Solidarity and Constitutional Constraints in Times of Crisis

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While important, European solidarity cannot take place at the expense of safeguarding citizens' economic and social rights under the Constitution of Finland. For this reason, the Finnish Government needs to remain alert to the risks involved in the increasing financial commitments given by Finland. Depending on their exact features, the constitutional problems relating to "corona bonds" might only be overcome by a risky and time consuming constitutional amendment procedure. This is the result of two days of deliberations by the Constitutional Law Committee of the Finnish Parliament relating to the euro group agenda dedicated to the COVID19 crisis. The Committee found that various elements in the proposals were problematic in light of the Finnish Constitution and gave the government clear and in practice binding guidance. Its position is likely to affect EU level negotiations especially in matters where each Member State's consent is required.

Constitutional background

Finland has a model of national decision-making in EU affairs that gives extensive participation and information rights to the Parliament. EMU related matters have been widely and repeatedly discussed in the Parliament, including the Committee on Constitutional Law. This Committee establishes the correct interpretation of the Constitution, for which it consults key experts on constitutional law. Its opinions generally enjoy great authority and are treated as binding on the Parliament and authorities. In the absence of a constitutional court, this makes the Committee the most central constitutional body in Finland.

Until this week, the Constitutional Law Committee has always concluded its examination stating that the European stability measures, sometimes after some adjustments, are compatible with the Constitution. Participation in these mechanisms has not been seen as a significant limitation of state sovereignty, even though they involve serious economic liabilities in particular if the possible risks were to materialise in full. In some matters, the Committee has determined that unanimous decision-making and possibilities of effective democratic control are preconditions for compatibility with Finnish state sovereignty and the Finnish Constitution.

In the context of the EFSF the Committee referred to the Parliament's prerogatives as regards state securities. EFSF issues are backed by guarantees given by the euro area Member States in accordance with their share in the ECB paid-up capital. If a country were to default on its payments, guarantees up to 165% of over-collateralisation would be called in from the guarantors. In the context of the ESM, the Committee assessed the amount of Finnish capital investment. It required that the financial liabilities and investments in the various parallel mechanisms be calculated *in toto* and considered the total amount of public debt and risks of the investment. In both of these cases, the state's liabilities did not endanger its ability to take responsibility for its Constitution-based duties.

The perspective of the Committee is constitutional. Thus, it has paid less attention to questions of EU competence, stressing that these questions fall under the exclusive jurisdiction of the CJEU. As long as the EU has competence to adopt a measure, it is not considered a constitutional matter in Finland. However, the possible indirect use of Union secondary legislation to modify the Treaties has been a particular concern. Likewise, the Committee has stressed that new legal instruments falling under Union competence

cannot involve new procedures or elements additional to those approved when ratifying the Treaties. These considerations have been relevant for the proposed budgetary instrument for convergence and competitiveness (BICC). Here, the Committee's position resembles that of the Council Legal Service, which has stressed that EU acts cannot legally oblige Member States "to contribute to the budget of the Union beyond the framework of their financial obligations as defined by the own resources system".

The implications of this week's statement for European discussions

The Constitutional Law Committee's statement, recorded in its minutes, builds logically on the Committee's established practice and uses that as the lens to address the new proposals. Under consideration were the use of the European Stability Mechanism (ESM), the Commission's new SURE proposal, the creation of a €25 billion guarantee fund to enable the European Investment Bank Group to scale up its support for companies in all 27 EU Member States, and the revived discussion about joint (and possibly several) issuance of bonds by EU member states, this time to fight the pandemic. The Committee recognizes the limited time and information available, anticipates other potential constitutional issues in the proposals, and expresses its intent to return to the matter for a full-scale review and the adoption of formal opinions.

First, the Committee addresses in particular the SURE proposal and recalls its earlier practice that emphasises the significance of EU Treaty boundaries. In SURE, additional financial obligations for Member States would be in the form of guarantees. 'Member States *may* contribute to the Instrument by counter-guaranteeing the risk borne by the Union [...]in the form of irrevocable, unconditional and on demand guarantees' (11 Article). However, while the use of "*may*" implies voluntariness and hence formally recognizes the limits of EU competence, the following Article states that the financial assistance "shall only become available after *all* Member States have contributed to the Instrument". This creates a tension between the formal decision-making rule and the practical reality. The instrument can, under Article 122 TFEU, be formally approved by qualified majority in the Council, but it cannot become operational without a full participation by Member States in the provision of guarantees. While the provision of guarantees falls under national competence, the exercise of this competence will inevitably take place under remarkable duress, as refusal by a single Member State would cause the whole instrument to collapse. The approach might be feasible, from a strictly legal-technical viewpoint, but it is not convincing from the viewpoint of a correct, democratic and accountable process.

