Making space for an economically democratic Union:

the EU Treaty changes we need

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Introduction

In principle, the European Union is an essential force for peace, prosperity and social progress. It has many positive achievements to its credit, and positive values to defend and uphold. But in recent years, a number of crucial negative developments have taken place, and the global financial crisis – followed swiftly by the ongoing Eurozone crisis – have highlighted the problems caused by the EU Treaties in so far as they relate to economic and related issues. The structure and operation of the Euro, especially when confronted with financial and economic crisis, have given rise to the most severe difficulties.

Yet because much of the economic policy of the EU is embedded in its Treaties, which can normally only be changed if all member states agree, there is a growing frustration that the democratic will of Europe's people simply cannot be expressed if on any point it differs from that set out in the Treaties. And while the Treaties are not in legal form a "constitution", their functional effect is extremely analogous to that of a Constitution; it is now generally agreed that the Treaties and their workings – including the fact that they included the concept of citizenship - provide a form of EU "constitutional order". We look at the general contents of national Constitutions, and find that the vast majority are neutral on the type of economic structure, ideology, policies and rules that the country should follow. This poses the question of why the EU should bind itself and its member states so tightly into a particular form of economic dogma.

Our aim is offer a relatively short set of essential Treaty amendments which would make the terms of the Treaties more policy-neutral, and enable the EU and member states, within their remits, to define and implement economic policies that are democratically chosen and appropriate to the circumstances and needs of their citizens.

The EU and its Treaties

The European Union was created by Treaty – originally the Maastricht Treaty, and since December 2009 its legal existence is provided for by the Treaty of Lisbon. The Lisbon Treaty in turn amends and renames the Maastricht Treaty (1993) to become the Treaty on European Union (2007) or TEU for short; it also amends and renames the Treaty of Rome (1957), now called the Treaty on the Functioning of the European Union (2007) or TFEU. The original European Economic Community (EEC) – created by the Treaty of Rome – was

renamed the European Community (EC) by the Treaty of Maastricht, and the EC was itself subsumed into the EU by the Lisbon Treaty. So far so simple!

But the mismatch was increasingly apparent between the inter-governmental Treaty *form*, and the creation of a new transnational entity – the EU - with its own (additional) citizenship as well as a common currency and with a court with far-reaching jurisdiction. In 2001, the EU Heads of State set up the Convention on the Future of Europe, under the chairmanship of Valéry Giscard d'Estaing, to draw up a European Constitution. While the Constitution was duly drafted and signed by all member states, it was rejected in national referenda in France and the Netherlands in 2005, and could not be ratified. However, its contents were effectively maintained (almost unchanged in substance) but redistributed as amendments into the newly named TEU and TFEU Treaties

The EU Treaties – a constitutional order

Despite the failure of the European Constitution, it is generally considered by lawyers and political scientists who study the EU that the Union has all or most of the attributes of a "constitutional order", and that its Treaties are to be seen as providing a constitutional framework. That is, they have to a large degree the functional equivalence and force of a written Constitution of a state (or of a 'sui generis' body with many or most of the attributes of a state, even if it has other non-state attributes).

There are indeed numerous books and papers which express this explicitly. For example, in the 2009 book "Principles of European Constitutional Law" - edited by two academics from the Max Planck Institute, Armin von Bogdandy and Jürgen Bast (Hart Publishing) - von Bogdandy argues

> "Moreover not only the functions but also the semantics of the Treaties (their 'coding') increasingly suggest a constitutional approach, since the Treaty of Amsterdam has availed itself…of the key concepts of liberal-democratic constitutionalism: liberty, democracy, rule of law and protection of fundamental rights."

Another example is the essay on "Parameters of Constitutional Development: The Fiscal Compact In Between EU and Member State Constitutions", by Professor Leonard Besselink (in "The EU After Lisbon", Springer Publishing, 2014). The abstract of his chapter states

> "…In this chapter, the boundaries of constitutional development are drawn broadly to encompass both the EU and the Member States constitutional orders. Also, not only the formal constitution, but also the substantive constitution is taken on board. This enables an analysis of one major response to the crisis, the Fiscal Compact

> contained in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. This instrument is constitutionally located 'in between' the EU and the Member States.. The chapter concludes that we are in the middle of constitutional change, which—once the dust has settled—may be codified and consolidated in the EU constitutional documents proper, in the style of 'evolutionary constitutions'.

Professor Robert Schütze, in his "European Constitutional Law" (2nd edition, Cambridge University Press 2015), goes further:

> "Indeed the real problem of the European Union is not whether there is a European Constitution, but that there is '[t]oo much constitutional law'…. For in comparison to the 34 articles and amendments that make up the written constitution of the United States, the European Treaties alone contain 413 articles. The European Treaties are therefore, with regard to their length, 'bad' constitutional law. For it is the task of constitutions to define the very principles on which societies are based."

