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Going 'Belt and Braces'
– Domestic Effects of Euro-crisis Law

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European University Institute
Department of Law

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– DOMESTIC EFFECTS OF EURO-CRISIS LAW**

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Constitutional Change through Euro-Crisis Law

This paper was first delivered at a conference held at the European University Institute in October 2014 presenting some initial results of the project on Constitutional Change through Euro Crisis Law. This project is a study of the impact of Euro Crisis Law (by which is meant the legal instruments adopted at European or international level in reaction to the Eurozone crisis) on the national legal and constitutional structures of the 28 Member States of the European Union with the aim of investigating the impact of Euro Crisis law on the constitutional balance of powers and the protection of fundamental and social rights at national level. An open-access research tool (eurocrisislaw.eui.eu) has been created, based on a set of reports for each Member State, that constitutes an excellent resource for further, especially comparative, studies of the legal status and implementation of Euro Crisis law at national level, the interactions between national legal systems and Euro Crisis law and the constitutional challenges that have been faced. The project is based at the EUI Law Department and is funded by the EUI Research Council (2013-2015).

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Abstract

This paper considers the effect of the recent EU measures relating to strengthened economic governance both at the EU level and the level of national (constitutional) law. We first explain the scope of EU competence in economic policy and its effects on Member State competence. We will then examine how this competence has been exercised during the past few years, in particular from the point of view of the domestic effects of the six-pack and two-pack, which constitute the ‘Belt’ needed to maintain stability in the euro area and thus hold the ‘trousers’ (economic policy decision-making) up. We then turn to the Fiscal Compact and the budgetary framework directive and their effects at national level, constituting the ‘Braces’ intended to ensure healthy national budgetary policies. The relevant question remains to be whether the current “belt and braces” rules are the appropriate approach for preventing new crises. There are both legal and political reasons for reconsidering some of the solutions made during the crisis. Maybe the trousers are just too loose?

Keywords

Euro-crisis, EU law, Constitutional law, Fiscal Compact, Economic governance

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Europe's economic crisis and the need for immediate action¹

During the past years the European Union rules on economic governance have been developed in great haste.² The six-pack and two-pack³ were adopted in swift succession, without any experience from the implementation of the new rules or a comprehensive vision of the future framework. The same applies to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), an international agreement between most EU Member States, which partly overlaps with the instruments of secondary law.⁴ The result is a maze of Treaty provisions and secondary legislation specifying Member States' obligations and the roles of the institutions in the two main processes created under Articles 121 and 126 of the Treaty on the Functioning of the EU (TFEU). These provisions have had the primary aim of ensuring trust in good economic governance through measures at the EU level. In addition, the Fiscal Compact has introduced Fiscal Councils and automatic correction mechanisms in Member States' national legislation, preferably backed up by constitutional guarantees. These reforms, together with the budgetary framework directive's aim at to ensure the achievement of jointly defined economic policy objectives also at national level... These measures illustrate the "belt and braces" approach that has been deemed necessary in tackling the crisis, involving measures at both EU and national levels.

The theme of our paper is the "*domestic impact of euro-crisis law*" in the context of the measures aiming at improved economic governance. It is evident that the effects of these measures have been by far the greatest on those Member States that have been in deepest economic trouble. These States have been subject to a number of additional procedures and requirements within and outside the EU framework, including those initiated by the European Central Bank acting confidentially and through bilateral consultations with national Governments.⁵ Within the EU framework a number of conditions relating to the conduct of economic policies have been based on Regulation No 407/2011 establishing a European Financial Stabilization Mechanism,⁶ which certainly raises serious questions about the relationship between the conditions placed on states in distress, the extent of EU economic policy competence and the state of emergency. The creation of a number of stability mechanisms have also questioned the credibility of the no bail-out principle and Member State responsibility for their own economic policy choices.

¹ Janne Salminen gratefully acknowledges the financial support granted by the Niilo Helander Foundation. We thank Marketta Henriksson and Ilkka Kajaste for a number of thoughtful comments on an earlier draft.

² Concerning the development in general, see Päivi Leino and Janne Salminen, *Should the Economic and Monetary Union Be Democratic After All? Some Reflections on the Current Crisis*, 14 *German Law Journal* (2013) 844–868.

³ The six-pack adopted in November 2011 to improve budgetary discipline, on the one hand, and economic surveillance, on the other, includes Regulation amending Regulation 1466/97 on the surveillance of member states budgetary and economic policies; Regulation amending regulation 1467/97 on the EU's excessive deficit procedure; Regulation on the enforcement of budgetary surveillance in the euro area; Regulation on the prevention and correction of macroeconomic imbalances; Regulation on enforcement measures to correct excessive macroeconomic imbalances in the euro area; and Directive on requirements for the member states' budgetary frameworks. For the two-pack, see below.

⁴ See also Janne Salminen, *Sopimus talous- ja rahaliiton vakaudesta – tie fiskaaliunioniin*, *Lakimies* (2013) 1076–1098 at 1082–1084.

⁵ For further references, see the ECB saga on a "secret" exchange of letters between the President of the ECB and the Irish Minister for Finance, declassified on 6 November 2014 following leakages and public debate, and now available on the website of the ECB. In his letter, the ECB President Trichet urged the Irish Government to go for bailout, threatening to stop emergency funding.

⁶ See e.g. the Council Implementing Decision (EU) on granting Union financial assistance to Ireland, as amended by Council Implementing Decision (EU) 2011/827; Council Implementing decision (EU) 2011/344 on granting Union financial assistance to Portugal, as amended by Council Implementing Decision (EU) 2011/683.

However, we will mainly concentrate on the general developments relating to economic policy coordination through secondary legislation and the Fiscal Compact. These legislative reforms have an impact on all Member States, but also demonstrate differentiation since the Member States belonging to the euro area are subject to stricter policy coordination. We will examine these developments from two intertwined angles: those relating to EU constitutional law, focusing in particular on the scope and effects of EU competence in economic policy, and national constitutional law. Even if legal and political action in the area of economic policy coordination were formally limited to the EU level, these choices have implications at the constitutional level of the Member States as well in the multilevel constitutional setting of the Union and its Member States.⁷ The coordination mechanisms that have been created based on EU (secondary) legislation rely on the usual legal effects of EU law in Member States' legal orders. The Fiscal Compact has generated legal and constitutional amendments to national law. The "impact" that we address is mainly legal – even constitutional – or political. We assess this impact mainly through examining the effects of these measures on the division of competence between the EU and its Member States, the effects of EU surveillance on Member States, or the eventual diminishing of national discretion in making policy choices.

During the years of crisis, the key challenge has been to create satisfactory supervisory mechanisms for Member States' economic policies that would convince markets of potential EU intervention, bringing bad national policies in line with sound and jointly defined economic policy objectives when necessary. The Member States have also been keen to subject each other to stricter Commission scrutiny, while they have a strong preference for maintaining national autonomy in their *own* economic policy choices. At the same time, it has been necessary to achieve these outcomes without amending the Treaties, where currently the primary responsibility for such policies remains with the Member States. It is obvious that these objectives are not only challenging in economic terms, but also filled with legal complications.⁸ In order to tackle these opposing demands, many of the measures have relied on legal ambiguity and abstraction for their success. All institutions have agreed on the need to by-pass legal complications in times of urgency, which has been a general feature of the euro-crisis measures.⁹ This has had obvious consequences for the accountability of measures both at the EU and national levels, and blurred the division of competence between the two. These concerns can hardly be avoided once the crisis calms down. These problems also affect the effectiveness of these policies.

