

Citizens, populism and politicisation: European economic governance and beyond

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Cross-cutting Crises: Comparing Euro-Crisis and Migration Crisis. A Legal Perspective.

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Introduction

- Comparing Euro-Crisis and Migration Crisis
 - The so-called 'Euro-Crisis'
 - The 'Migration Crisis'
- The contribution of EU law to the lack of efficiency of EU crisis responses
- Comparing EU law in 'crisis times' with EU law in 'normal times'
- Conclusions

Euro-Crisis

- The so-called 'Euro-Crisis'
 - Multiple crises
 - Crisis of financial regulation (cf. subprime mortgage crisis 'infects' EU banks)
 - Crisis of lack of economic policy coordination (cf. the creation of 'bubbles' such as the housing bubble in Spain or the 'financial institutions bubble' in Cyprus and Ireland)
 - Crisis of excessive legacy government debt and deficit (cf. Greek Debt Crisis)
 - Crisis Responses
 - Bailing-out 'systemically relevant' credit institutions
 - Stimulating interbank lending
 - Stimulating (private) demand and (private) investments
 - Providing financial assistance to Member States

Euro-Crisis

■ The so-called 'Euro-Crisis'

– Legal Framework

- Economic Policy Coordination (Article 121 TFEU) (*preventing excessive deficits*)
- Excessive Deficit Procedure (Article 126 TFEU) (*preventing threats to fiscal stability*)
 - Naming and Shaming
 - Market-based enforcement
 - Fines
- Monetary Policy (*maintaining price stability*)
 - Legally binding, centralised decision-making (ESCB)
 - Working method: Increasing/decreasing money supply
 - Tools: Open market operations, minimum reserves, 'lender of last resort' (for banks)

Euro-Crisis

Crisis Response	Member States	EU
Bailing-out 'systemically relevant' credit institutions	Financial means to bail-out	No financial means to bail-out (due to limited budgetary capacities)
		COM: veto player through EU State aid control
Stimulating interbank lending	Cleaning balance sheets of banks: <ul style="list-style-type: none"> • bail-out • state guarantees 	No financial means to bail-out (due to limited budgetary capacities)
		COM: veto player through EU State aid control
		ECB: Increase of liquidity
Stimulating (private) demand and (private) investments	Fiscal Policy Subsidising private demand Subsidising private investments	Limited own fiscal policy <ul style="list-style-type: none"> – due to limited budgetary capacities – EIB, EFSI
		COM: veto player through EU State aid control
Providing financial assistance to Member States	Bi-lateral/Multi-lateral financial assistance (within the limits set by Article 125 TFEU): EFSF, ESM	Limited financial assistance <ul style="list-style-type: none"> – due to limited budgetary capacities – due to limits set by Article 122(2) TFEU: EFSM

Migration Crisis

■ The 'Migration Crisis'

– Multiple crises

- Crisis of the 'Dublin System' (responsibility for 'irregular migrants' of the MS whose borders were crossed irregularly)
- Crisis of external border control
- Crisis of common asylum standards (triggering migration of refugees within EU)

– Crisis Response

- Redistribution of refugees between Member States
- Closing borders (externally as internally (Schengen border controls))
- Financial assistance for Member States with a lot of refugees

Migration Crisis

■ The 'Migration Crisis'

– Legal framework

- Common Policy for Visa (Article 77(2)(a) TFEU)
- Common European Asylum System (Article 78(2) TFEU)
- Common Policy for Legal Immigration (Article 79(2) TFEU) limited by the right of Member States to define the volume of legal immigration
- Emergency Powers for the EU in the event of Mass influx (Article 78(3) TFEU, Directive 2001/55/EC)
- Solidarity clause in Article 80 TFEU
- Decision-making in the Council requires qualified majority voting

Migration Crisis

Crisis Response	Member States	EU
Redistribution of Refugees	Bi-lateral and multilateral agreements	Provisional Measures (Article 78(3) TFEU) Long-term Measures (Article 78(2)(e) TFEU)
External Border Control	Bi-lateral and multilateral agreements	Measures to strengthen the common external border control: Article 77(2)(b) and (d) TFEU
		Establishing Border Control Agency: Article 77(2)(b) and (d) TFEU
Harmonising Asylum Standards	Coordination of standards	Measures to harmonise standards: Article 78(2) TFEU
		Establishing Asylum Agency: Article 78(2) TFEU
Providing financial assistance to Member States	Bi-lateral/Multilateral financial assistance (within the limits set by Article 125 TFEU)	Limited financial assistance – due to limited budgetary capacities

