The European Stability Mechanism and the case for an Irish referendum

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The December 2010 meeting of the EU prime ministers and presidents in the European Council decided to amend the Treaty on the Functioning of the EU (TFEU) to establish a permanent bail-out fund, or 'European Stability Mechanism' from 2013, using the so-called 'simplified revision procedure' set out in Article 48.6 of the Treaty on European Union, which was agreed in the Lisbon Treaty that came into force a year earlier.

The existing temporary bail-out fund – whose two EU-linked elements are titled the European Financial Stability Mechanism and the European Financial Stability Facility – which was agreed last May for a period of three years, and from which the EU/IMF money has been provided for Ireland, was set up under Article 122.2 of the TFEU. This Article permits EU financial assistance to be granted to a member state in the event of it experiencing 'severe difficulties caused by natural disasters or exceptional occurrences beyond its control'.

The continuing public deficit and borrowing problems experienced by Greece, Ireland, Portugal, etc. are clearly very different from the 'severe difficulties beyond a Government's control' that are envisaged in Article 122.2. That is why it is widely believed that the existing bail-out fund is illegal under the EU treaties. Its legality has been challenged before the German Constitutional Court on these grounds, and also on grounds specific to the German constitution. Judgement on this challenge is expected sometime in the spring.

This legal challenge also relies on Article 125 of the TFEU which forbids EU bail-outs of member states in principle, most obviously when these are the result of states failing to abide by the '3% of GDP' maximum annual deficit rule and the '60% of GDP' maximum national debt rule that are laid down in the same treaties. Article 125 TFEU states: 'The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.' See also Art.123 TFEU, which forbids overdraft or credit facilities by national governments with the European Central Bank.

The German government in particular, is worried that its Constitutional Court may rule that the Financial Stability Mechanism element of the existing EU/IMF bail-out fund is illegal under either EU law or German law or both. That is the essential political reason why this further amendment to the EU treaties is being proposed, going beyond the amendments made by the Lisbon Treaty, so as to give the German government legal cover. Germany hopes that the insertion of the proposed amendment, if agreed to, will help to head off an adverse Constitutional Court ruling, about which it appears to be significantly concerned.

The proposed treaty amendment is an addition of a third paragraph to Art.136 TFEU, which would read: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.' (See the European Council Conclusions, Annex 1 below)

The proposed permanent fund from 2013 is envisaged as being established 'to safeguard the financial stability of the euro area as a whole', rather than the problems of an individual member state. That is why the December European Council stated that Art.122.2 'will no longer be needed for such purposes', implying that it is being used for such purposes at present to cover the existing bail-out fund.

But what might be needed 'to safeguard the financial stability of the euro area as a whole'? Whatever suits Germany or France? The European Council decision states that 'The mechanism will be activated by mutual agreement of the euro area Member States in case of risk to the stability of the euro area as a whole.' In practice the phrase 'the euro area as a whole' will always be open to political interpretation. There is a clear presumption of an EU 'summit' consensus being there before anything happens.

The text of the treaty amendment establishing the proposed permanent Financial Stability Mechanism is given in Annex 1 of the European Council conclusions. General features and outline rules for the Stability Mechanism's working are given in Annex 2. These are to be fully spelled out later.

The simplified treaty revision procedure specified in the Lisbon Treaty and set out in Art. 48.6 TEU requires the Commission, the European Parliament and the ECB to be consulted before a decision to amend the treaty is finally taken unanimously by the twenty-seven presidents and prime ministers on the European Council. This is now being done and the final decision will be formally taken at the European Council meeting in March, after which the proposed amendment to the treaties will go round the twenty-seven member states for approval 'in accordance with their respective constitutional requirements'.

This 'decision' of the European Council to amend the treaties will require parliamentary approval everywhere. The question is will it require a referendum in Ireland.