In this contribution, we will first explain how we understand the scope of EU competence in economic policy and its effects on Member State competence. We will then examine how this competence has been exercised during the past few years, in particular from the point of view of the domestic effects of the six-pack and two-pack, which constitute the 'Belt' needed to maintain stability in the euro area and thus hold the 'trousers' up. We will then turn to the Fiscal Compact and the budgetary framework directive and their effects, constituting the 'Braces'. But the two dimensions interact both in real life and in the current contribution. We will then close with a few more general remarks.

⁷ For a discussion on the general idea of the compound character of the Union in the context of the euro crisis, see especially Ingolf Pernice, *Domestic Courts, Constitutional Constraints and European Democracy: What Solution for the Crisis?* in Maurice Adams et al. (eds.) *The Constitutionalization of European Budgetary Constraints*, Hart Publishing (2014) 297–317. Concerning the multi-level constellation and its requirements in this particular field, see Fabian Amtenbrink, *Integration, Coordination or Fragmentation in Economic Policy Matters? A Comment on the René Smits Contribution*, in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law*, Europa Law Publ. (2007) 171–184 at 181–184.

⁸ Or, as Bekker and Palinkas put it, 'the "new measures are also increasingly mingling with matters of national competences"'. Sonja Bekker and Ivana Palinkas, "The Impact of the Financial Crisis on EU Economic Governance: A Struggle between Hard and Soft Law and Expansion of the EU Competences?", *Tilburg Law Review* (2012) 360-366. Similar findings can also be found in Roland Bieber, "The Allocation of Economic Policy Competences in the European Union", in Loïc Azoulay (Ed.), *The Question of Competence in the European Union* (OUP 2014).

⁹ See Päivi Leino and Janne Salminen, 14 *German Law Journal* (2013), above No. 1.

Going belt – The new framework for Economic Governance

The two pillars of the Economic and Monetary Union rely on different modes of integration. While the Monetary Union is based on Union exclusive competence and is largely run by the European Central Bank, the Economic Union was built around a mode of soft coordination of Member State economic policies, building on a vague conception of 'common concern'.

The Lisbon Treaty did not change the specific character of economic policy among EU policies.¹⁰ This is particularly visible in the first Articles of the TFEU, which aim at clarifying the categories of EU competence (exclusive, shared and competence to support, coordinate or supplement the actions of the Member States), and the nature of competence in different areas of EU action.¹¹ The *sui generis* character of economic policy is visible in the fact that economic policy is not covered by any of these provisions, but has received its own paragraph in Article 5 TFEU,¹² which leaves the exact nature of this competence and its effects on the Member States formally undefined. The specific Treaty provisions on economic policy later in the Treaty illustrate these choices. The Treaties provide for a number of possibilities to coordinate and even supervise Member States' economic policies and to adopt relevant secondary legislation, if deemed necessary. The Treaties also place the Member States under an obligation to consider their economic policies as a "matter of common concern" (Article 121(1) TFEU) and thus take into account the spillover effects of their national choices on other Member States in the wider EMU framework. But even if the Treaty provisions affect the primary responsibility of the Member States for their economic policies, they ultimately leave the responsibility for such policies with the Member States. As the CJEU acknowledged in its ruling in *Pringle*,¹³ "Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures" (para 64).

The Economic Union has been built around a number of general principles. The Member States are to conduct their economic policies with a view to conforming to a number of rather broadly defined Union objectives, and to regard their economic policies as a matter of common concern. However, their obligations have been largely limited to a duty to coordinate such policies, based on broad guidelines adopted through recommendations by the Council. This is the procedure known as the 'multilateral surveillance procedure', and is regulated by Article 121 TFEU. The Article lays down a procedure for coordinating Member State economic policies in the Council, which monitors and evaluates whether Member State policies comply with jointly agreed broad objectives. Monitoring is based on information produced by the Member States and Commission reporting. If Member State policies are found not to be in line with the broad guidelines, the Council may address recommendations to the concerned Member State, based on a recommendation from the Commission.¹⁴ The procedure has a soft character: it builds on recommendations, and makes no provision for sanctions.

The choices made when defining EU competence in the area of economic policy are a natural reflection of various national, even constitutional, ideologies concerning the democratically acceptable

¹⁰ See Jean-Victor Louis, Economic Policy under the Lisbon Treaty, in Stefan Griller and Jacques Ziller (eds.) *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer (2008) 285–298 at 291–292; Ulrich Häde, The Treaty of Lisbon and the Economic and Monetary Union, in Hermann-Josef Blanke and Stelio Mangiameli (eds.) *The European Union after Lisbon. Constitutional Basis, Economic Order and External Action*, Springer (2012) 412–439.

¹¹ Article 3 TFEU includes a list of policy areas in which the Union has exclusive competence; Article 4 TFEU includes a list of the "principal areas" in which the Union and the Member States have shared competence; and Article 6 TFEU defines the areas where the Union has competence to support, coordinate or supplement the actions of the Member States.

¹² Article 5(1) TFEU: "The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro."

¹³ Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*.

¹⁴ On the institutional roles in the procedure, see C-27/04 *Commission v the Council*.

way of economic and fiscal policy-making. The most well-known and authoritative example of the statements concerning the “essential areas of democratic formative action”, which belong to the national sphere and where the room for the constitutionally accepted transfers of power is limited, is found in the decisions of the German *Bundesverfassungsgericht*. The Federal Constitutional Court has established that “revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights” are among such questions. For the *Bundesverfassungsgericht*, the key question concerns the extent of the powers to be transferred and the degree of independence that EU-level decision-making enjoys and its (lack of) democratic guarantees. The German concern thus relates especially to the substantial influence that national parliaments should enjoy in this field in order to guarantee the democratic nature of decision-making.¹⁵ The same kind of logic can be identified in other national contexts too.¹⁶

In addition to establishing the main parameters of the multilateral surveillance procedure, Article 121 TFEU includes a legal basis for the adoption of regulations laying down detailed rules for the said procedure. This legal basis has been used various times during the past years. Regulation No 1466/97, as amended by Regulations No 1055/2005 and 1175/2011, lays down the preventive arm of the Stability and Growth Pact. Regulation No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area and Regulation No 1176/2011 on the prevention and correction of macroeconomic imbalances establish the “MIP” – the new procedure relating to macroeconomic imbalances. This procedure also builds on the last stage of the multilateral surveillance procedure under Article 121 TFEU. In addition, there are three Regulations that concern only the euro states: Regulation No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation No 472/2013 on the strengthening of economic and budgetary surveillance of euro states experiencing or threatened with serious difficulties with respect to their financial stability, and Regulation No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the euro area Member States. The last two Regulations form the so-called two-pack.