In fact, the idea that the Treaties form a constitutional order is not confined to academics. The European Court of Justice had itself, in a formal Opinion delivered as long ago as 1991, therefore before the introduction even of EU Citizenship and the Charter of Fundamental Rights, itself described the (then) European Economic Community Treaty as a "constitutional charter", contrasting the EEC with the European Economic Area:

> "The European Economic Area is to be established on the basis of an international treaty which merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions." (Our emphasis).

More recently, in its judgment in the case of Kadi (ECJ C402-05) of 2008, the ECJ pronounced:

> "The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a

> condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty." (Our emphasis again).

But in any event, the Treaties perform a function that is so analogous to a Constitution – and in particular to a "liberal-democratic" state constitution – that it is wholly justifiable to assess its provisions against the norms of such states.

The core elements of national Constitutions

A Constitution may be defined as:

> "The fundamental law, written or unwritten, that establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers…. A legislative charter by which a government or group derives its authority to act."

Each Constitution is the product of its own time and history, and some run to just a few pages, others to hundreds. But we may summarise their general features – and in so doing will see that the European Union is extremely unusual – and unique in the degree of detail - in laying down the economic philosophy (or ideology) and detailed rules to govern day-to-day economic policy-making.

A Constitution in general terms sets out the institutional relationship between the different parts and levels of government, it usually allocates competences between the different parts and levels of government, including the division of roles and functions between legislature, executive and judiciary. It may often set out the founders' general values and aspirations. It frequently lays down the principal rights (especially human rights) which the state's citizens are to enjoy. The provisions of the Constitution are almost always entrenched, i.e. are harder to amend than ordinary laws.

If one studies Constitutions across what are seen as democratic states with "advanced economies", one notable feature is that, with few exceptions (at least until the Eurozone crisis), the content and details of economic and monetary policy are quite absent; the Constitution may set out the goals to be aimed for and the procedures to be followed, but the content of the policies is left to the product of democratic debate through Parliamentary law-making (as well as day-to-day operational management).

The small number of exceptions to this general rule are to be found in more recent constitutions in a few EU countries' constitutions, which have adopted one or more rules (e.g. Poland's 1997 Constitution caps debt as a percentage of GDP) of the EU post-Maastricht Treaties. We may also note the very recent fashion – generated in the heat of the Eurozone crisis - for "debt-brake" or balanced budget amendments to national Constitutions in a few countries (Germany, Spain, Italy, Slovenia).

In general terms, national constitutions often include provisions laying down the forms and requirements of annual budget-making, tax-setting or the incurring of governmental debt, but these are about the *decision-making processes* not the *policy content*.

Here are just a few examples from different European countries to illustrate the points[1]:

France:
"Article 1: France shall be an indivisible, secular, democratic and social Republic"
No provisions prescribing the content or rules of economic ideology or policy.

Netherlands:
No provisions on economic ideology or policy

Denmark:
No provisions on economic ideology or policy

Finland:
No provisions on economic ideology or policy

Austria:
"Article 1: Austria is a democratic republic. Its law emanates from the people".
No provisions on economic ideology or policy (but detailed budget procedural rules)

Belgium:

[1] If one looks beyond Europe, to the USA or Japan, India or New Zealand (which has a Constitutional Act), there are no provisions that lay down binding economic policy rules in the way the EU Treaties do.

The Constitution of the Philippines is an interesting example of setting goals but not prescribing a specific economic policy or ideology. In Article II Section 9, it provides that "The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all". It also (Section 20) provides that "The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."

"Article 7bis: the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations"
No provisions on economic ideology or philosophy

Italy:
"Article 1. Italy is a democratic Republic, founded on labour"
"Article 41. Private economic initiative is free…The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives."
No provisions defining a specific economic ideology or philosophy, but a form of balanced budget (over the cycle) constitutional amendment (Article 81.1) was adopted in 2012

Portugal:
"Article 80: Fundamental principles
Society and the economy shall be organised on the basis of the following principles:
a. Economic power shall be subordinated to democratic political power…"
No specific provisions on economic ideology or philosophy

Spain's Constitution touches on economic issues, but in a more eclectic manner:
"Article 1. Spain is hereby established as a social and democratic State, subject to the rule of law…"
"Article 38 - Right to competitive marketplace: Free enterprise is recognized within the framework of a market economy"
"Article 128.2: Public initiative in economic activity is recognized. Essential resources or services may be reserved by law to the public sector especially in the case of monopolies."
In 2012, in mid-crisis, a constitutional amendment was adopted (Article 135) to require Spain to adhere to the EU's structural deficit and debt limits.

The EU Treaties – how far do they 'constitutionally' impose a specific economic philosophy and policy?

Article 3 and the social market economy

The general values and aims of the EU are set out in the TEU, while the detailed policies and rules are laid down in the TFEU. One needs to examine both to see how the economic philosophy and rules interact. And the rules for changing any provision are the same for all articles under both Treaties – and very difficult.

