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The transformation of the euro: law, contract, solidarity

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Law, Contract, Solidarity

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Previously published work

This thesis contains and/or builds on the following previously published work by the author:

- Borger V, 'De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme' (2011) 59 SEW 207.
- Borger V, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14 GLJ 113.
- Borger V, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7.
- Borger V, 'The European Stability Mechanism: a crisis tool operating at two junctures' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 150.
- Borger V, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*' (2016) 53 CML Rev 139.
- Borger V and Cuyvers A, 'Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in de Economische en Monetaire Unie: de juridische en constitutionele complicaties van de eurocrisis' (2012) 60 SEW 370.
- Van den Bogaert S and Borger V, 'Twenty Years After Maastricht: The Coming of Age of the EMU?' in De Visser M and Van der Mei AP (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013) 451.
- Van den Bogaert S and Borger V, 'Differentiated integration in EMU' in De Witte B, Ott A and Vos E (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 209.

Preface

‘It’s not a bad idea, and I would support it if you were to pursue it, but you should consider doing a thesis on a different topic. Why not write on the euro crisis ...’

It was spring 2010 and I had travelled to Leiden to discuss possibilities for PhD research with Stefaan Van den Bogaert. Several weeks earlier I had approached him with a research proposal on the prohibition on discrimination on grounds of nationality and third-country nationals. It was closely connected to my studies in European law at Maastricht University, which I was about to finish. Now, however, my former teacher in Maastricht, who had just moved to Leiden, challenged me to explore a completely different topic, one that was all over the news but that I had hardly touched upon during my own years in Maastricht. That did not show a blind spot in the curriculum I had followed there, which had given me a very solid training in European law. It simply reflected the general thrust of European legal scholarship on its ‘classics’, such as the law on free movement and competition and the institutional issues to which their development had given rise. The law on economic and monetary policy, by contrast, received little attention. Certainly, since its inclusion in the Treaty of Maastricht the currency union had occasionally been the subject of debate, even of litigation, yet these instances of heightened legal attention had contributed to, instead of negated, its status as a special policy area; one that belonged first and foremost to the province of politics and economics, and only secondarily to that of law.

Crisis developments during the first months of 2010, and their coverage by the media, only strengthened this perception, at least for me personally. With increasing frequency political leaders convened in the *Justus Lipsius* building in Brussels to discuss the situation of Greece and other debt-stricken member states that had come under fire in the markets.¹ After every meeting, often lasting deep into the night, they would come out and confront an army of journalists and reporters that had gathered in the building in tense anticipation of the decisions taken. Almost immediately, these would then be commented on by economic experts and pundits on radio and television. Usually, they would sketch the conditions for a viable euro and explain how ‘at the

1 Since 2017 the European Council meets in a new venue, the ‘Europa building’.

moment of truth' politicians had displayed a lack of determination by settling for a 'compromise' that fell far short of the ideal scenario. Law did not figure prominently in their commentaries, if at all. At most, they would point out that the rescue actions in support of financially distressed states blatantly 'violated' the rules on which the euro was founded.

I was therefore not immediately won over by the idea of writing a thesis on the crisis. What could I possibly say about it as a legal scholar? Would I not just be trying to do research that scholars from other disciplines were much better placed to carry out? At the same time, I was captivated by the prospect of exploring an area of law that was new to me. And the more I delved into the facts and the law of the crisis, the more I realised that it was too important to be left to economists alone. Behind the talk of 'sovereign defaults', 'spreads' and 'financial contagion', there was a political and legal reality waiting to be discovered. When months later I started my research project on the crisis, this had taken on systemic proportions, threatening not just Greece, or even the euro, but the Union itself. In the period that followed I would be carrying out my research while the events unfolded.

This thesis is about these events and how they have changed the euro. For me, as a legal scholar, writing it was a great challenge. Where to start? The overhaul of budgetary rules, the new procedures for economic policy coordination, the recapitalization of financial institutions, or perhaps the bond-buying action of the Central Bank? Changes to the euro have been so numerous that it is easy to get bogged down in them, even if one has the privilege – like I did – of spending a lot of time studying. And what to figure out about these changes? Whether they are legal? Doing that, or to put it more adequately: doing *just that*, was not a very satisfying prospect. The reform of the currency union was so profound, so clearly changing the rules of the game on which the euro had originally been founded, that I felt more could, and should, be said about it.

