Editorial

The Fiscal Compact and the European constitutions: 'Europe speaking German'

In between the writing of this editorial and the publication of this issue of *EuConst*, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, in everyday parlance the 'Fiscal Compact', will have been signed by the representatives of the governments of the contracting parties – the member states of the European Union minus the United Kingdom and the Czech Republic. The Fiscal Compact is intended to foster budgetary discipline, to strengthen the coordination of economic policies and to improve the governance of the euro area. It reinforces, substantively amends and consolidates, in the form of a Treaty, existing rules of the Stability and Growth Pact and the measures in the so-called 'Six Pack' of five Regulations and a Directive of November 2011. It substantively generalizes the 'reverse qualified majority voting' procedure for decision-making by Eurozone countries in the excessive deficit procedure, a voting mechanism introduced for specific decisions in the so-called 'Six Pack' Regulations but unknown to EU primary law until now (Article 7). The Fiscal Compact also redefines the 'balanced budget rule' in stricter terms than was done in the Six Pack, and obliges the parties to the Treaty to adopt them in national law, preferably national constitutional law.

The economic, social and fiscal consequences of this tightening of the rules are inevitably controversial. Here we can only develop some thoughts on the constitutional questions raised by the Fiscal Compact and especially by its provisions on the 'balanced budget rule.'

Article 3(2) of the Fiscal Compact provides that the rules on the balanced budget must take effect in the national law of the parties within a year after the entry into force of the treaty. This national law must take the form of 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.'

The same provision stipulates that the contracting states also have to put in place under national law a mechanism automatically triggering corrective action

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in the event of 'significant observed deviations' from the medium-term objectives towards reaching a balanced budget, on the basis of 'common principles' proposed by the Commission.

Article 8(1) 'invites' the European Commission to report in due time to the contracting parties on the provisions adopted by each of them in compliance with Article 3(2). If the Commission finds that a contracting party has failed its duties under Article 3(2), the Article provides that 'the matter will be brought to the Court of Justice of the European Union by one or more of the Contracting Parties.' A contracting state may also, independently of the Commission's findings, bring the matter before the Court. In both cases, the judgment of the Court of Justice is binding on the parties involved, 'which shall take the necessary measures to comply with the judgment within a period to be decided by the Court.' Article 8(2) adds that if a state does not take the necessary measures to comply with a judgment, another contracting party can take the case to the Court of Justice again and request the imposition of financial sanctions.

These provisions raise interesting constitutional issues, at the national and the European level and at their interface. The requirement to incorporate the 'balanced budget rule' into national constitutional law is no doubt the most interesting. It affects the autonomy of national constitutional orders in Europe and highlights their differences.

The Franco-German initiative of August 2011 and the first draft of the Fiscal Compact proposed (more) mandatory language on amending the national constitutions, more or less in line with constitutional amendments adopted recently in Germany and Spain.[1] But what can be done in Germany and Spain cannot be done everywhere. Constitutionally, the Union's member states may not be legally able, or ready, to 'speak German'.[2]

[1] Since 2009 the German Constitution provides in Art. 115 (2) *Grundgesetz* among other things: '(2) Revenues and expenditures shall in principle be balanced without revenue from credits. This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 percent in relation to the nominal gross domestic product. In addition, when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically … .' Art. 135 Spanish Constitution provides since September 2011: '… The State and the Autonomous Communities may not incur a structural deficit that exceeds the established limits, if any, by the European Union for its Member States. … The volume of public debt of all public authorities in relation to the GDP of the State shall not exceed the reference value established by the Treaty on the Functioning of the European Union.' In France, a proposal to amend Art. 34 of the Constitution, delegating the precise deficit targets to a *loi organique*, is still pending. Any day now, the Italian Senate can vote the incorporation of the balanced budget rule into Article 81 of the Italian Constitution, which was initiated as a follow-up to the so-called Europlus Pact contained in the European Council Conclusions of March 2011.