As regards SURE and the new guarantee fund for the European Investment Bank, the Committee reminds that state guarantees are the prerogative of the Parliament and entail a specific parliamentary approval procedures.

For the Parliament to do its part, the government must also be able to provide the exact amounts that would be subject to the guarantee. It remains open to interpretation whether the maximum exposure of each state would equal the aggregate amount of guarantees or merely its *pro rata* share thereof. This ambiguity, hinting towards a possible joint and several nature of the guarantee, might be intentional or merely the result of hasty drafting, but the issue is fundamental. In the context of the EFSF, small states guarantee small amounts and big states guarantee big sums, proportional to their *pro rata* shares. A joint and several liability would entail equal maximum liability for each state, irrespective of its size.

The Committee also points out the relevance of decision-making procedures. In the context of SURE, the Commission would have complete discretion to adopt decisions that have immense budgetary implications for individual Member States, including in determining how long the 'temporary' instrument would be available.

As regards the calls to make precautionary financial assistance from the ESM, in the form of the Enhanced Conditions Credit Line (ECCL), available essentially without conditionality, the Committee sees problems in terms of the key provisions of the ESM Treaty. What is of relevance here is also the Court's

confirmation in *Pringle* that the ESM Treaty was compatible with EU the no- bail out clause in Article 125 TFEU "provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy". Conditionality is needed as a matter of EU law. For the Committee, conditionality is also a constitutional matter, necessary to ensure the functionality of the ESM and its funding capacity.

Finally, the Committee takes a position on the accumulation of financial commitments in general and in relation to the corona bonds in particular. It points at the need to maintain an overall view of such guarantees, the risks involved, and evaluate their effects on budgetary sovereignty and the state's ability to respect its constitutional commitments, including ensuring the economic and social rights of its citizens.

In the absence of concrete proposals, the Committee examines the matter at a general level, in light of the rather vague proclamations in the letter of nine governments, and the more explicit proposals put out by France. The latter entails a dedicated Covid fund. The scarcity of information precludes a full constitutional analysis, but the Committee expresses concern that such an arrangement could interfere with budgetary sovereignty, encroach the parliament's budgetary powers and undermine the ability of the state to live up to its constitutional obligations. While this does not strictly exclude their adoption, it would require the procedure for constitutional enactment (Section 73).

Effectively, this means that even if a Finnish government were to propose joining an arrangement of a significant size and based on joint and several liability – already a politically unlikely scenario – the approval could require an overwhelming majority in the Parliament, making a positive outcome even more unlikely. That the Committee chose to flag the matter early should also be seen as a contribution to the European debate. The message is that even if the hurdles relating to Article 125 TFEU were somehow bridged, the national constitutional ones would still remain.

The political discussion in the EU focuses on joint and several responsibility, which means that each Member State would be liable for the whole aggregate amount of the arrangement. This would allow maximal sharing of credibility and it is what makes the idea politically attractive for some. For example a common debt instrument, which would initially amount to 2-3% of EU27 GDP, might seem modest. However, the joint and several guarantees would make the liability for smaller states simply astronomical. For Finland, arrangement of 3% of EU27 GDP would entail a liability of around 220% of GDP. For Estonia, it would be roughly 2200% of GDP.

Could it seriously be expected that these states could ever live up to such commitment? Considering the dimensions, could the commitment ever be given in any other manner than frivolously? And if not, what is the value of such a commitment? While few would doubt that there indeed is a need for solidarity in the face of crisis like this, the scale of the proposals, and the way in which countries are bullied to accept them undermines the intention. You may object, but will you please still hand over your wallet.

By definition, the circumstances in which the guarantees would be called upon would be abnormal, and would be preceded by a default of one or more States on their obligations towards not only the joint eurobond venture but likely also on other mechanisms of financial assistance. This would lead to very high market uncertainty, heightened political tensions among the governments, and possibly even speculations about the end of the Euro. In such circumstances, few guarantors would be willing to contribute anything beyond what could be presented as their 'fair share' in the domestic political arena. Whether or not the joint and several guarantees among Member States would in the end be respected is impossible to say. The outcome would depend on the circumstances and be determined by a complex political and intergovernmental negotiation process rather than an interpretation of law.

The need for solidarity is genuine. It needs to be based on proposals that are realistic and take consideration of constitutional constraints. They exist to safeguard that those affected by decisions are effectively in a position to influence them. In today's Europe, such

constraints are there to be cherished, not to be ridiculed or intentionally circumvented. Power needs to be scrutinized critically, especially in times of crisis.

The author was one of the experts consulted by the Constitutional Law Committee.

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