Some important political issues arise in an Irish context:

1. The March date for finalising the European Council decision could be just before or after the general election here. It is therefore open to people to make an issue in the general election of the government's desire to oblige the EU by denying the people a referendum vote on this very important matter. The government will say that the proposed Permanent Financial Stability Fund does not need a referendum here because it does 'not increase the competences conferred on the Union in the Treaties' (Art.48.6 TEU). But if it does not

increase the powers of the EU or the member states of the euro area to establish a permanent bailout fund, governed by 'strict conditionality', why is an amendment to the treaties necessary at all?

The government will contend that the proposed stability mechanism is confined to the euro-zone states only, so that it is therefore 'intergovernmental' and does not empower the EU as a whole or its institutions in any new way. But the euro is the currency of the Union as a whole (Art.3.4 TEU). Is there not still a surrender of sovereignty by Ireland, even if is to the EU institutions that will administer the proposed permanent Stability Mechanism, viz. the ECB and the EU Commission, which will require compliance with its rules and terms to enforce 'strict conditionality', including the imposition of fines and other penalties envisaged in Art.126.11 TFEU? It surely does increase the EU's powers to enable it to establish such a fund to bolster the euro, especially in the light of the general ban on the Union and member states assuming mutual financial commitments in Arts.125 TFEU. On this issue, see also Art.123 TFEU. Will euro-zone member states not be required to contribute to the permanent Stability Mechanism once it is established? If so, this implies obligations that do not exist at present.

One can take it that the wording of the December European Council Conclusions – for example the reference to the Commission finalizing work 'on the intergovernmental arrangement setting up the future mechanism by March 2011' and the reference to the proposed amendment 'not increasing the competences' of the EU – are carefully geared to helping the Irish government avoid a referendum in this country at all costs.

The reason is that if an Irish referendum were held, it might not pass. Even the prospect of an Irish referendum could induce other euro-zone states to delay ratifying the treaty amendment. That is why the Irish government will be under heavy pressure to say that a referendum is not needed here. The attorney-general will also be under heavy personal pressure to advise the Government that a referendum is unnecessary.

If Fianna Fáil attorney-general Paul Gallagher advises the government that a referendum is not constitutionally required, will that be the advice of the next government's attorney-general also? Depending on the general election date, probably in March, which attorney-general's advice should prevail? The Fianna Fáil government should be challenged not to commit itself on such an important matter before the general election.

2. Fine Gael and Labour will probably want to oblige the EU and Germany by not pressing for a referendum on this important matter. Other parties could embarrass them by pressing them on whether they support the demand for a referendum in Ireland or not. Fine Gael and Labour should be pressed to demand a referendum during the election campaign. That may help divide Fine Gael from Labour, and if either Fine Gael or Labour say during the election that a referendum is needed, it will be difficult for them to avoid holding one if they get into government.

3. Only the Supreme Court can say definitively whether a referendum is constitutionally needed in Ireland or not before the proposed amendment to establish this permanent EU Financial Stability Mechanism can be approved. Even if a legal challenge to the

government's failure to hold a referendum were to be lost, there seem to be good political grounds for taking it, as it would put litigants in the position of 'defending the Constitution', while Fianna Fáil and the other parties want to deny the people their voice.

There seem to be good political and legal reasons therefore for concerned citizens to start planning now for a Supreme Court challenge to any failure by the government to hold a referendum on what is arguably a further transfer of power to the EU, beyond that envisaged by the changes made by the Lisbon Treaty. The proposed permanent Stability Mechanism will have all sorts of rules and implications, including presumably the obligation for Ireland to provide funds for it if called on. Defending the right of the Irish people to vote on such an important issue when Fianna Fáil, and possibly Fine Gael and Labour, want to deny them that right, should do critics of the government a lot of good.

The Irish constitution provides that Ireland is bound by the laws, acts and measures adopted by the EU that are 'necessitated by the obligations of membership' of the EU, these obligations being laid down in the treaties. The core legal argument in any constitutional challenge would therefore be, as it was in the 1987 Crotty case, that the EU treaty amendment to establish a permanent European Financial Stability Mechanism does go beyond what the existing Lisbon-based treaties provide for. It would seek to establish that, contrary to what the European Council and the government claim, this is more than a slight technical change or a 'limited amendment', to use the European Council's own phrase – all amendments after all are limited – and does increase the existing competences of the EU.