As a result of these measures, Article 121 TFEU today forms a basis for three separate procedures:¹⁷ the preventive arm of the SGP, and both the preventive and corrective arm of the MIP, which also forms part of the European semester. With the exception of the preventive arm of the MIP, these procedures add new stages to the Article 121 TFEU multilateral surveillance procedure; stages that can be seen to have taken on the characteristics of an infringement procedure. In practice, however, these new infringement stages have not been used.

In addition, Article 126 TFEU places the Member States under an obligation to avoid excessive government deficits and report on their actions. The Commission monitors, reports, and if needs be, addresses an opinion on the matter to the Council for the purpose of making recommendations, and ultimately imposing fines, upon the Member State concerned under the Excessive Deficit Procedure (EDP). When compared with the multilateral surveillance procedure discussed above, the Treaty establishes harder edges for the EDP. But in practice, instead of moving the matter to the infringement stage, Member States have been given a more flexible timeframe for addressing the observed

¹⁵ German Federal Constitutional Court, *Bundesverfassungsgericht*, Case No. 2 BvE 2/08, June, 30, 2009 (Lisbon) at para. 244, 249. For a short review of these ideas and the case law of the Court in the context of the euro crisis, Peter M. Huber, *The Rescue of Euro and its Constitutionality*, in Wolf-Georg Ringe and Peter M. Huber (eds.) *Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation*, Hart Publishing (2014) 9–26, and forward looking, Mattias Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the EDP and the Fiscal Treaty of 12 September 2012*, 14 *German Law Journal* (2013) 22–52.

¹⁶ In the context of the recent EMU developments, see for example the Statement of the Grand Committee of the Finnish Parliament, 4/2012 vp. *Banking Union and the Future of EMU*; Judgment of the Estonian Supreme Court of 12 July 2012, paras 10, 127.

¹⁷ In greater detail, see Marketta Henriksson and Päivi Leino-Sandberg, ”Talouspolitiikan koordinaatio EU:ssa: lohduton labyrintti vai tie talouspoliittiseen täyttymykseen?” 4/2014 *Kansantaloudellinen aikakauskirja* 521-548.

problems – something that has not always contributed to overcoming them. The reference values for excessive government deficit have been laid down in Protocol No 12 on the Excessive Deficit Procedure, which establishes 3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices and 60 % for the ratio of government debt to gross domestic product at market prices – figures that were determined based on the economic situation in the early 1990's. But even these figures play a key function in the Treaty framework, as their implementation involves complicated and detailed calculations. In addition, Article 3 of the Protocol stipulates that the governments of the Member States are responsible for the deficits of general government. The Member States are to ensure that national budgetary procedures enable them to meet their Treaty obligations.

Article 126 TFEU also includes a legal basis for the Council to lay down detailed rules and definitions for the application of the provisions in Protocol No 12 on a proposal from the Commission and after consulting the European Parliament. This provision has only been used to adopt the so-called corrective arm of the Stability Growth Pact and the budgetary framework directive 2011/85/EU.¹⁸ Even if the approximate debt level in the euro area now is around 95 % of GDP, no procedures have been launched solely on the basis of the debt criterion. This is either because the Member States already have an excessive budgetary deficit procedure, or because they still benefit from a transitional period of three years. In the case of Finland, the procedure was not launched because the Commission considered that the critical percentages were caused by its participation in the euro area rescue operations. Therefore, even a seemingly strict budgetary rule can be implemented with imagination.

A third legal basis for the development of economic policy rules can be found in Article 136 TFEU, which concerns the euro states. It enables the adoption of:

- (...) measures specific to those Member States whose currency is the euro:
- (a) to strengthen the coordination and surveillance of their budgetary discipline;
- (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

This legal basis has been used jointly with Article 121 or 126 TFEU when measures concerning euro states have been adopted (see above). It is a particularly loosely defined provision, which enables both particular measures and those with a more general scope, presuming that these aim at ensuring "the proper functioning of economic and monetary union". At the same time, the Article includes no *passerelle* for reaching beyond EU economic policy competence in general. Therefore, its implementation is subject to the general provisions in Article 5 and Article 119 TFEU. In particular, Article 136 TFEU cannot be used to expand Union competence, to change its nature, or to replace Member State competence in the area of economic policy. Therefore, it gives no powers to amend the budgetary obligations of the Member States, noting that the Article specifically excludes from its scope measures that aim at amending Protocol No 12.

When studying the impact of the six-pack and the two-pack on the Member States and their competence in economic policy, it is specifically the Regulations that are based partly on Article 136 TFEU that are of interest. These measures significantly develop the multilateral surveillance procedure, in particular, far beyond measures of coordination. In fact, the relevant question becomes whether it is still proper to speak of the same multilateral surveillance procedure, keeping in mind the mandate of the legislature in Article 121 TFEU. It is evident that this mandate covers, for example, the setting of time limits or the definition of key concepts, but the amendments made to the multilateral surveillance procedure reach far beyond such technicalities.

¹⁸ Council Regulation (EC) 1467/97, amended by Regulations 1056/2005 and 1177/2011 and Council Regulation (EC) 479/2009, as amended by Regulation 679/2010.

In practice, regulations have not only been used to regulate the Article 121 TFEU procedure in greater detail, but have also been used to add a number of new stages to the procedure, to expand the roles of the institutions from those defined in the Treaty-based economic policy framework and to determine significant legal consequences for a Member State's unwillingness to follow recommendations given in the procedure. These measures build on a comprehensive reading of the Member States' obligation to coordinate their economic policies, relying on the specific demands of the Monetary Union, which influence the economic and fiscal policy of the Member States in the context of the EMU. Thus, the general obligation to 'coordinate policies' has turned into intensive cooperation even in the field of economic policy.¹⁹ If nothing else, the new pieces of secondary legislation must effectively exhaust the legal bases provided by the Treaties for the development of economic coordination.²⁰ However, these questions can also be approached with a more critical perspective.

We have not found a clear answer in the jurisprudence of the Court of the European Union as to how much a procedure that is established by the Treaty can be further developed through secondary legislation. It is evident that all institutions involved in the relevant legislative procedures agreed upon the necessity of these reforms, and they have not subsequently been challenged before the Court, which has not addressed their compatibility with the Treaties. In its jurisprudence the Court has generally stressed that "the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves".²¹ Following this, the "Treaty alone may empower an institution to amend a decision-making procedure established by the Treaty".²² The Court has, in particular, stressed the importance of preserving the institutional balance created by the Treaties:

The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.²³

The new instruments of economic coordination do not necessarily amend the roles of the institutions beyond their usual constitutional mandate framed in the Treaties – the Commission still proposes and supervises, and the Council adopts the measures,²⁴ which can with goodwill be understood as falling under "implementation", with the Council taking the necessary decisions.²⁵ However, the

¹⁹ See René Smits, *The Impact of EMU Law on National Budgetary Freedom*, in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law*, Europa Law Publ. (2007) 133, and Christian Calliess, *From Fiscal Compact to Fiscal Union? New Rules for the Eurozone*, in Catherine Barnard et al. (eds.) *Cambridge Yearbook of Eur. Legal Studies 2011–2012*, Hart (2012) 101.