The TEU starts well, in the sense that the values under Article 2 are broadly similar to those of many Constitutions:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Article 3.1 sets out an "aim" which again is not controversial:
The Union's aim is to promote peace, its values and the well-being of its peoples.

But much of Article 3 provides a set of objectives or mandates for the EU which have a strong economic policy dimension, though expressed in general terms:

> 3.3 The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment…

The priority here is curious, since establishing an internal market should surely be a means to the end, not the primary objective. Yet it comes ahead of the rest. Europe's sustainable development is "based on balanced economic growth" and "price stability, and on "a highly competitive social market economy." Only at the end of this list do we find the formulation about "aiming" at full employment and social progress, which appears from the French version of the text ("qui tend au plein emploi et au progrès social") to be an aspiration of the social market economy, and only very indirectly of the Union (the English version is ambiguous). The term "balanced" in 3.3. is not defined, but we may note that, far from becoming closer to achievement, by any standard the Eurozone in particular has become more divergent and unbalanced, whether judged by GDP or unemployment etc.

There are very few national Constitutions that cover any of this territory. The use of the phrase "highly competitive social market economy" is unique. Slovakia is the only one that comes close, in its Article 55.1:

"The economy in the Slovak Republic shall be based on the principles of a socially and ecologically orientated market economy", but this is a looser formulation than that of a "social market".

But what is meant by a "highly competitive social market economy"? Does it carry any philosophical "baggage" that makes it inappropriate in limiting democratic debate and policy choices? Probably not directly, but we need to understand its usage. A page of the website of the German Ministry of Economic Affairs and Energy is dedicated to the Social Market Economy:

> "The underlying idea of the social market economy is to protect the freedom of all market participants on both the supply and demand side, whilst also providing for a strong safety net…. The social market economy forms a pivotal part of our free and open society, which is also characterised by solidarity. It has proven itself as an economic system that allows for prosperity and full employment whilst also providing welfare and promoting a strong social fabric."

The page continues in a simplistic eulogy of markets, based on neoclassical economic theory, and without a balancing reference to the role of government in macroeconomic (including fiscal) policy to deal with problems that arise, such as the impact of the global financial crisis. The problem of course is that at European level, the working of the social market economy to date has precisely not delivered full employment; unemployment in August 2016 was still at 10% across the Eurozone, and had fallen below that level for only one month in seven years. Of course, the proponents of ultra-free markets will argue that it is imperfections in markets (and insufficient liberalisation) that have led to this imperfect result in the real world. But this precisely opens the question of which economic theory and policies is most appropriate – and this should be subject to democratic debate and not embedded in constitutional forms that preclude democratic change.

Although the phrase "social market economy" is not to be found in the German Basic Law, the Treaty between the Federal Republic of Germany and the German Democratic Republic establishing a Monetary, Economic and Social Union (18 May 1990) provided in Article 1 that

> "The basis of the Economic Union [between the two German states] shall be the social market economy as the common economic system of the two Contracting Parties."

It is thus a concept that has a particular resonance in Germany, and reflects orthodox German (ordoliberal) economic philosophy. The term was introduced via the Maastricht Treaty in 1992, which also set the highly-disputed convergence criteria (including the public deficit and debt criteria) and the newly created central bank's primary task of price stability, irrespective of the impact on employment. In essence, the philosophy of the social market economy places somewhat more emphasis on the role of the state in driving competition

and the market mechanisms than the (more laissez-faire) neoliberalism – and perhaps a greater emphasis on strict adherence to fixed rules by the state.

That said, Hayek (seen by many as a neoliberal, though not by all) also saw an important role for the state in providing the framework for a highly competitive market economy – for example, in The Road to Serfdom (Routledge), p.39:

> "the functioning of competition not only requires adequate organisation of certain institutions like money, markets and channels of information – some of which can never be adequately provide by private enterprise – but it depends above all on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible."

Hayek was also open to the state taking certain regulatory steps, e.g. to limit working hours or require certain sanitary arrangements; moreover

> "Nor is the preservation of competition incompatible with an extensive system of social services – so long as the organisation of these services is not designed in such a way as to make competition ineffective over wide fields."

What is excluded by the concepts and rules of ordoliberalism (and thus the social market economy) and Hayekian (neo)liberalism is, for example, a more Keynesian approach – both monetary and fiscal – to the economy and society, where it is recognized that for long periods the economy may remain stuck in a sub-par equilibrium which involves sustained high unemployment, and which may require major public investment if the private sector is not willing or able to invest sufficiently. Moreover, ordoliberalism and neoliberalism both underestimate or ignore the role and potentially disruptive power of free movement of capital, and the need to control imbalances. Instead, both concepts assume or claim that the major problem to address is government deficits. These in fact arise largely as an outcome of economic failure, and are not the cause of other imbalances or of financial and banking crises.

In conclusion on this issue of the EU's economic objectives, our preliminary view is that while Article 3.3 contains elements that are not controversial, its wording evidences particular ideological assumptions and goals that are not appropriate to the Constitution of a democracy, and should be redrafted.