The crisis itself helped me find out what exactly. Each day I could see on the news and read in the papers how law was being made. Heads of state negotiating in Brussels over rescue funds, national parliaments voting on amendments to the Union Treaties, courts assessing their constitutionality ... it made me realise that the law is much more than a set of rules; it is also *history*. This historical dimension to law has been aptly put by former law professor and American President Barack Obama. Looking back at his years in law school he tells how 'poring through cases and statutes.... The study of law can be disappointing at times, a matter of applying narrow rules and arcane procedure to an uncooperative reality'. 'But that's not all the law is',

he continues. 'The law is also memory; the law records a long running conversation, a nation arguing with its conscience'.²

Whereas this is true for any legal system, it has special relevance for the Union.³ In 1950, in his proposal for the creation of a Coal and Steel Community, Robert Schuman predicted that Europe would 'not be made all at once, or according to a single plan' but instead 'through concrete achievements....'⁴ Over the following decades he was proven right. The Union evolves gradually, and often under the pressure of events, when it needs to adapt to a changed reality. At such moments, it is up to politics, to executive and legislative authorities, to decide; to act and reposition the Union in the face of a new situation. And courts are called upon to scrutinise the actions. Its constitution is consequently both shaped by and a reflection of such acts and judgments. History, in other words, is part and parcel of it.

The euro crisis was a momentous event, or rather sequence of events. When it erupted late 2009 it caught the Union and its member states off guard. The currency union was ill-prepared for taking on the market forces that were unleashed upon it. Its toolbox was poor and primitive. The law, central to European integration and one of its great achievements, could not show the way this time. The answer had to come from politics. And it came. At the height of the crisis, from 2010 to 2012, European politics saved the euro, and with it the Union, through a constitutional make-over of its set-up.

When it comes to *how* the euro was saved, the critics are lining up. Renowned economist and Nobel laureate Joseph Stiglitz, to name one, in his recent book *The Euro and Its Threat to the Future of Europe* reflects on the currency union and on what needs to be done to make it work. The story of the euro, Stiglitz argues, is one of 'platitudes, uttered by politicians unschooled in economics who create their own reality, of positions taken for short-term political gain that have enormous long-term consequences'.⁵ He consequently sees the currency union as 'flawed at birth' and its crisis as an accident waiting to happen.⁶ And now, after years of bad crisis management, the Union is facing a tough choice: either it takes a great leap forward through the creation of a common bank deposit insurance scheme and pooling of debt or it drops the euro, either through the exit of several states, the creation of multiple currency blocs or by putting in place more 'flexible' monetary arrangements. Anything in between these two extremes, which Stiglitz calls 'muddling through',⁷ only

2 Barack Obama, *Dreams From My Father* (Canongate 2016) 437.

3 WTE, 'The European Way. History, Form and Substance' (2005) 1 *EuConst* 5, 5-6.

4 Schuman Declaration, 9 May 1950.

5 Joseph E Stiglitz, *The Euro and Its Threat to the Future of Europe* (Penguin 2016) xx.

6 Stiglitz (n 5) 7.

7 Stiglitz (n 5) 32.

puts off the evil hour and threatens to 'sacrifice' the Union 'on the cross of the euro'.⁸

But Stiglitz is missing the point. 'Men make their own history', Karl Marx once famously said, 'but they do not make it just as they please in circumstances chosen by themselves; rather they make it in present circumstances, given and inherited'.⁹ When Europe's political leaders had to decide on a single currency in the early 1990s a perfect monetary union, one that could count on the support of economists like Stiglitz, was not on the menu. 'It was *this* monetary union, or *no* monetary union', as the late Dutch Central Bank Director André Szász has pointed out.¹⁰ And in a Europe shaken to its foundations by the fall of the Wall, they chose monetary union. Likewise, when the euro was on the brink of collapse early 2010, the choice was not between letting it fail or moulding it to perfection. Constrained by electorates, competing priorities and, paradoxically, the very law on monetary union that had been put in place two decades earlier, political leaders had to operate within the bounds of possibility. Still, they decided to defend the euro, changing its set-up step by step during the years that followed. And any future reforms, I dare say, will also fall short of perfection.

This does not mean that one may not criticise the actions politicians have taken in defence of the euro. One certainly may. Yet, to dismiss them as aberrations, as point-blank wrong, simply because they do not correspond to economic textbook solutions does not do justice to their action in the situation. More importantly, it does not help us understand the deeper meaning of these actions, what they tell us about the foundations of the Union and how it operates.

This thesis consequently takes a different approach. It does not argue for or against the euro. Likewise, it does not contain a plea for or against the severe austerity measures and structural reforms that member states like Greece, Portugal and Spain have had to implement over the past years and the enormous hardship this has caused in their societies. And it certainly does not make claims about the desirability of possible future reforms of the currency union. What it does do, is to look back and show how, in the face of a crisis unprecedented in the Union's history, political leaders and other authorities, among which law courts, managed to save the Union and its currency by drawing on transformative powers under the constitution that hitherto had gone unnoticed.

Leiden, 03-07-2017

8 Stiglitz (n 5) 326.

9 Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte (Terrell Carver tr)' in Mark Cowling and James Martin (eds), *Marx's Eighteenth Brumaire: (Post)modern interpretations* (Pluto Press 2002) 19.

10 André Szász, 'Een Duits dilemma: de euro van geloofwaardigheids- naar vertrouwenscrisis' (2012) 66 *Internationale Spectator* 137 (emphasis added, translation by the author).

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