²⁰ See Calliess (2012) 102–103. See also Salminen (2013) 1082–1084.

²¹ Case 68/86 *UK v Council*, para 38.

²² Case C-133/06 *European Parliament v the Council*, paras 54–55, which concerns the use of so-called secondary legal bases. The Court referred to ex-Article 67(2) TEC, which included a specific *passerelle* for the amendment of the applicable decision-making procedure. At the same time, however, for example Regulation 1/2003 on the implementation of competition rules develops the Procedure included in Article 101 and 102 TFEU quite significantly. See the legal basis for the Regulation, Article 103 TFEU.

²³ See Case C-70/88 *European Parliament v the Council*, paras 21–22.

²⁴ See Miguel Poiaras Maduro, "Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty", in Anna Kocharov (ed.) *EUI Working Papers, Law 9/2012*, at 3–4.

²⁵ For an example of slightly similar "implementing" decisions, see Article 9(4) of Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community: "Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by

considerations reflected in the case law still need to be examined, particularly in relation to three key elements in the said procedures, as they have been developed by secondary legislation. In all, these reforms have arguably affected the institutional balance in economic policy and the delimitation of competence between the EU and the Member States.

First, while the instrument in Article 121 TFEU is a recommendation, the procedures developing the multilateral surveillance procedure rely in their later stages on Council decisions, which are used to establish that certain Member State measures have been insufficient, or to adopt decisions on interest-bearing deposits or fines. This choice bears clear legal consequences. Recommendations have "no binding force" (Article 288 TFEU) and fall outside the legal control carried out by the CJEU (Article 263 TFEU). According to the Court jurisprudence, "recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on", but are still not entirely "without any legal effect".²⁶ This seems to correspond to their function in the Treaty-based economic policy framework. The Court has acknowledged that recommendations are generally adopted by the institutions when "they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules".²⁷ But the Court has also stressed that even when non-binding instruments are used, the institutions must duly take account of the division of powers and the institutional balance established by the Treaty in that particular field.²⁸ It seems dubious whether the mandate under Article 121 TFEU, even when read jointly with Article 136 TFEU, includes the possibility to change the applicable instrument from a non-binding one to a binding one.²⁹

The changed nature of the instrument has contributed to blurring the division of competence between the EU and Member States in economic policy, and has turned the soft coordination procedure into one with rather hard edges. A Council decision is "binding in its entirety" and its legality can be reviewed by the Court of Justice of the European Union. Therefore, for example, the legality of a Council decision establishing an excessive macroeconomic imbalance in a Member State should in principle be possible to submit to the Court for review. Such decisions are particularly prominent in the context of the two-pack, where these powers have also been used in relation to the programme countries.³⁰ Based on Regulation No 472/2013, the Council also adopts implementing decisions approving the update of the relevant Member States' macroeconomic adjustment programme.³¹ Council implementing decisions have been used, for example, to place Portugal under a set of incredibly detailed obligations reaching into most areas of society.³² The relevant question becomes also whether such requirements can be justified under a procedure that should be multilateral in character and coordination-focused.

(Contd.) _____

the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission."

²⁶ C-207/01 *Altair*, para 41.

²⁷ C-322/88 *Grimaldi*, para 13.

²⁸ See Case C-233/02 *France v Commission*.

²⁹ Cf Article 82(2), Article 83(2) and Article 168(6) TFEU, which all include limitations concerning the applicable instrument.

³⁰ The Court has previously examined two preliminary rulings concerning Portuguese national legislation establishing salary reductions for certain public sector workers and the compatibility of the said legislation with the EU Charter of Fundamental Rights. The Court did not identify a concrete factor demonstrating that the cases would have involved the implementation of EU legislation. The relevant references for preliminary rulings had, however, been made in the spring 2012, more than a year before the entry into force of the two-pack. See Court orders in cases C-128/12 *Sindicato dos Bancários do Norte and Others v BPN* and C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial*.

³¹ For a recent decision concerning Portugal, see Council Implementing Decision 2014/235/EU of 23 April 2014 approving the update of Portugal's macroeconomic adjustment programme.

³² See Council implementing decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal.

After the entry into force of the two-pack, the Council position concerning insufficient Member State action is adopted as Council decision, and it is well within the bounds of possibility that the national measures adopted subsequent to such decisions could be considered to constitute situations where a Member State is implementing Union legislation, thus bringing these situations within the scope of implementation of the Charter of Fundamental Rights.³³ At the same time, it is clear that if the decisions adopted at EU level have binding implications for the Member States, these decisions should be capable of being subjected to a legality check – especially keeping in mind how many of the euro-crisis related measures have proved difficult to challenge in a court of law.³⁴ More recently, there have been claims based specifically on the Council decisions being *ultra vires* in reaching beyond EU competence in economic policy by dictating specific outcomes in a Member State.³⁵ While Article 126 TFEU includes an exception to the implementation of the Article 258 and 259 TFEU procedures, preventing the Commission and Member States from bringing cases against a Member State suspected of breaching their obligations under Article 126 TFEU, Article 121 TFEU includes no such provision. From an institutional point of view, it is hardly a useful development if key decisions on economic policy are increasingly settled by the courts instead of by political decision-making bodies.

Secondly, many of the measures relating to economic governance have contributed to a significant strengthening of the role of the Commission in this policy field. From a legal point of view, this is especially related to the introduction of reverse qualified majority voting (RQMV) in many of the procedures falling under forming part of economic governance.³⁶ This entails that the Council is assumed to have adopted Commission recommendations, unless it decides to reject them by a qualified majority. The use of RQMV is intended to make the adoption of decisions more automatic. Since all institutions ultimately agreed on the introduction of the procedure, the Court has not addressed its compatibility with the Treaties. There has been surprisingly little legal discussion concerning this development.³⁷ Criticism has related in particular to the way in which RQMV amends the decision-making procedure under Article 121(4) TFEU and the main principle of qualified majority voting under Article 16(3) TFEU. The Court has addressed a Council decision-making procedure with a similar character in *Eurocoton*,³⁸ but this decision predates the Treaty of Lisbon and relates to competition law, where institutional roles and competence are different from those applicable in economic policy.

In the preamble of Regulation No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, RQMV is justified by how the "Commission should have a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on site missions, recommendations and warnings" and the general need to strengthen economic governance. It is evident that the introduction of RQMV buttresses, in particular, the position of the Commission in relation to the Council and limits the possibility of a Member State opposing the decision, by preventing it from being taken in the first instance. In practice, the Commission recommendation is likely to determine the substance of the Council decision. At the same time, RQMV might increase the interest of the Commission to ensure the support of the Council prior to the adoption of its recommendation, since a possible refusal by the Council would come at great

³³ On this, see also Keen Leaner's, 'EMU and the European Union's Constitutional Framework', 39 *EL Rev* (2014) 753 at 759.

³⁴ See in particular the various cases relating to the Cypriot bail-out, e.g. Case T-680/13 *K. Chrysostomides v. the Council*.