What would seem to be a more "normal" and sensible approach to the EU's "constitution"1 is to recognize at the outset the role of both private and public sectors in contributing to a European society and economy that matches the values it is committed to and proclaims. This would leave the path open to debates over different solutions and policies in the

economic sphere – and contribute to a proper European democracy of which we can be proud.

"The principle of an open market economy with free competition"

Under the heading "Economic Policy", we find in Articles 119 and 120 no fewer than three separate references to "the principle of an open market economy with free competition", without definition. Yet there is not a single mention in these articles of a policy of full employment. Moreover, there is no explanation of whether – and if so how – the principle of an "open market economy" differs from that of a "social market economy".

As we have seen, it is rare for national constitutions to define their economic systems in this quite prescriptive way. While we surmise that few would be opposed to some variety of *substantially* open market economy, provided this is balanced by strong social protection, the term is often defined (though not in the Treaties) in quite extreme free market terms, for example the website Investopedia:

> "An open market is an economic system with no barriers to free market activity. An open market is characterized by the absence of tariffs, taxes, licensing requirements, subsidies, unionization and any other regulations or practices that interfere with the natural functioning of the free market."

Moreover, the term "free competition", left unqualified, may not be seen as always and in every circumstance the right approach, e.g. if European citizens wished to argue that certain natural quasi-monopolies (e.g. network utilities like water or railways) should be publicly owned. There should be the freedom to argue over and democratically choose different options, not have constitutional constraints erected to prevent the open competition of ideas and public choice.

Constitutional rules for public finances, especially budget deficits and public debt

Since the Great Depression and rise of fascism in the 1930s, and following publication of Keynes's General Theory, the democratic world has debated issues of fiscal and monetary policy, and reached different decisions at different times. This includes, as a central issue, the scale and scope for fiscal policy – covering both current budgets and investment.

In opposition to the fiscal dimension of Keynesianism (notably to tackle depressions involving high unemployment), ordoliberal theory is opposed in principle to public budget deficits – even for capital investment purposes. The Eurozone crisis since 2010 was wrongly framed by most of Europe's political leaders – and far too many economists – as a public

debt crisis, whereas it was a crisis that originated in excessive private debt, capital flows and imbalances. In their publication "The long shadow of ordoliberalism: Germany's approach to the euro crisis", Sebastian Dullien and Ulrike Guérot, published by the European Council on Foreign Relations in 2012, the authors argue that

> "Ordoliberalism differs from other schools of liberalism (including the neo-liberalism predominant in the Anglo-Saxon world) in that it places a greater emphasis on preventing cartels and monopolies. **For example, it rejects the use of expansionary fiscal and monetary policies to stabilise the business cycle in a recession and is, in that sense, anti-Keynesian."** (Our emphasis).

Consequent on this deliberate rejection of active fiscal policy, the whole of Eurozone policy since the crisis broke has on the contrary centred on the reduction of budget deficits, with something close to a blind eye being turned to the more severe problems of private debt overhangs and trade and current account imbalances within the Eurozone.

But whether the ordoliberal or the Keynesian view is correct, it is extraordinary that the EU – which is expressly committed to democracy as a key value – should use Treaties to close off debate and the democratic choice of other legitimate economic policy options. Thus, the main political response within the EU hierarchy to the Eurozone crisis was to draw up and pressure member states to sign yet another Treaty – to tie states into a yet tighter commitment to the ordoliberal view on fiscal policy, in the form of the "Treaty on Stability Coordination and Governance in the Economic and Monetary Union" of 2012.

Until recently, there were hardly any national constitutions that sought to place limits on deficits and debt. Decisions of finances have traditionally been the province of public debate and democratic decision-making. The concept of specific limits on deficits and debt was introduced in the Maastricht Treaty of 1992. Even though the global financial crisis of 2007-9, and the Eurozone crisis of 2010-13, were not caused by the state of public finances, they were singled out by the EU's leadership as the main target for corrective action, and this means the current EU Treaty provisions are supplemented by the separate Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2012.

Also in the context of the Eurozone crisis, as we have seen, a number of states have for the first time amended their own national constitutions (or Basic Law in Germany's case) to include "debt brake" provisions, e.g. Germany (2009), Spain (2012), Italy (2012) and Slovenia (2013), though in most cases with some considerable wriggle room to allow (at least to some extent) for economic reality to impinge. A few other governments tried to do so but were defeated politically.

The current deficit/debt rules have helped to contribute to an overall low rate of GDP increase in the Eurozone in particular – compared to the rest of EU and other similar "advanced economies" – and a higher rate of unemployment for the Eurozone as a whole.

In a nutshell, we would argue that this is down to a significant degree to the contractionary fiscal policies pursued by the European Commission and other EU institutions. But whether this view is right or wrong in the eyes of the institutions, it is hard to see why it should not be the subject of democratic debate and freedom to choose different fiscal paths at European and/or national levels.

