The Euro – Protective Shield or Trap: Can a Country's Membership in the EMU Be Abrogated in Cases of Insolvency and Permanent Deficits on Current Account?

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The economies of some countries in the eurozone have displayed high rates of inflation for some years. To the extent that the EMU member states in addition have high deficits on current accounts, which is not seldom the case, their economies are clearly no longer sufficiently competitive. This is a situation that has touched of alarm signals at the European Commission and the European Central Bank. An additional factor is that the debts of these countries are constantly increasing as a result of the expansion in government tasks and the failure to cover expenditures by taxation. For any additional debt these countries must pay increasingly higher risk premiums that are demanded by investors on the basis of the poorer creditworthiness assigned to them by the rating agencies. For these member states the danger of insolvency exists. With the threat of national bankruptcy and because of the preceding economic-policy mistakes of several member states, the continued existence of the European Monetary Union and the stability of the euro, as seen in its loss of value, are greatly endangered.

Member states that belong to the monetary union no longer have their own monetary and currency sovereignty. They no longer have the option of reducing their debts via a monetary or paramonetary financing of their budgets in order to avoid national bankruptcy. They are no longer able to reduce debts via non-secured credits of a dependent central bank or via a currency reform.

Upon entering the monetary union the member states obligated themselves, in the interest of the stability of the monetary union and its currency, to fulfil, on their own responsibility and for the long term, the economic and legal conditions prescribed by the Maastricht Treaty. The stability of the common European currency urgently requires that the states participating in the monetary union do not undermine the monetary policies of the European Union with their economic, budgetary or wage policies. And it must not be forgotten that monetary policies aimed at currency stability are also social policies since inflation means an unsocial redistribution of earnings.

The heads of state and governments of the so-called euro group expressed their deep concerns regarding the dangerous economic developments in one member state at a special meeting on 12 February 2010. Solidarity prohibits the European Union from blindly leaving struggling member states to their own fate. However, at the same time, in order to ensure the integration process in Europe, the EU must act in accordance with the concerns of the monetary union and the interests of the other member states.

The same rules that hold for a federal state do not apply within the European Monetary Union. In a federal state, the member states and the federal state itself carry an unlimited liability for the obligations and the insolvency of an indebted member state. The containment of an unsound or even unconstitutional fiscal policy of a member state is the task and obligation of public opinion, policy and justice in a federal state. Conversely, in an alliance of states the member states and the alliance itself are fundamentally not liable for the liabilities of a heavily indebted member state.

To be sure, the Maastricht Treaty did indeed upgrade the European Economic Community into a so-called Economic and Currency Union and transferred the monetary and currency sovereignty of the member states to the European Union. However, the member states participating in the monetary union were placed

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in a situation comparable with members of a federal state. This is because the simultaneous transformation of the European Union into a federal state, or the transformation of the 'United Nations of Europe' into 'United Europe' with a transfer of additional policy areas, especially economic policy, social policy and tax sovereignty to the European Union, which in itself would have been the prerequisite for turning over monetary and currency sovereignty to the EU, was neither politically desired nor would have been politically attainable.

Since the basic structure of the European Community as an alliance of states – with, to be sure, considerable supranational features – was not newly constituted as a federal alliance of states, a decision had to be taken in the Maastricht Treaty as to whether the member states and the European Union should be liable for the financial obligations of a member state facing insolvency by vouching for these debts. As a result of a consciously made decision, whose material importance and far-reaching consequences were clear to all countries participating in the Maastricht conference, the Maastricht Treaty states explicitly that neither the European Community, now the European Union, as such nor its member states must vouch for the debts of a member country that participates in the monetary union – as in the case of a federal state.

Although Germany placed particular emphasis on the absolute liability exclusion as a prerequisite for abandoning the deutschmark as a national currency, the no-bailout clause was an unconditional prerequisite not only for Germany but for all member states participating in the conference for transferring monetary and currency policies from national responsibility to the exclusive responsibility of the European Community. The unconditional direct responsibility of the member states for their budgetary and fiscal policies that results from the no-bailout agreement was accepted by all the member states as an ordering principle of the Maastricht process. For the member states, there was only the alternative of either completely refusing to establish a monetary union or agreeing on the absolute exclusion of mutual liability.

The prohibition of assuming the debts of a member state and the direct responsibility of the member states for reducing their indebtedness had as a consequence that the European Union does not have the authority to provide financial assistance, with the exception of help that is permissible under EU law in cases of catastrophes and economic predicaments in which there was no erroneous economic-policy behaviour on the part of a member state.