[2] Referring to fiscal discipline and the future Fiscal Compact, the CDU parliamentary leader Volker Kauder declared at a party meeting in November 2011: 'Jetzt auf einmal wird in Europa Deutsch gesprochen.'

The toning down of the requirement to incorporate the fiscal rules in constitutional law is probably prompted by two considerations. The first relates to the rigidity of several constitutions, the second to the wish to avoid interference of the *vox populi*. There is a time element related to the rigidity of several national constitutions, such as that of say, Belgium, The Netherlands and Denmark. The Fiscal Treaty is scheduled to enter into force on 1 January 2013 (Article 14(2)), so the general budget rule and the automatic correction mechanism have to be implemented by 1 January 2014. In the countries mentioned, a constitutional amendment requires not only adoption by two parliaments, but also elections in between. If, for instance, in the Netherlands these elections were to coincide with periodic elections, as is the practice, these would not be held until May 2014: too late. Of course, to speed up the process, the Dutch parliament could be dissolved solely for the purpose of the constitutional amendment – which is not impossible but has not been done since 1948. In that case, however, the elections would probably be taken as a referendum on the EU, on which the country has had its first and last experience when the Constitutional Treaty was rejected. In Denmark, a constitutional amendment has to be approved by referendum. A referendum is also required in Ireland.[3] The process of ratification of the Treaty of Lisbon already showed that the EU and member state leaders are not very fond of referenda, and this is confirmed by the negative reactions to the Papandreou proposal, which would have given full powers for any measure whatsoever to keep Greece in the Eurozone.

However, the toning down of the mandatory language in the Compact, which still prefers the codification in constitutional provisions, but now also allows 'provisions of binding force and permanent character ... guaranteed to be fully respected and adhered to throughout the national budgetary processes', has not resolved all problems. The United Kingdom and the Netherlands are among the countries in which the rule applies that a parliament cannot bind itself.[4] A parliament deciding on the budget cannot be bound by a 'balanced budget rule' enacted by act of parliament, if parliament does not want to be bound by it or ignores it when deciding on the budget. Nevertheless the Dutch government has announced that it intends to implement the balanced budget rule by an act of parliament.[5]

[3] After finalization of this editorial it transpired that the Irish government, just before the signing of the Fiscal Compact, decided on the advice of the Attorney General that it will subject the Fiscal Compact to a constitutional referendum, thus obviating the necessity of transforming the budget rules into specific substantive provisions of the Irish Constitution.

[4] The United Kingdom may at some point in the future be bound to the Fiscal Compact by accession under Art. 15.

[5] Letter Minister of Finance and State Secretary of Foreign Affairs to the Lower House, Parliamentary Documents, *Tweede Kamer* 2011/12, 21 501-20, 603, p. 4.

This brings us to the issue of the position of the Court of Justice in its supervisory role and its consequences for the constitutional autonomy of member states. If called upon, the Court will have to adjudicate whether a member state complies with the demand of codifying the balanced budget rule in 'provisions of binding force and permanent character (…) guaranteed to be fully respected and adhered to throughout the national budgetary processes'. It may then have to decide intricate issues of national constitutional law, thus entering into the autonomy of the national constitutional orders. One of the issues might be whether incorporation of the balanced budget rule in an act of parliament – which does not formally bind a future parliament and which can be abrogated according the *lex posterior* rule – complies with the Fiscal Compact. Another is whether a parliamentary convention of conforming to the balanced budget rule qualifies as binding. Perhaps these questions cannot be decided without having recourse to extra-legal issues of fact such as a member state's reputation of financial stability and the will of its political actors to ensure sustainable public finances. After all, in Germany, constitutional guarantees have a different meaning in practice than in many other parts of Europe; *speaking* German is not necessarily *acting* German.

Not only the Court, but also the Commission, which is supposed to report on compliance, and other member states that consider bringing the inter-state complaint will have to form their judgment on such national constitutional and factual issues concerning the relevant member state.