We will of course need to consider what if any rules or guidelines or indicators might be appropriate – and consistent with democracy - for the maintenance of the single currency, on the basis that there is no real democratic political and economic union to accompany the monetary union.

The Central Bank – role and mandate

The TFEU embeds both the absolute independence of the European Central Bank – which is removed from any direct democratic oversight – and defines a single primary mandate – price stability. The Treaty also strictly enforces the division between the Bank and other governmental sectors, preventing the ECB from providing any credit facilities to government or public sector bodies.

Almost all aspects of the ECB's Treaty roles and mandate are disputable and disputed, in terms of economic theory and policy.

The concept of central bank independence – notably in the field of monetary policy - is far from new (it featured strongly in debates in the early 1920s) but came to the fore as a favoured policy (by most but not all economists) from at least the late 1980s. It is only quite recently that debate has started to open up as to whether – while maintaining operational independence for the central bank - the focus should not be more on *partnership* between the central bank (monetary policy) and central government (fiscal policy).

The European Central Bank was born at a time when the doctrine of independence was at its peak, and the Treaty embeds a very strong form of independence, indeed of total detachment from any democratic accountability, as well as fixing a single primary mandate of price stability.

In his book "Making the European Monetary Union", which was commissioned by the ECB itself in 2008, the highly-regarded economic historian Harold James underlines the very particular philosophical roots of the Bank (p.6):

> "The European Central Bank was designed as a non-state actor whose primary purpose was to issue money – the kind of institution that had basically only been imagined before the 1990s by antistatist liberal economist and philosopher Friedrich Hayek and some of his wilder disciples."

He continues (p.15)

> "The intellectual shift toward central bank independence, which characterised the late twentieth century, and which brought a considerable degree of price stability, was possible only on the assumption that there was a clear rule or principle that the central bank should follow. When that rule or principle became muddied, and discretion in policy-making returned in the aftermath of the financial crisis, the case for central bank independence began to look more problematic… The new post-crisis vision of the central bank is often of a very different sort of institution from the 1990s vision of a mechanism for guaranteeing price stability."

And again (p.322):

> The ECB statute represents the high-water mark of the idea of an independent central bank committed to the unique goal of price stability. The outcome of Maastricht was possible only because of the widespread consensus about central bank independence, which made it seem as if the astonishing act of European monetary integration could occur without any substantial transfer of sovereignty. Tommaso Padoa-Schioppa saw this emphasis on the independent central bank as part of a more general acceptance of "minimum government" that made a new stage of European integration possible. As he implied, the discussion of central banking was part of a broader trend that prepared the way for what was later dismissively referred to as "market fundamentalism".

Comparison with the mandates of other central banks of democracies with developed economies demonstrates that the current Treaty basis of the ECB in fact precludes proper democratic debate – and whose rigidity has obliged the ECB under Draghi's presidency to interpret the Treaty provisions with a creativity that – however sensible in its own terms – surely overturns the intentions of the original drafters.

Looking simply at the degree of independence, the ECB's is at one extreme. The only comparator national central bank which comes close in terms of a constitutionally embedded independence is perhaps the Swedish Riksbank:

> "Article 13. The Riksbank is the central bank of the Realm and an authority under the Riksdag. The Riksbank is responsible for monetary policy. No public authority may determine how the Riksbank shall decide in matters of monetary policy."

But even here the bank is "under" the Parliament, and its mandate is self-determined, i.e. *can be varied if circumstances change*. The central bank's *existence* is provided for in the constitutions of a few other countries, but with little more set out in terms of independence or mandate, which is left to legislation. In many more countries, the central bank's existence depends on legislation – which by definition is subject to democratically decided change.

As is well known, the US's central bank, the Federal Reserve, has a wider mandate than the ECB. It is entirely a creature of statute, not mentioned in the Constitution. In 1977, Congress amended The Federal Reserve Act, stating the monetary policy objectives as follows:

> "The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices and moderate long-term interest rates."

Even more remarkably, the Canadian central bank has its mandate set in the Preamble to the Bank of Canada Act 1985, in the broadest terms:

> "WHEREAS it is desirable to establish a central bank in Canada to regulate credit and currency in the best interests of the economic life of the nation, to control and protect the external value of the national monetary unit and to mitigate by its influence fluctuations in the general level of production, trade, prices and employment, so far as may be possible within the scope of monetary action, and generally to promote the economic and financial welfare of Canada".

Moreover, the partnership approach is written into the statute:

> 14 (1) The Minister and the Governor shall consult regularly on monetary policy and on its relation to general economic policy.

And the Minister may ultimately issue a "written directive concerning monetary policy" to the governor of the bank for a specific period.

The UK's Bank of England has a 1998 legislation-based monetary policy mandate that is similar to the ECB's in wording:

> In relation to monetary policy, the objectives of the Bank of England shall be—
> (a) to maintain price stability, and
> (b) subject to that, to support the economic policy of Her Majesty's Government, including its objectives for growth and employment.