³⁵ See Case T-531/14 *Sotiropoulou and (67) Others v Council*,

³⁶ See Regulation 1173/2011, Article 4(2), 5(2) and 6(2); Regulation 1466/97 as amended by Regulation 1175/2011, Article 6(2) and 10(2); Regulation 1173/2011 Article 4(2), 5(2) and 6(2), Regulation 1176/2011, Article 10(4); Regulation 1174/2011, 3 Article. Also the Fiscal Compact includes provisions stipulating the use of RQMV.

³⁷ See, however, Rainer Palmstorfer, 'The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union?', 20(2) *European Law Journal* (2014) 186–203.

³⁸ Case C-76/01 P, *Eurocoton*.

political cost to the Commission.³⁹ But since RQMV increases the role of the Commission, it also affects institutional balance, which for the CJEU has been of crucial significance when evaluating what kind of procedural changes might be compatible with the Treaties. While the gravest concern of the Court has often related to the prerogatives of the European Parliament, the principle also has a wider purpose and function. For the Court, the principle signifies that "each of the institutions must exercise its powers with due regard for the powers of the other institutions".⁴⁰ Even if no proceedings against the legislative acts as such can, at this stage, be initiated before the Court,⁴¹ in principle the question relating to the Council's decision-making procedure may also come up if the validity of its subsequent decisions is challenged.

Third, questions can also be raised concerning the way in which the multilateral surveillance procedure has been developed to also involve the possibility of imposing sanctions on the Member State that does not follow the recommendations given in the procedure. It is evident that the introduction of sanctions is specifically aimed at turning the recommendations into something that are binding in practice. Sanctions are intended to have implications for the character of the procedure and the Member States' room for manoeuvre in following these recommendations. Therefore, the introduction of sanctions can hardly be justified with the mandate to adopt more detailed rules on the procedure,⁴² even if Article 136 TFEU does offer a wider mandate to adopt provisions relating to the euro states.

However, when keeping in mind the core character and limits of EU economic policy competence, one would need to consider whether the reforms make the EU economic policy guidance more binding and its effects on Member State discretion more significant than what the Treaties might imply. This is partly a rhetorical question, since this effect is exactly the one that was aimed at with the reforms. Nevertheless, the amendments and their significance for the division and the nature of competences between the EU and Member States have been subject to very little public discussion – presumably because the reforms are legally problematic, and it was understood that a formal Treaty amendment reassessing the nature of Union economic policy competence would not be possible within the timeframe that was deemed necessary.

The new framework for economic governance can be seen as a balancing exercise between risk assessment and risk management, with the Commission assessing domestic performance and the Council taking formal decisions based on its assessments.⁴³ Chalmers questions the success of the model in other policy fields, where risk assessment has been seen as driving the formal decision-making process and has subsequently become highly politicised. However, framing economic governance as a regulatory process is not honest: it is "political in economy terms, namely that it is a significant part of the process for organising a State's economy and budget."⁴⁴ As a consequence of the six-pack and two-pack reforms, the EU surveillance mechanisms now have received a more formal structure that covers a broader area and is more detailed than before. This indicates a "trend towards the adoption of increasingly detailed and enforceable budgetary and economic surveillance that does not stop at the imposition of objectives, but that may also increasingly require certain specific reforms

³⁹ Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18(5) *European Law Journal* (2012) 667–693 at 691.

⁴⁰ Case C-133/06 *European Parliament v the Council*, para 57.

⁴¹ See Article 263 TFEU, final paragraph: "The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

⁴² See on this Palmstorfer (2014). However, noting that Article 126 TFEU includes a reference to sanctions, these would not seem to be automatically incompatible with the nature of EU economic policy competence.

⁴³ Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18(5) *European Law Journal* (2012) 667–693.

⁴⁴ *Ibid*, 691.

to achieve those objectives”.⁴⁵ These are reflected in the level of detail in the surveillance reports and the introduction of sanctions for euro countries to enforce compliance with recommendations under the EDP and the MIP (and significant deviation in the SGP preventive arm). At the same time, no actual infringement procedures have been launched based on macroeconomic imbalances. No decisions have been taken by reversed qualified majority, and no sanctions adopted. This demonstrates the political difficulties involved in applying the powers under the new rules and questions their usefulness and added credibility. Since the new rules have scarcely been applied, the effect of EU measures on national policy making remains difficult to measure.

The Country Specific Recommendations are intended to “offer advice to guide national policies every year” through a set of “concrete, targeted and measurable” recommendations concerning measures that “can realistically be achieved in the next 12-18 months”.⁴⁶ Such recommendations are given to all Member States with the exception of the programme countries (Greece, Portugal, Ireland and Cyprus). Country specific recommendations often take a very comprehensive approach. For example in 2014, Finland received a number of recommendations relating to sound public finances, administrative reforms relating to the structure of municipalities and social and health care services, the labour market, competition and labour market segmentation.⁴⁷ All of these are deeply rooted in comprehensive national reform agendas that are not achieved in a year. Since the Member States have the possibility to comment on the recommendations given to them before their adoption, the recommendations can be expected to largely reflect their own reform agendas as well. At the same time, the general usefulness of country specific recommendations has been questioned in many contexts. The Commission evaluated in 2014 that out of the 86 country specific recommendations given to the Member States in 2013 only one had been fully implemented and another six demonstrated substantive progress. Therefore evaluating the actual impact of these recommendations on the Member States is not entirely straightforward.

In addition, even if the key procedures have been specified further in secondary legislation and various soft law documents, their implementation still presumes a great deal of discretion. The amount of soft law, consisting of guidelines, recommendations and codes of conduct in the area of economic governance is striking. It is widely used instead of legal acts complementing the framework, and is largely adopted without the participation of the European Parliament. Soft law has been deemed necessary, in particular by the Member States, in order to limit the discretion of the Commission and ensure equal treatment. At the same time, it contributes to the further complexity of the framework and its lack of transparency. Under economic governance, the adoption of reports and recommendations often falls under Commission discretion. The methodologies used for evaluating successful measures are complex and the evaluations have proved difficult to predict or repeat, which also stresses Commission discretion.⁴⁸ Even the concept of “structural deficit”, which forms the core of the preventive arm of the SGP, is difficult to measure and includes a great risk of error. This also stresses the risk of incorrect policy recommendations. Such a wide room for discretion in the exercise of administrative power in a key policy area and with it, even a possibility to misuse the power, raises obvious questions relating to political accountability.

In October 2014 questions relating to institutional powers under the EDP, discretion and scrupulous budget discipline have again surfaced as the media have reported on the possibility that the Commission might ask France to amend its 2015 budget draft under Regulation No 473/2013 and

⁴⁵ Alicia Hinarejos, *Fiscal Federalism in the European Union: Evolution and Future Choices for EMU*, 50 *Common Market Law Review* (2013), 1621–1642 at 1631.

⁴⁶ See the website of DG EFCIN.

⁴⁷ See Council recommendation of 8 July 2014 on the National Reform Programme 2014 of Finland and delivering a Council opinion on the Stability Programme of Finland, 2014. Published in OJ C 247/127 of 29 July 2014.

