

A post-mortem on the European Council

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with Peadar ó Broin & Piotr Maciej Kaczyński

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In the first evening of the European Council meeting of 28-29 October, the heads of state came to a result that few had expected: a unanimous agreement to a 'limited' Treaty reform, which in turn would allow Germany to agree to a permanent crisis resolution mechanism, i.e. a permanent successor to the temporary European Financial Stability Facility (EFSF).

That all 27 members agreed on a limited change in the Treaty becomes less surprising when one realises what it is likely to imply, namely no change to the no bail-out clause (Art. 125), but simply the addition of a few words to one or two articles in the Treaty.

One approach would be to change Art. 122 TFEU. This article at present reads:

Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned.

Adding a reference to financial stability in this article should be enough to satisfy the German Constitutional Court and at the same time provide a solid legal basis for the new permanent EFSF, which will probably not be explicitly referred to in any Treaty changes.

This small change to Art. 122 would not create the 'perma-EFSF', but it would create a permanent legal basis on which an EFSF could exist post-2013 – the year specified in the Council Conclusions as the date by which time any limited treaty changes can be ratified. The perma-EFSF could then probably be created on an intergovernmental basis and might not involve the creation of a new institution. Instead, it could take the form of an emergency financing mechanism run by the Council whose use would, for political reasons, require unanimity, as in the existing EFSF.

Such a 'reform' of the treaties could indeed be very limited – sufficiently so to allow for the use of the simplified treaty revision procedure and avoid the need for a referendum. Including the EFSF in the treaties would have been problematic as a new EU institution falls outside Part Three of the TFEU, and therefore cannot be created under the simplified revision procedure.

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The summit meeting also agreed that the IMF would play a role in a permanent EFSF, but did not elaborate this role. This is likely to mean that the new permanent EFSF will be available only to countries that have satisfied IMF policy conditionality (along the lines of the Greek financial support mechanism, including fiscal targets, structural reform, etc.).

This agreement for a 'limited' Treaty change now opens the way for the work that really counts, namely agreeing on the details of the new permanent EFSF. Given that only a little more than six weeks remain until the December European Council meeting and in light of the fact that in the end Germany's financial contribution will be essential, it is likely that the new permanent EFSF will be a rather light structure, probably along the lines of a 'Berlin Club' – now being mooted in German government circles. This structure could be designed in such a way as to allow also for an "orderly sovereign default", thus allowing for the participation of private creditors mentioned in the Council Conclusions. This is likely to be the most difficult part of the new mechanism.

The intention of the Council is clearly to make the Treaty change so small that it could not reasonably be opposed by anyone. This now seems likely to be achieved, but a number of uncertainties remain. For example, the German Constitutional Court will certainly consider whether even the very small change to Art. 122 would affect the no-bailout clause in Art. 125 TFEU, thereby changing the nature of monetary union and creating a fiscal transfer union (*Transferunion*). Legal scholars in Germany are already debating whether a reference in Art. 122 to allow emergency aid in order to secure the stability of monetary union as a whole would be too broad a provision, with the effect of making Art. 125 practically redundant.

Another route being considered would be to use Art. 143, which is the legal basis to extend the existing EU support mechanism to non-euro area member countries. This could also be achieved with a very small Treaty change, namely by merely adding a reference to Art. 143 in the special Treaty article for the euro area countries (Art. 136). Legal scholars will no doubt vigorously debate the merits of this suggestion over the coming months.

Ratification even of a minimal Treaty change might also present obstacles. For example, Ireland is on the verge of passing legislation through parliament that would allow it to join the EFSF. If this can happen by parliamentary means on the basis of a eurozone intergovernmental agreement, a referendum should not be needed simply because the same mechanism is part of the Treaties. In any case, the Irish Government will not agree to any reforms that require a referendum, as the Government does not want to face yet another referendum with the possibility of a legislative election looming in the spring of 2011 and a second wave of austerity measures to be implemented following the December 2010 budget. It is important to bear in mind that the trigger for a referendum in Ireland is a change to the "essential scope and objectives" of the EU. Adding a reference to eurozone stability in Art. 122 is unlikely to constitute such a change (although see comments above regarding *Transferunion*); hence the creation of a perma-EFSF seems to pass this test. In any case, given the fact that Ireland could yet stand to be a beneficiary of the EFSF, a referendum held in Ireland could pass if the Government declares its need to tap the fund. If not, a third referendum (already being referred to as 'Lisbon 3' in the national press) would face significant obstacles.