However, ultimate control lies with the government, since (by section 19(1) of the 1998 Act):

> "The Treasury, after consultation with the Governor of the Bank, may by order give the Bank directions with respect to monetary policy if they are satisfied that the directions are required in the public interest and by extreme economic circumstances."

The purpose of setting out these different national solutions is to show that the Treaty provisions for the ECB in the TFEU are not necessary, and demonstrate a disregard for democracy in that they embed a very particular – and conservative – economic philosophy which is based (as Tommaso Padoa-Schioppa indicated) on the presumption of desirability of "minimum government".

Moreover, the Treaty provisions have not led to a superior economic performance on the part of the Eurozone – on the contrary, the Eurozone has tended to underperform other advanced economies, and has consistently had a much higher rate of unemployment – as we write, still at 10%. While it is still probably necessary for the ECB's existence to be defined via the Treaties, it is surely time that the role and mandate of the ECB was opened up to democratic debate and potential change by democratic choice – either through more flexible Treaty provision, or by leaving the key policy issues to legislation rather than Treaty.

At the same time, the Treaties have also failed to give the ECB sufficient powers in fields where these are obviously required. While we may argue that the ECB's power is too great in that it holds monopoly over monetary management without democratic oversight, the ECB is too weak in that it lacks necessary instruments to carry out the basic tasks of central banks, e.g. to be "lender of last resort".

Solidarity (support for states that are in economic difficulties)

We must not ignore what is arguably the most important flaw in the structure of the Eurozone – the lack of any mechanism for fiscal transfers and adequate automatic stabilizers. Given the lack of economic convergence between the original member states, and the problems that have arisen since, it is (or should be) patently clear from an economic perspective that such transfers – at least to a reasonable scale – are essential if the single currency is to prove successful in the long term. Yet for political and perhaps ideological reasons, this is currently ruled out. The EU own budget is only about 1% of EU GDP, which means that there is simply no capacity at Union level (compare this to the US Federal Budget of around 18-20% of US GDP). The need for a fundamental rethink of the fiscal framework of the single currency is however largely beyond the scope of this project. We are of course aware of proposals which might go some way to filling the gap, e.g. for shared unemployment insurance[2].

State aid (subsidy ban)

Unlike in the USA, or elsewhere to our knowledge, the EU has a strong set of Treaty rules (TFEU, Articles 107-109), as part of its "highly competitive" philosophy, that ban any form of state aid save (a) a few cases where this is specifically allowed, and (b) in a somewhat wider set of cases, where the European Commission permits it. The fact that similar provision is not to be found in other advanced economies seems to demonstrate conclusively that state aid restrictions are not an intrinsic or integral part of modern capitalism, but an optional policy choice. That said, to a certain degree the outlawing of subsidy may have the positive effect of preventing a subsidy race or "investment blackmail", in which corporations play one government or region or municipality off against another.

However, the banning of state aid (save in the few permitted cases) is not extended to its functional equivalent, the ability of states to lower corporate taxation, in what has become a damaging tax race to the bottom. Ireland, the Netherlands and Luxembourg are all examples of states that have crudely used taxation as a form of non-outlawed state aid by another name.

In terms of opening up economic policy to democratic debate, the options for discussion on state aid range from
(a) total removal from the Treaties (leaving it to legislation if any steps are required to deal with undesirable forms of state aid) or
(b) amendments to the Treaties to widen the scope for beneficial state aid, e.g. where a short or medium term (say, up to 5 years) degree of aid is needed to assist an industry defined as strategic by a member state to weather a particular economic storm. By limiting the time period, this would also limit any impact on the internal market.

[2] Such as the proposals put forward by former Commissioner for Employment, Social Affairs and Inclusion, László Andor, e.g. on PRIME's website.

It is to be noted that precisely such an exception exists for the benefit of Germany, faced with the incontrovertibly major issue of reunification. Thus under Article 107.2.c, state aid by the Federal Government is automatically permissible if given to

> "…certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division."

It is hard however to see why this should be the only exception of its kind where the member state government is itself given power to decide, given the impact of economic and technological change that have contributed, for example, to the Brexit Referendum vote and now to the election of President Trump.

Another area for consideration, in relation to state aid, is the impact of subsidy on public services (the effects of the Altmark judgment), which are the subject of the next section.

Public services and services of general economic interest

The EU legal and jurisprudential framework for public services is a conceptual mess, which flows from a profound error – or at least bias – in economic perspective. In effect, the European Commission (and others) often view the existence of ordinary public services as flowing from "market failure" on the part of the private sector. That is, they are not always seen as a complement to private sector market services, but as a replacement for it, which can be rectified if the market can be created or expanded to cover them. With more and more contracting out, or full privatisation, of public services, there is often increasing uncertainty as to which services are to be considered as "market services", therefore covered by internal market rules, and which are to be considered as "non-market" services.