⁴⁸ On the scope of Commission discretion, see also Henriksson & Leino-Sandberg quoted above No. 15.

submit a new one that would better reflect the French deficit reduction obligations in the EDP.⁴⁹ France was expected to bring its budget deficit below the 3 percent of GDP level by 2013, but was given a two-year extension in 2013. In September 2014, the French Government announced that it would not meet the 2015 deadline and that its budget deficit would only fall below 3 percent in 2017, with a debt level estimated at 95,6 % GDP for 2014 and 96,6 % GDP for 2015.⁵⁰ Strong concerns were also raised in the case of Italy relating both to its debt and its structural deficit. Ultimately, however, the Commission announced that it had found no instances of “particularly serious non-compliance”.⁵¹ The flexibility found in relation to large Member States raises questions relating to the equality of Member States when many smaller states have needed to adopt serious austerity measures.⁵²

While the current procedures pose a number of legal problems to the EU legal framework, their implementation might not live up to the current economic demands or the formal criteria set down in the Treaties either. If used to the maximum, these mechanisms would certainly come close to the red lines relating to the exercise of competence in economic policy stipulated by the German Constitutional Court, for example. However, in practice many of the relevant procedures have remained in reserve, and their key function has related to operating as a deterrent. The risk of EU sanctions procedures has perhaps gained slightly stronger foothold in national debates. The healthier your national economic policies are, the more autonomy you enjoy in determining them. In practice the Commission and the Council have proved reluctant to invoke their new powers to insist on better economic policies and, if need be, to impose sanctions to secure such objectives. Instead, another methodology has been discovered, enabling the Commission to carry out new calculations, which have then enabled the possibility of granting the concerned Member States more time to carry out the necessary reforms.

The Commission has proposed solving many of these challenges by suggesting a move towards a fully-fledged fiscal union, which would also presume some fundamental Treaty changes amending the division of competence between the EU and its Member States, and reformulating the nature of EU competence in economic policy.⁵³ We will not go into this discussion in the context of the current contribution. Keeping in mind the political realities in Europe at the moment it is unlikely that such reforms would be adopted in the short term,⁵⁴ and it is questioned to what extent a further strengthening of EU powers might help, noting how difficult the strengthened powers given to the Commission have proved to apply. The ultimate responsibility for economic policy choices remains with the Member States, whose discretion is limited not only by the EU rules, also by market pressures. Against this background, the current surveillance model adopted by the EU is problematic. The role of the EU in enforcing budgetary discipline is thought of as corrective, but the trend is towards “increasingly detailed and enforceable prescriptions from the centre”,⁵⁵ which further emphasizes the legal, political and economic challenges illustrated above. At the same time, serious question marks exist as to whether the most fundamental fault is with the current rules, or with their

⁴⁹ See Article 7, Regulation 473/2013.

⁵⁰ See the Commission European Economic Forecast Spring 2014, available at http://ec.europa.eu/economy_finance/eu/countries/france_en.htm.

⁵¹ See the statement by Commission Vice-President Katainen on the Draft Budgetary Plans, Strasbourg 29 October 2014, available on the Commission press releases website.

⁵² See e.g. Council Decision (EU) 2010/320 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, as amended by Council Decisions (EU) 2011/734 and 2012/211.

⁵³ Communication from the Commission: A blueprint for a deep and genuine economic and monetary union Launching a European Debate, COM/2012/0777 final.

⁵⁴ Päivi Leino and Janne Salminen, Beyond the Euro Crisis: European constitutional dilemmas and Treaty amendments, The Finnish Institute of Foreign Affairs, *Briefing Paper* 154 (2014).

⁵⁵ Alicia Hinarejos, quoted above No. 44..

implementation. The six-pack and two-pack will be subject to a review by the end of the year. While there certainly would seem to be room for improvement, changing the legal framework every two years also creates legal uncertainty, which weakens the functioning of the rules in a situation where the crisis does not seem to be entirely over.

Going braces – Creating national guarantees for sound economic policy-making

The increased powers of EU institutions naturally affect the Member States as well, with coordination moving a great deal towards hard law initiatives. The six-pack and the two-pack have contributed to a need for the Member States to adjust their budgetary procedures to EU requirements. The six-pack Directive on requirements for the member states' budgetary frameworks requires national implementing legislation concerning the systems of budgetary accounting and statistical reporting; rules and procedures governing the preparation of budgetary planning forecasts; and the adoption of fiscal rules, such as the debt or deficit limits and medium-term budgetary frameworks.⁵⁶ In addition, the success of the Fiscal Compact relies on national implementation measures. Therefore, while reaching for the 'belt' introduced by the six-pack and two-pack, Member States are 'going braces' too. Key reforms at or affecting national level involve strengthened numerical fiscal rules, provisions relating to medium-term budgetary planning, rules on budgetary coordination between different levels of government, the introduction of national fiscal councils, budget monitoring - including an 'automatic' correction mechanism - and macroeconomic and budget forecasting.⁵⁷

In general, the Reports from individual Member States generated within the current EUI research project demonstrate that six-pack legislation was welcomed by the Member State governments. The deepest concerns related to subsidiarity and possible amendments to institutional balance through secondary law. During the implementation phase, some Member States considered that their national legislation and practices required no changes and were already in line with the Directive of the revised Stability and Growth Pact. In cases where there were implementation troubles, they were usually related to the budgetary coordination between the different administrative levels and the legislative amendments needed in that respect. Some Member States have traditionally had strikingly minimalistic or low-level legislation on budgetary matters. This relates to how such rules have mainly concerned how budgetary decisions are made, not the substance of the economic policy.

The Fiscal Compact met with relatively little opposition during its negotiations. For many it mainly appeared to be political theatre. At the same time, the Fiscal Compact offered many governments something to rely on in parliamentary debates. Its main substance derived from both existing provisions in EU legislation and constitutional principles, even if these rules and principles had proved less than effective in practice. The Fiscal Compact strengthens the aims of the amended Stability and Growth Pact.⁵⁸ The Compact is much disputed,⁵⁹ especially due to the doubts concerning Member State competence to agree to a Treaty of this kind and to use Union institutions for other purposes.⁶⁰ Nevertheless, according to the Compact itself, it is applied and interpreted in line with the EU

⁵⁶ Also some other pieces of EU legislation include provisions affecting Member States' national arrangements. See e.g. Article 5 on Independent bodies monitoring compliance with fiscal rules in Regulation 473/2013.

⁵⁷ In greater detail, see e.g. "The importance and effectiveness of national fiscal frameworks in the EU". ECB Monthly Bulletin, February 2013, 73-88.

⁵⁸ See Christoph Ohler, Treaty Change, Fiscal Union and the ECB, in Wolf-Georg Ringe and Peter M. Huber (eds.) *Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation*, Hart Publishing (2014) 121–130 at 128.

⁵⁹ See for example the sharp critique in Christian Joerges, Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation, 15 *German Law Journal* (2014) 985–1027 at 1002–1003.