The European Union can also not grant financial support by means of borrowing on the capital markets and transferring this to a member state that is threatened by insolvency due to over-indebtedness on a non-contractual basis nor on the basis of the so-called flexibility clause of Article 352 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 235 EEC Treaty and Article 308 EC Treaty).

Furthermore, in Germany the use of such authorisations, as are currently being discussed, would require special legislation from the Bundestag, according to the ruling of the Federal Constitutional Court on the Lisbon Treaty of 30 June 2009.

The liability exclusion, the prohibition of monetary and paramonetary financing of government budgets and the obligation of the member states to limit their annual upper deficit limits to 3 percent of GDP and their total indebtedness to at most 60 percent of GDP safeguard price stability in the European Union as a basic constitutional principle and the value of the euro as its common currency. A country's tax revenue does not stand at the disposal of other member states or of the European Union. It is reserved for the financing of the national tasks and obligations of the respective member state.

Control measures in the form of legal actions before the European Court of Justice or through the imposition of sanctions in supervision procedures dealing with the budget situation of the member states, both of which are only possible under very restricted conditions and which are also not particularly effective, to force a member state to comply with its Maastricht obligations are only available in a very limited form in the European Union. Appealing to the European Court of Justice is largely excluded in the Maastricht Treaty in the area of the monetary union. The imposition of sanctions within the framework of the supervision of the budget situation of the member states, which is not subject to any automatic procedures, involves complicated procedural steps that require a majority vote.

Correcting the financial imbalances in a member state that faces insolvency consists inevitably in the reduction of governmental tasks and an increase of the tax

burden on the population. Should it be the case that due to pressure from the unavoidable efforts of a member state domestic unrest results and democratic and legal processes in the country can no longer be maintained, the European Union would be faced with the decision of whether it would have to initiate procedures against the member state to deprive it of certain rights, as foreseen in Article 7 of the EU Treaty (formerly Article 7 of the Maastricht Treaty).

In addition, membership in the monetary union is by no means compulsory according to the Maastricht rules. Instead, alongside member states that are part of the monetary union the Maastricht Treaty also recognises 'member states with an exceptional status'. 'Exceptional status', by which member states, for example Britain, Denmark and Sweden as well as Poland and other member states that have subsequently joined the EU and that are not degraded into the second ranks, can also be granted afterwards to members of the currency union. The European Union can offer to a member state that can only normalise its finances and economy on its own 'by means of or with a miracle' the possibility of becoming a member state with 'exceptional status', i.e. the relinquishing of its membership in the currency union and the re-introduction of its own currency.

The rescinding of membership in the monetary union would have to occur by means of a joint decision of the Council consisting of the heads of state and government and would grounded in EU law on the basis of Article 2 TFEU. Article 2, Paragraph 1 TFEU as well as Article I 12 of the failed constitutional treaty allows a member state in the area of exclusive competence of the European Union – monetary and currency policies are an exclusive competence – the 'powers to legislate' upon authorisation of the European Union. Accordingly, it can also rescind its participation in the common monetary policies and re-introduce its own currency.

The admissibility of the mutually agreed departure is also based – *a maiore ad minorem*, from the greater to the smaller – on Article 50 EU Treaty, according to which any member state of the European Union can quite simply leave also from sub-areas of their competence. After a departure the member state can attempt to restore the competitiveness of its economy under the new conditions of its own currency via an exchange rate correction in the form of suitable devaluation. Furthermore, in case of a balance of payments crisis the member state can take advantage of the 'mutual assistance' based on the protection clauses in Articles 143 and 144 TFEU under the new conditions. In addition according to the arrangements of the European Monetary System II it can attain 'monetary support' more easily. Under these conditions the European Union can contribute to an economically sensible stabilisation of its external equilibrium.

Assistance from the International Monetary Fund in comparable cases also presupposes that the state that is to receive help, in addition to an economic recovery programme, must adjust its currency to external economic factors, which means a possible devaluation of its currency. The departure from the monetary union – if only temporarily – is for the benefit of a weakened member state. It makes sense in terms of economic and integration policy and it is also vital in an emergency. It lies both in the interest of the weakened member state as well as in the interest of the preservation of the monetary union.

The European integration process as such will be consolidated and not weakened by a correction of this process consisting of the timely departure of a member.