The Treaties do not mention *public* services; the only reference (and this is minimal) is to "services of general economic interest" (SGEIs), but the dividing line between SGEIs and non-economic (public) services is extremely unclear, with the jurisprudence failing to provide clarity. In essence, if a public service is an SGEI, it is in general subject to the internal market and competition rules. If it is deemed to be a Service of General Interest (SGI). It remains unclear whether or how far, for example, public health services are deemed to be SGEIs, in which case they are subject to the competition and procurement rules.

Article 14 of the TFEU requires both the EU and the member states to take care that SGEIs "operate on the basis of principles and conditions, particularly economic and

financial conditions, which enable them to fulfil their missions." However, this requirement is subject to complying with the Treaty provisions on competition and state aid, and leaves the overall position highly unclear. The Council and Parliament are on paper required to enact a Regulation for this purpose – but have steadfastly ignored this obligation.

The leading academic writers in the field confirm the problems posed by the unclear way that EU law (based on minimal Treaty foundation) treats public services. Thus Ulla Neergaard, co-editor of "The Changing Legal Framework for Services of General Economic Interest" (TMC Asser Press, 2009) argues (p.49):

> "…it may be concluded that at present we are left with a terminology that lacks legal clarity and thereby fails in providing a reasonable degree of legal certainty. In other words, it may be classified as a conceptual disaster"

Now, if what was or is a public service is now in effect operating fully commercially in a market on a competitive basis, then it is fair to require it to operate on equal terms with other market operators. But with non-commercial, not-for-profit public health services, social services, educational services, some environmental public services…the decision whether they should be exposed to the full force of the market must be left to democratic decision-making in each state – and the Treaties need to make this clear. The creeping enforced marketisation of national public services through EU-level interpretations (for there is no clear Treaty provision) was never justified – other than by a Hayekian economic ideology which is too prevalent in the internal market service of the Commission – and needs to end.

This is a problem noted by other commentators; thus Professor Wolf Sauter, in his book "Public Services in EU Law" (Cambridge University Press, 2015), at p.77:

> However, many commentators warn of an opposite trend: a hollowing out of public services and of the welfare state itself due to unrestricted liberalization by means of negative integration by directly effective EU law that, given certain inherent weaknesses of the decision-making processes at EU level, cannot be compensated politically by positive European policies.

In fact, the TFEU contains a definition which could have been held to exclude non-commercial public services from coming within the scope of the Treaties in the first place. Article 57 of the TFEU provides

> **Services shall be considered to be 'services'** within the meaning of the Treaties **where they are normally provided for remuneration**, in so far as they are not

governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

In general, ordinary public services (e.g. health, social services, state education) are nor provided for remuneration, in the sense that the client or citizen does not pay anything at all, or anything close to the market price, for the service. Unfortunately, the European Court of Justice has (wrongly in our view) held in some cases that the remuneration in question need not be provided by the recipient, and this has brought great legal uncertainty in its wake.

There are two possible approaches. The first is to exclude all non-commercial public services from the Treaties. The second is to define sensible rules that can operate at European level and aim to protect public services. At this stage, the former approach appears simpler.

Trade in goods and services

Since the common market was founded by The Treaty of Rome, trade has naturally been a central concern of the EEC and its successor, the EU. And while much trade is undoubtedly beneficial, the debate today is much more open as to whether or how far further extensions of "free trade" – in particular given the context of special courts to deal with investor-state disputes – are really beneficial for the majority of citizens[3]. Moreover, much trade now is not about comparative advantage in production and exchange of discrete goods or services between countries (assuming the theory of comparative advantage to be true for the moment), but about multinational corporations' vertical (dispersed) production networks, with different parts of the production process based in different countries depending on labour costs and required skills.

So although hotly disputed, there is today no strong professional nor public consensus that absolute free trade (especially in a context of unfettered capital mobility) is an absolute good.

[3] See for example the recent article Straight Talk on Trade (15 November 2016) by Professor Dani Rodrik, who in general supports trade but sees the downsides as well.

The EU Treaties already reflect some ambiguity. Article 3.5 of the TFEU refers (as part of the EU's international objectives) to contributing to "sustainable development of the Earth, solidarity and mutual respect among peoples, **free and fair trade**, eradication of poverty.."

The Preamble to the TFEU includes reference to the need for concerted action to guarantee (inter alia) "balanced trade", but also to contribute to "the progressive abolition of restrictions on international trade". Article 32 underlines "the need to promote trade between Member States and third countries". Article 206, under the Common Commercial Policy", requires the EU "to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."

Trade, in terms of the EU Treaties, needs to be considered in at least three aspects. First, trade within the internal market. Here, it seems evident that provided other rules (including social and environmental) are complied with and standards met, there should be full freedom of trade, and ditto in relation to services, provided that public services are not undermined. Otherwise, the concept of an internal market effectively disappears.