Comparing Euro-Crisis and Migration Crisis

■ Both crises have in common:

- Exogenous shock triggered developments that surpassed the capacities of single Member States to mitigate the negative effects of these developments
- Consequence: Calling for European solutions
 - Relief for the most affected Member States (call for solidarity)
 - Protection against spillover effects from the most affected Member States to less affected Member States (call for effective control)
- Solutions: Intergovernmental negotiations within the European Council
- Intergovernmental solutions failed or were likely to fail

Comparing Euro-Crisis and Migration Crisis

■ Both crises differ:

- EU legal framework at hand to find European solutions
 - Euro Crisis: Either **no** legal base or **no** budgetary capacities
 - Migration Crisis: Legal bases allowing for qualified majority voting
- ‘Buying’ time for intergovernmental solutions through EU-wide action
 - Euro Crisis: ECB’s monetary policy eased financial market operators
 - Migration Crisis: **No** action.

Comparing Euro-Crisis and Migration Crisis

■ Interim Conclusions

- When faced with a crisis, EU politics is not able to present quick European solutions
- As a consequence, Member States start acting on their own
- This creates an image of a 'weak' and 'incompetent' EU
 - from the perspective of Member States that are more affected by the crisis: EU refuses to help countries in need
 - from the perspective of Member States that are less affected by the crisis: EU undermines national efforts to shield a country against spillover effects
- Reason for this can be found in (the combination of):
 - lack of Union institutions that can act in emergency situations
 - Intergovernmental method

Contributions of EU law

- Contributions of EU law to these interim conclusions
 - **NOT**: EU legal framework that does not provide for sufficient legal bases to act on the basis of qualified majority voting (probably the case for the 'Euro-Crisis', not the case for the 'Migration Crisis')
 - **NOT**: EU law that does not allow for empowering the Commission or Union agencies to act with executive powers (CJEU, Case C-270/12, UK v Parliament and Council (short selling))
 - **Lack of trust** in Member States' willingness and ability **to comply** with EU requirements
 - Ignorance of economic policy guidelines and EDP in the past
 - Differing asylum standards despite extensive harmonisation (CEAS)

Contributions of EU law

■ Change of perspective

- EU law does not distinguish between crisis and normal modus
- EU legal framework is the same in normal times as in crisis times

■ Issue of Compliance under EU law

– Internal Market law

- Individual rights enshrined in Primary law (no need to implement rights into national law)
- Direct Effect and Supremacy of Primary law individual rights
- National courts enforce EU individual rights against national institutions on the initiative of affected individuals
- European Commission can rely on rights with direct effect against Member States
- Individual rights in secondary law (which requires implementation) have vertical direct effect after the expiry of the transposition period

Contributions of EU law

■ Issue of Compliance under EU law

– How does compliance work in ‘normal times’?

- Euro legal framework

- No direct effect
- No individual rights

- Migration law

- Big parts: No individual rights and no direct effect
- Where there are individual rights of third-country nationals, these rights are only enshrined in secondary law (which requires implementation)
- These individual rights can have vertical direct effect after the expiry of the transposition period

Conclusions

- Internal Market law shows that 'supranationalism' supersedes intergovernmental bargaining
 - Internal Market law allows for qualified majority voting concerning inconvenient subject-matters
 - Enforcement is secured by affected individuals in front of national courts
- Where conditions for effective supranationalism are not met, intergovernmentalism takes over
 - Shortcoming of unanimity voting and blockade by single countries
 - Loss of public support for EU measures

Conclusions

- Based on this understanding ...
 - the EU can establish and uphold an internal market in good times and in bad times in overcoming conflicting political will of Member States
 - outside the internal market, the EU can run other policy areas in good times but not overcome conflicting political will of Member States in crisis times
- Call for the EU to manage crises is valid but its current governance is not able to deliver (which creates frustration with citizens) ...
 - as long as compliance in other fields than internal market is not enhanced;
 - as long as emergency competences are conferred upon the EU equipped with sufficient legitimacy to act against the conflicting political will of single Member States

Thank you for your attention

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