A further set of issues concerns the architecture between the Fiscal Compact, the Union Treaties and the national constitutions.

Creating a treaty instrument mostly outside the EU framework, but not quite, to which not all member states adhere, is not new, as the experiences with the Schengen Agreement and the Prüm Convention have taught us. Here we focus on what it tells us about the autonomy and maturity of the Union's legal and constitutional order.

Reading the various provisions of the Fiscal Compact on its relation to the European Union will cast a shadow of doubt over that autonomy. Although the EU institutions are made use of, these provisions show that the Fiscal Compact is an addition from 'outside' the EU legal framework. Repeated incantations in the preamble and elsewhere that the Compact is in conformity with the EU Treaties actually make one suspect that the opposite might well be the case. That the Fiscal Compact, crucially, remains outside the EU framework is confirmed by the language of Article 16. It provides that within five years at most, steps will be taken to incorporate the substance of the Fiscal Compact, 'in compliance with the Treaty on the European Union and Treaty on the Functioning of the European

Union (…) into the legal framework of the European Union.'[6] So the Fiscal Compact is not 'in the legal framework' of the Union, but outside it.

The EU Treaties themselves, evidently, are insufficient to master the problems of governing the economy under the Union's own monetary system. The need of an intergovernmental treaty for which the supervision over compliance is not under the normal EU procedures, raises doubts on the constitutional maturity and even the constitutional nature of the Union. This is not to say that there is no nexus between the Fiscal Compact and the European Union. The objectives served by the rules contained in the Fiscal Compact are fully a function of the objectives of the European Union. But it needs acts outside the EU framework to realise these.

The Fiscal Compact's relationship to national constitutions is also intriguing. To a degree not seen before, the Compact seems to instrumentalise national constitutional law for the benefit of Union law. The obligation to incorporate the budget rule in at least substantively constitutional provisions raises questions regarding the constitution-making powers of the member states. In this respect, it is remarkable that while the German constitutional court tenaciously defends the sovereignty of its *verfassungsgebende Gewalt*, a 'Europe that is speaking German' would like to order the constitution-making powers of the other member states to incorporate the rule. (The same may be said of the statement of the 'Eurogroup' of 21 February 2012, which 'welcomes the intention of the Greek authorities to introduce over the next two months in the Greek legal framework a provision ensuring that priority is granted to debt-servicing payments. This provision will be introduced in the Greek constitution as soon as possible.'[7])

Certainly, Union membership has always come at a certain constitutional price. Direct effect and primacy take their toll on the autonomy that national constitutions claimed to have under the Westphalian paradigm. That is confirmed by the newer member states' carving out a space for the Union in their otherwise nationally oriented constitutions. The Maastricht Treaty necessitated several of the older member states to change constitutional rules on electoral rights for non-nationals, while 'Schengen' and some other 'third pillar' legislation forced some of the older and newer member states to amend constitutional rules on asylum and extradition. All this touched on the position of citizens. The Fiscal Compact, however, strikes at the heart of the institutions of parliamentary democracy by dislocating as a matter of constitutional principle the budgetary autonomy of the member states.

[6] This incorporation can done by primary or by secondary law, which if necessary can provide for exceptions for those countries which do not want to be bound by the rules in the Compact (cp. Protocol No. 15 to the TEU and TFEU and Art. 8 of Council Directive 2011/85/EU of 8 Nov. 2011).

[7] <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/128075.pdf>, visited 4 March 2012.

It affects the power of the purse of national parliaments (and also for the European Parliament!), historically the primary spring of development of their powers.