Second, and this is by way of a caveat to the first point, internal trade – and in particular within the Eurozone - needs to be "balanced", i.e. avoiding excessive trade and current account surpluses as well as deficits. The original Treaty of Rome provided precisely for this, in its Article 104:

> "Each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices."

This provision, however, was repealed by the Maastricht Treaty. Something similar may now be required, given the experience of the huge trade and current account surpluses of Germany and the Netherlands. Instead, the current account deficit countries of the Eurozone have been in effect required to do all the harsh economic and social adjustment in the wake of the crisis (which, as Jens Weidmann, president of the Bundesbank, had insisted upon) through internal wage reductions, unemployment and deflation.

Third, there is international trade, i.e. with third countries. Here, it now appears not appropriate to require the EU in all circumstances to seek the progressive abolition of any restriction on free trade or FDI. It should be sufficient, we would argue, to promote the harmonious development of balanced, fair and free trade. The issue of excessive current account surpluses is more a matter for the international community than for the EU Treaties to resolve.

Capital flows

Again, the existence of an internal market implies that capital should be able to move relatively freely (subject to compliance with rules and standards).

However, even since the Treaty of Rome, the Treaties have gone further and sought to promote international cross-border free flows of capital. While the international mobility of capital has long been seen in neoliberal policy as a positive good, this is another hotly disputed point, since sudden and sharp swings in short-term flows can be severely destabilizing to an economy, as we saw in the Asian crisis of the late 1990s, and indeed more recently with countries like Brazil. Even the IMF now question whether free capital flows are always a good thing, e.g. "Capital Controls or Macroprudential Regulation?" by Anton Korinek and Damiano Sandri (2015). Professor Hélène Rey, in her paper "Dilemma not Trilemma: The Global Financial Cycle and Monetary Policy Independence" (2015) likewise concludes that capital controls - as well as other macroprudential tools - may be needed:

> "Depending on the source of financial instability and institutional settings, the use of capital controls as a partial substitute for macroprudential measures should not be discarded.

Yet today, Article 63.1 of the TFEU imposes an obligation to remove *all* restrictions on capital movement with *all* third countries:

> "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited".

We will argue that it is wrong for the EU Treaties to take such an position is favour of unfettered international cross-border capital mobility, given that there are clear disadvantages as well as advantages. Once again, this is an area that should be subject to debate and change, depending on circumstances – and not have a particular ideological line embedded in Treaty texts.

Conclusions

It has not been possible in this paper to deal with all the problematic areas of the EU Treaties linked to economic policy and ideology. There remains the difficult issue, for example, of the European Court of Justice. In many respects, the court performs a positive and necessary function. Yet is has reached many decisions which appear to stretch the

meaning of the Treaties beyond what the drafters are likely to have intended. In some cases, this does not matter. But it has the consequence that – being an interpretation of Treaties – the decision of the Court cannot be simply overridden by legislation. And because the Treaty texts are so long and so detailed, it provides far more space for such immutable interpretation than is even available to – for example – the US Supreme Court.

But the problem posed by the rigidity and policy bias of the Treaties is urgent – and made more so by recent events such as the Brexit vote, and the election of President Trump in the US. Though both reflect what the US economist Brad Delong calls "nativism" among a wide set of discontented voters, the economic factors in that dissatisfaction are also evident. This is the culmination of a process long in the making. At present, it is the right-wing and far right forces that are gaining more support from those who are dissatisfied with the failure of European economic policy.

Since 2009, and in particular with the emergence of enduring mass unemployment in many parts of the EU, and the lowering of real wages and living standards, we have seen the emergence of new radical political forces in Europe on both left and right. Many of these groups or parties do not share the economic policy goals of the EU and in particular of the Eurozone.

At the country level a political system should enable the challenge from new groups to be integrated through democratic means. But many key economic and social policies are decided not through debate and elections, but as we have argued above, *via* inflexible EU Treaties which lay down a specific economic ideology and policy framework. No matter how they vote, citizens are not allowed to choose a truly different set of economic policies. The treaties themselves are enforced ultimately via the ECJ, and changeable only by unanimous agreement of all 28 Member States. Thus, we have a democratic blockage, and the imposition of a centrally-controlled economic policy that has in reality made the standard of living worse for many, especially for the less well-off.

The situation is also particularly problematic for those on the left who have broadly supported the European project for all its economic flaws. The challenge is to unite progressives across Europe in a socially and economically democratic European project - and at the same time to 'deconstruct' the economic hegemony embedded in the Treaties.

Our approach to this is to provide a practical tool - a brief set of clear, reasonable and (we hope) widely-supported changes to the EU Treaties.

We recognize that putting forward Treaty amendments faces the practical problem of getting change through the existing structure, which has been made deliberately difficult. However, a broad European campaign on behalf of democratic freedom under the Treaties

to change economic course would itself almost certainly have a practical impact on decision-making, positively affect the balance of political forces, and start to change the nature and content of political debate across the EU.