The formal character of any legal challenge would presumably be a request for various Declarations by the High Court, with appeal by either side to the Supreme Court, coupled with an injunction application to prevent the government notifying the secretary-general of the European Council of its approval of the decision to adopt the proposed EU treaty amendment unless a referendum in Ireland is held first.

4. During the 2008 and 2009 Lisbon Treaty referendums the EU member states said that there would be no need for further institutional or treaty changes for the foreseeable future. Yet this further amendment is being proposed just one year after Lisbon came into force in December 2009. More importantly, Irish voters were promised a special treaty protocol on (a) neutrality, (b) Ireland's right to decide its own company taxation and (c) the constitutional position on abortion, in the next EU treaty. At the time this was thought to be the EU accession treaty for Croatia or Iceland. Now it is to be the European Council decision establishing the Permanent Stabilisation Fund from 2013, which has the legal status of an EU treaty or is legally equivalent to it, as it is an agreement among all the EU member states to do something which binds them all, just as any EU treaty does and it is an amendment to the existing treaties which must be ratified by the EU states in accordance with their constitutional requirements, just as happens with all EU treaties.

It should be possible to make political capital in the upcoming general election by calling for the promised protocols to be drafted and added to EU treaties at the same time as the proposed amendment on the permanent Stability Mechanism comes into force, if it does come into force.

As well as this promised protocol itself, the government made much play during the 2009 Lisbon Treaty referendum that it intended registering the agreement to give Ireland a protocol with the United Nations in New York. We don’t know whether or not that has been done, and if it has been done, what the terms of the notification in question are. But, if the UN has not been notified, the big question is why not?

Treaty articles referenced in the text – in the order in which they appear

Article 48.6 of the TFEU
Simplified revision procedures

The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area.

That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

Article 122.2 of the TFEU

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. The President of the Council shall inform the European Parliament of the decision taken.

Article 125 of the TFEU

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Article 123 of the TFEU

1.Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

Article 3.4 of the TFEU

The Union shall establish an economic and monetary Union whose currency is the euro.

Article 126.11 of the TFEU

As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures: – to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,

– to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,

– to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected,

– to impose fines of an appropriate size.
The President of the Council shall inform the European Parliament of the decisions taken.

European Council Conclusions – 16-17 December 2010

ANNEX I

Whereas:

(1) Article 48(6) of the Treaty on European Union (TEU) allows the European Council, acting by unanimity after consulting the European Parliament, the Commission and, in certain cases, theEuropean Central Bank, to adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union (TFEU). Such a decision may not increase the competences conferred on the Union in the Treaties and its entry into force is conditional upon its subsequent approval by the Member States in accordance with their respective constitutional requirements.

(2) At the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of theEuropean Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect.

(3) On 16 December 2010, the Belgian Government submitted, in accordance with Article 48(6), first subparagraph, of the TEU, a proposal for revising Article 136 of the TFEU by adding a paragraph under which the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole and stating that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality. At the same time, the European Council adopted conclusions about the future stability mechanism (paragraphs 1 to 4).

(4) The stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself. At its meeting of 16 and 17 December 2010, the European Council agreed that, as this mechanism is designed to safeguard the financial stability of the euro area as whole, Article 122(2) of the TFEU will no longer be needed for such purposes. The Heads of State or Government therefore agreed that it should not be used for such purposes.

(5) On 16 December 2010, the European Council decided to consult, in accordance with Article 48(6), second subparagraph, of the TEU, the European Parliament and the Commission, on the proposal. It also decided to consult the European Central Bank. [On […dates…], the European Parliament, the Commission and the European Central Bank, respectively, adopted opinions on the proposal.]

(6) The amendment concerns a provision contained in Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties,

HAS ADOPTED THIS DECISION:

Article 1

The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union:
‘3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.’

Article 2

Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.
This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph.

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The People’s Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.