The Fiscal Compact can thus be viewed as confirmation that globalisation in its regional variety of Europeanisation marks the end not only of the political Westphalian paradigm but, in its wake, the economic Keynesian paradigm as well. It intends to restrict fiscal instruments of government control over the economy both formally and substantively more than was practically feasible under the EU Treaty. This view seems to be confirmed by the inability of the state systems to cope with the global financial markets. At the beginning of the banking crisis, this appeared for a while to be the opposite. At that juncture, it was not the international institutions like the IMF or the Basel Committee, which were supposed to regulate the banks, nor was it the EU which rescued banks, but the 'sovereign' states. The sovereign debt problem, however, reverses the situation again. The Six Pack and the Fiscal Compact were created in an effort to pacify the financial markets.

There is however another view. Viewed 'from below', that is from the member states' perspective, the situation is different. The truth is that a large sovereign debt and budget deficits reduce the fiscal room of manoeuvre of states drastically precisely when (neo-)Keynesian policies are desirable. Restoring that room for manoeuvre is restoring political power over the economy.

A balanced budget requirement was already contained in secondary Union law.[8] The question is why it was deemed necessary to oblige the contracting states to incorporate those Treaty commitments into national law, preferably of a formally, but at the very least of a substantively constitutional nature. At least three effects may have been intended. First, incorporation of the balanced budget rule in national constitutional law makes the commitments more visible for both the national politicians and the national public than primary and secondary Union law ever could. The second effect is that incorporation of the said rules in national constitutional law might significantly enhance the legitimacy of the budgetary limitations by emphasising that they are self-imposed (just as the treaty form of the inter-governmental Fiscal Compact emphasises the 'self-imposition' of the obligation). From this follows the third effect, that if the balanced budget rule is contained in national constitutional law, it will be harder for national politicians and the national public to blame 'Brussels' for the loss of budgetary self-determination and for the attending spending cuts and tax increases necessary to balance the budget. In the same vein, the automatic correction mechanism decentralises supervision and will, if it functions well, prevent the necessity of interventions of Brussels.

[8] See especially Art. 2a of Regulation 1175/2011 of the European Parliament and the Council of 16 Nov. 2011.

In short, the Fiscal Compact clearly expresses the need for constitutionalisation at the national level in not unilaterally imposing the balanced budget rule on member states, but requiring positively the acceptance of that rule as a substantively national constitutional provision. The mere enshrining of rules on budgetary restraint in EU Treaties and elaborated in secondary EU law could not muster the constitutional quality required for the challenge of reconquering political power over the economy in the very context of a global economy. This suggests the mutual dependence of the legal and constitutional orders involved, which together might be said to form the 'composite' constitutional order of Europe, a 'compact' in which the one cannot do without the other. Thus viewed, the Fiscal Compact can be characterised as a constitutional instrument more than an instrument of ordinary politics, unlikely as this may seem for an instrument invented in the panic to cope with the economic and sovereign debt crisis caused by the banking crisis of a few years ago. This characterization is underpinned by the role the Compact gives to national parliamentary committees.[9]

The combination of processes of deconstitutionalisation and constitutionalisation steered and revealed by the Fiscal Compact can only be understood from the dialectics involved. At the national level it diminishes the power of the purse of national parliaments, a central although mostly unwritten tenet of national constitutional law, while simultaneously requiring the national constitutionalisation of its essential mechanism, the balanced budget rule. At the European level it seems to undermine to a certain degree the constitutional consistency of the EU, since the fiscal regime is kept outside the EU framework. However, the possibility of its integration into the EU framework offers the prospect of a future strengthening of the EU and its 'partial' constitution, which for the moment hinges crucially on the member state constitutions.

The Fiscal Compact gives much food for thought. Its constitutional impact and relevance raise innumerable questions to solve, both for constitutional practice and constitutional scholarship.

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[9] Art. 13 Fiscal Compact: 'As foreseen in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the national Parliaments and representatives of the relevant committees of the European Parliament in order to discuss budgetary policies and other issues covered by this Treaty.' The opening words are somewhat curious, since the Protocol did not provide for a separate Treaty which would provide that the parliaments would do so for the purpose stipulated in this provision.