanced cooperation must respect the Treaties – meaning that it cannot amend the EU's primary law. So, for instance, enhanced cooperation could not be used to give the Commission or Council any powers over Member States' budgets beyond those which the Treaty allows for those institutions.

In the second case, the prevailing view is that it is possible for a group of Member States to negotiate a treaty regarding an area (like economic governance) which is not within the EU's exclusive competences – providing that they do not breach EU law. Any move to change the Treaty rules concerning, for instance, the powers of the Commission or Council over Member States' budgets, would – as in the case of enhanced cooperation – not be possible without the consent of all Member States to amend the Treaties.

Certainly it would not be possible in either case to change the procedure relating to the appointment or dismissal of a Commissioner, or to place a Commissioner to some extent under the control of the Council.

Conclusion

Any Treaty amendments relating to economic governance should, assuming that they are desirable at all, leave the choice of measures to take in order to comply with economic governance rules up to national parliaments and governments. More broadly, any general move toward Treaty amendments which strengthen the EU institutions' role in economic governance must be accompanied by a greater role for of the EP in this area, as well as a greater degree of control by national parliaments over EU activity as compared to other areas of EU integration. Furthermore, if there are any significant Treaty amendments in this area, all Member States which have not yet joined the euro-zone must be given a choice as to whether or not they still wish to join in future.

Sources

Articles 119-144 TFEU
Articles 219, 234 and 282-284 TFEU
Protocol on excessive deficit
Protocol on UK and monetary union
Protocol on subsidiary and proportionality
Articles 17-18, Treaty on European Union
Article 48, Treaty on European Union
Treaty establishing the European Stability Mechanism