⁶⁰ Under so-called 'Bangladesh' case law, however, it is possible to allocate duties to the EU institutions under legal arrangements other than the EU Treaties. See Joined Cases C-181/91 and C-248/91 *European Parliament v the Council and European Parliament v the Commission*; Case C-370/12 *Thomas Pringle*, para 68, 158-159.

Treaties, and its core substance should be incorporated into the legal framework of the EU in the near future. Since the presumption is that this would require a Treaty change – or why would the Fiscal Compact otherwise have been necessary in the first place? – it is not evident that the plan will hold. Sensitivities relating to the exercise of economic policy competence are unlikely to be overcome in the near future, and especially in the programme countries these sentiments are hardly likely to decrease.

The Fiscal Compact recalls the so-called balanced budget rule, familiar from the original Stability and Growth Pact: general government budgets shall be "balanced" or in surplus. It further includes a debt brake rule, similar to the six-pack reform amendment of EU Regulation No 1467/97; and related provisions concerning an automatic correction mechanism which is triggered in case the balanced budget rule or the debt brake rule is not followed. Member States are required to implement these provisions in their national legislation.

We have examined the Reports from individual Member States in order to study how the Member States have addressed this requirement.⁶¹ Our focus is on the constitutional change generated by the Fiscal Compact.⁶² The obvious assumption behind the Fiscal Compact is that provisions included in a national constitution provide a strong guarantee for their actual implementation. The main architects of this agreement were Germany and France. The German Government wished to achieve a "constant stability union". Member States would agree to introduce debt brakes in their national constitutions and allow the EU Commission to monitor their economic and monetary policies.⁶³ The introduction of the golden rule, and possibly even the demands concerning its obligatory inclusion into national constitutions, is straightforward from the German perspective as Germany already had such a rule in its Constitution. However, it is likely that constitutional troubles with the agreement would have been raised, had this not been the case. The previous French Government favored the idea of amending the French Constitution in order to introduce the balanced budget rule required by the Fiscal Compact, rather than writing it down in an organic law. The French debate stressed the role of France in proposing the golden rule to be introduced in national legislation.

The basic idea behind the Fiscal Compact was to include budget rules in national legislation, especially in order to support fiscal consolidation in the euro area Member States. The idea of incorporating the balanced budget rule into the national constitutions or—where this would be substantially impossible due to difficulties in amending the constitution—in special domestic sources of law that are hierarchically superior to the ordinary acts of parliament, was a crucial element of the plan. The rule would operate as a ground for constitutional review of budgetary laws, and thus its implementation would be ensured on the national level by national courts.⁶⁴ Both of these elements soon gained softer tones because of the extra hurdles they would have created for the ratification of the agreement and the implementation of the rules. Amendments to national constitutions in some EU Member States require elections or referenda, which in this context would most presumably have turned into elections or referenda about the European Union at large and about participation in the euro. Nevertheless, the inclusion of specific constitutional provisions relating to fiscal discipline was

⁶¹ For this purpose, we have consulted the European University Institute, Law Department database "Constitutional Change through Euro Crisis Law: Country Reports on the impact of crisis Instruments on the legal structures of the EU Member States" at <http://eurocrisislaw.eui.eu/> (11 October 2014). Also the considerations of the Member States' actions in implementing the six-pack legislation are based on a consultation of this database.

⁶² For a more general examination of the Fiscal Compact, see for example, Paul Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, *European Law Review* (2012) 231, and Steve Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics?*, *European Constitutional Law Review* (2012) 404 and Calliess (2012) and Salminen (2013).

⁶³ See also Leonard Besselink and Jan-Herman Reestman, *Editorial: The Fiscal Compact and the European Constitutions: "Europe speaking German"*, *European Constitutional Law Review* (2012) 1.

⁶⁴ Federico Fabbrini, *The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism*, *Boston College International & Comparative Law Review* (2013) 1–38 at 32–38. See also Kaarlo Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, *EUI Working Papers, Law* 2012/28, 19–20.

tempting: the existence of such rules would create a constitutional commitment binding on future governments, thus limiting their policy choices.

The Compact is a mixture of national modes of enforcing budgetary discipline. At the same time, it facilitates recourse to sanctions and is backed up by a stronger role for the Court of Justice of the European Union. While it represents an anti-federalist vision of the development of the integration in the middle of crisis, placing sovereign rights at the center of the project, the agreement itself relies on heavy centralization, deeper than that, for example, in the USA.⁶⁵ In the literature, the idea of setting constitutional limitations on the discretion of political decision-making by way of clauses adopted under great time pressure and in response to external motivation is seen as typical of the kind of rule-making that takes place during crisis.⁶⁶ Contiades and Fotiadou demonstrate that when provisions are adopted because of the demands of an international treaty, they are usually discussed through the source of that rule (the agreement itself), and consequently, as a question of sovereignty. Less consideration is given to the consequences of those rules and their potential impact at national level once they enter the sphere of national constitutional law and their impact on constitutional interpretation. In urgency, greater weight is placed on the symbolic constitutionalisation of the balanced budget rules and not, for example, on their applicability and future purpose and function, or the institutional or other consequences of their constitutional status.⁶⁷

According to Article 3(2) of the Fiscal Compact, its main provisions

shall take effect in the national law of the Contracting Parties -- -- through 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 Article further establishes that the correction mechanism is to fully respect the prerogatives of national Parliaments. In this way, Article 3 is not only the material core provision of the Treaty, but also sets demands concerning the national implementation measures. From the point of view of traditional public international law, this is done in a rather unconventional manner. The provision is constitutionally the most interesting provision of the agreement. Adopting the balanced budget rule into national law explicitly, be it as a constitutional provision or something else, has been the most obvious and straightforward reason for formal constitutional amendment or national legal change with a direct linkage with the crisis.⁶⁸ German legislation after the 2009 constitutional reform has served as the model for the drafting of the balanced budget rule in the Fiscal Compact. The German design of the budget rules is in its turn largely based upon Swiss debt brakes, which had already been implemented in the early 1920s in some of the Swiss cantons.

The Fiscal Compact does not specify in exact terms what kind of balanced budget rules or correction mechanisms it entails. The Commission is currently evaluating national implementation measures. Its findings will also be of relevance for the application of the ESM Treaty, since the granting of new financial assistance programmes will be conditional on the ratification of the Fiscal Compact and compliance with its requirements.⁶⁹ There is great heterogeneity in the manner of implementation

⁶⁵ Fabbrini (2013), 32–38. See also Mark Humphery-Jenner, *Balanced Budget Rules and Expenditure Limits: Lessons from the US and Australia and Implications for the EU*, 13 *German Law Journal* (2012) 607–638. And looking from the less formalistic perspective of the United Kingdom, see John McEldowney, *Debt Limits in Constitutional Law – A UK Perspective*, in Wolf-Georg Ringe and Peter M. Huber (eds.) *Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation*, Hart Publishing (2014) 63–78.

⁶⁶ Xenophon Contiades and Alkmene Fotiadou, *How Constitutions Reacted to the Financial Crisis*, in Xenophon Contiades (ed.) *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate (2013) 28–30.

⁶⁷ Ibid.

⁶⁸ See discussion in Besselink and Reestman (2012).

