

From the Board

Scratch the Currency and You Will Find the Deal

The deadline for this editorial, and day of its writing, is 9 May 2010. In Brussels, the Ecofin ministers are currently together to shore up the euro's defences. Today is the sixtieth anniversary of the Schuman declaration.

Like the measures that the ministers are fighting over in Brussels today, Schuman's plan of 1950 was borne in good part from fear and even panic. Today, it is fear from the onslaught of the 'market forces'. Then, it was French fear from the prospect of sovereignty being returned to Germany over that country's coal and steel resources. As one will recall, the decision was tabled five years after Germany's capitulation and one year after its resurrection. The United States and the United Kingdom were in favour of returning coal and steel; France, opposed, was in the minority. Its fear, however, sparked the idea to agree on the condition of Germany pooling these resources with France and other countries. Fear is not always bad counsel.

The Schuman plan was not only a plan but also a deal. Likewise, it was a recipe. Crucial deals such as this one, and others, born from the heat and fear of the day, have marked the course and the structure of Europe's history and Europe itself. They turned sources of conflict into springs of invention and agreement. They changed a play of power, violence, and fear into one of politics, peace, and evolution.

The Schuman recipe is never exhausted. In 1989 and 1990, a fear rekindled of Germany's ascendancy and led France to table a pooling of currencies in return for its agreeing to German reunification and to Germany accepting it. This is the historic deal underlying the euro. The euro is an institution, based on legal instruments. However, if you scratch the institutional surface, you will find again, beneath the legal rules, a compact. This compact is still alive today with the occasion that brought it forth and has the irreversibility of all things original. If one can be confident on a day such as this Sunday that the euro will not go down in the financial turmoil, it is probably less due to the firmness of its legal structure than due to the underlying historic understanding.

These are some thoughts coming to mind as the ministers of finance in Brussels are stretching their meeting from the intended two hours into four, six, and more.

Today's decisions once taken will be commented upon by professionals and press and tested by markets and moneymakers. However, short of their clean failure, there is no knowledge today, nor will there be tomorrow or probably even next month, of what they are worth, that is what is in them in terms of successful novelty. Our business as scholarly

commentators can be more modest than that of those called to judge immediately and in a way it can be more direct. The business is to draw lessons and other forms of profit from the crisis, not by way of passing judgment but in order to develop scholarship.

The events in themselves, including the measures taken, are momentous as change-makers. From the European Council meeting of 25 March until the end of this period, Europe is probably undergoing a structural change equivalent to that reached in the ten years it took to get the Lisbon Treaty into the treaty records. Why are even scholars now indulging in alarmist predictions about the ultimate fate or risks of the euro and about the weakness of its legal regime?

No doubt this is so in part because change, when seen through the prism of scholarly logic and forecast, will only show its disruptive face and not reveal its creative secrets. Short of a total demise of the euro, which would be immediately clear but is improbable, it will take time to know what news this crisis will have brought.

For scholarship, it may be better therefore not to focus on the weaknesses of the euro but to think about the state of legal scholarship concerning it, both in terms of problems and of opportunity. What areas of relative academic neglect are being exposed in these events? What new avenues for research are being opened?

One subject springing to mind that deserves greater attention from law scholarship in the coming years, and one that deserves to be celebrated on this date of 9 May, is solidarity. Let us see why.

Solidarity is fundamental to any form of political organization. It is not a strictly legal subject. Schuman himself in his declaration spoke of the creation of 'solidarity of fact' between the European states. The old 'loyalty clause' (now Article 4(3) of the Treaty of the European Union (TEU)), is a first legal expression of solidarity as an obligation, with great consequence. Recently, the virtue of solidarity has found more various legal expressions in the Treaties. There is a solidarity clause between the states against terrorism and disasters (Article 222(1) of the Treaty on the Functioning of European Union (TFEU)), there is financial and energy solidarity in case of natural disasters and exceptional events (Article 122), and there is solidarity in case of armed attack (Article 42(7) TEU, an innovation even compared to the Constitutional Treaty!).

In one place, solidarity strikes by its absence. Article 125 of the EU Functioning Treaty prohibits Member States from assuming each others' debts. In 25 March, the European Council in its Eurozone composition (one innovation born from the financial and fiscal crises) decided nevertheless to affirm such solidarity between Member States of the euro. In the heat of the current crisis, a legal provision central to the law of monetary union was reinterpreted and states came to each others' rescue. What is there to learn from this?

One lesson is that a legal norm cannot keep the reality of a crisis from affirming itself. Solidarity is not a matter of obligation only but also a matter of fact. The normative builds upon the awareness of reality shared.

This is best seen from the opposite side. If shared reality starts to fade, the norm will be hard to keep in place. Two people who stop sharing their daily lives and realities will have

difficulty sharing life's hardships. Belgium's two communities increasingly live in different worlds. It is no surprise that the normative solidarity underpinning the Belgian political system is beginning to break down.

If, conversely, shared reality makes itself felt, the norm will necessarily follow. The reality concerning the euro is represented best in the negative, in the abyss of the euro's possible demise. These dangers, for European integration as such and as a whole, are now at the basis of the actual solidarity à la Schuman. It is solidarity found at the bottom, built up from the facts. Each new crisis, then, is a test of the actual solidarity existing and, if not fatal, will result in the addition of a new normative layer, a new set of deals.

In 1951, the Communities started on this recipe. By 1989, the solid crust of deals struck in four decades proved its worth when the Berlin Wall fell. The immense forces and pressures of that event, instead of wrecking the Communities, were channelled and invested in the creation of a new set of deals among the Member States, legally expressed in the Maastricht Treaty of 1992. This included the deal for a monetary union and, in due course, the euro. Like now, in those days there were reports of shouts and threats among the European Council members; like now, the Communities then were seen to be on the verge of falling apart.

What is in this experience for legal research and for teaching? One thing is this. Apart from the legal provisions, the obligations, their logic, and their system, we always need to remember the reality, the situations, and occasions under whose powers these rules were conceived and created. Too little attention is given in legal scholarship to the origins of great legal instruments, to the forces contained in the deals that were struck, under the highest pressures of time and the closest calls of failure.

These deals exhibit the powers of solidarity in the Union. They need to be made part of the substance of research and writing. Scratch the legal surface of any institution and you will find the compacts underlying it. Likewise, with the compact you will be able to gauge the solidarity of fact as consolidated into legal form.

In addition, if, as in these days, the deal is struck at the expense of the existing legal norm, so be it. Each true creation, as the artist tends to know better than the lawyer, is also a violation.

W.T.E.
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