⁶⁹ See the Preamble of the Fiscal Compact, which stresses “the importance of the Treaty establishing the European Stability Mechanism as an element of the global strategy to strengthen the economic and monetary union and pointing out that the

across the Contracting Parties. Ordinary legislation can typically be altered through a simple majority in the Parliament. Additionally, typical meta-rules such as *lex specialis* or *lex posterior* function as 'business as usual' in relation to more general or older ordinary legislation. In all, it is not evident that the provisions of the Fiscal Compact, or the national implementation measures, satisfy the key criteria relating to the design of fiscal rules in being well-defined, encompassing all levels of government, strictly binding and fully enforceable. Against this background, both the Fiscal Compact and the budgetary framework directive include clear loopholes, providing generous escape clauses and a correction mechanism that is not quite as automatic as it perhaps should be.⁷⁰

Most of the euro area Member States adopted national legislation relating to the Fiscal Compact before the implementation deadline expired (1 January 2014). In case a formal amendment of the Constitution had been required, Greece would have faced particular problems since the Greek Constitution establishes a mandatory time interval between two consecutive amendments. Instead, a regulatory act was used in Greece, and there seems to have been no plan to introduce such a rule into the Constitution. Belgium implemented the Compact by an accord.

Spain (2011), Italy (2012), Slovakia (2011) and Slovenia (2013) have used the constitutional level for national implementation. Germany already had identical rules in place concerning both the Federal level and the *Länder* on the constitutional level. In France, the level of the so called organic laws, *Lois organique*, is used. As the balanced budget rule belongs to the program of the French conservative party, there was a proposal for amending the Constitution, but the changes in the government after the election of 2012 have ensured the end of any prospect of such constitutional reform, and the *Conseil Constitutionnel* established that a constitutional amendment was not, in any case, necessary to comply with the requirements of the Fiscal Compact. Nevertheless, following a constitutional amendment in 2008, Article 34 of the Constitution already provides an "objective of a balanced budget". The limited implications of this rule can of course be examined in the context of the recent debates on the French draft budgetary plan referred to above.

Although the new rules were not given constitutional status, the Austrian law does represent an Interstate Treaty (*Staatsvertrag*), which is in its effect equivalent to a constitutional law. Also the Portuguese budget rule has a superior legal status. The Cypriot Government has been contemplating a constitutional amendment, but reverted to ordinary legislation because of time pressure. In some Member States, Malta for example, there are plans to amend the constitution. Latvia is still in the middle of a constitutional amendment process. Due to the fact that the golden rule and the other key provisions of the Fiscal Compact are based on an international treaty, they enjoy a special constitutional status in the Netherlands. Interestingly, the Czech Republic, one of the opponents of the Treaty and ultimately outside the Compact, has introduced a Fiscal Constitutional Act. Comparisons between the Member States' legal doctrines and theoretical debate in this field reveal that, for example, the requirement of the balanced budget rule was often believed to constitute one of the recognized legal principles of constitutional law, predating the requirements of the Fiscal Compact. This has eased the process of incorporating the rule into the text of national constitutions.

The choices made in Spain and Italy are of particular interest.⁷¹ The Spanish Constitution of 1978 is known to be extremely difficult to amend and has been amended only once before. Now it was amended in a very hasty process in order to incorporate the balanced budget rule. The symbolic force

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granting of financial assistance in the framework of new programmes under the European Stability Mechanism will be conditional, as of 1 March 2013, on the ratification of this Treaty by the Contracting Party concerned and, as soon as the transposition period referred to in Article 3(2) of this Treaty has expired, on compliance with the requirements of that Article". The linkages between the Mechanism and Compact are underlined in the literature; see for example Calliess (2012) and Salminen (2013).

⁷⁰ See "The importance and effectiveness of national fiscal frameworks in the EU". ECB Monthly Bulletin, February 2013, 73-88.

⁷¹ See Contiades and Fotiadou (2012) esp. at 23, 28–30 and 47–48.

of constitutional amendment, and a very quick one, was intended as a message to the international markets.⁷² The German model served as a source of inspiration, but it seems that the amendment largely anticipates the obligations of the Fiscal Compact. The main difficulty during the Spanish amendment process related to the exclusion of the autonomous communities from its preparatory process. The balanced budget rule was also introduced into the 1948 Italian Constitution through a fast-track procedure. While setting aside the discussion on the content and practicability of such clauses, *Contiades* and *Fotiadou* consider their very adoption an example of constitutional adaptation in the face of the crisis. This reform of the Italian Constitution has been notable for the consensus it demonstrates in a country which is otherwise characterized by polarized political elites.⁷³ In both countries, there seems to have been discussion on the extent to which the constitutional law doctrine would have included such a rule even before its formal introduction, which certainly has made the adaption easier.⁷⁴

The incorporating acts of the Fiscal Compact demonstrate great variation in how its contents are understood. In some Member States it was seen to introduce significant and new obligations. On the other hand, for example in Finland the Fiscal Compact was not considered to establish any significant new competences at the European level.⁷⁵ A closer look at the Member States' implementing legislation, constitutional or ordinary parliamentary laws, reveal that the major part of the nationally implemented balanced budget rules actually seem to be – as black letter law – rather weak ones. Thus it will be interesting to see how they are seen to perform in the future Commission report. Almost all the national implementation laws have incorporated the Fiscal Compact exceptions, allowing deviations in emergency situations. Likewise, there seems to be a great deal of variation in the ways in which the balanced budget rule covers different levels of government in the Member States. Nevertheless, the Spanish budget rule seems to be strong on paper. Article 135 of the Spanish Constitution prohibits a structural deficit during 'normal times'. All levels of government are included. Exceptions to the rule require parliamentary approval.

So, is the Fiscal Compact a treaty without an impact? National constitutions have shown great capacity to adapt to its demands. But this alone will not guarantee more effective implementation of budget rules. Member State contexts and traditions vary a great deal. Domestic legal effects depend on various institutional features and the different levels of government, such as the role of parliaments in the budgetary procedures, or the system of constitutional review including the mechanisms by which review by Constitutional Courts can be activated. In these circumstances, the key consideration relating to whether the golden rule and other key provisions meet the requirements of the Fiscal Compact would seem to relate to how they serve their function in a particular Member State. The

⁷² See Agustín Ruiz Robledo, The Spanish Constitution in the Turmoil of the Global Financial Crisis, in Xenophon Contiades (ed.) *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate (2013) 141–165 at 158–163.

⁷³ Tania Groppi et al., The Constitutional Consequences of the Financial Crisis in Italy, in Xenophon Contiades (ed.) *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate (2013) 89–113 at 96–99. See also Fabbrini (2013).

⁷⁴ See Contiades and Fotiadou (2012) esp. 23, 28–30 and 47–47.

⁷⁵ It was stressed that the Compact underlines the Member States' own responsibility for their fiscal and budgetary politics within the EMU framework. Although the provisions of the Fiscal Compact limit the budgetary powers of the Parliament, *eduskunta*, and these limitations were considered significant as such by the Constitutional Law Committee when compared to those contained in the EU Treaties and the Stability and Growth Pact, the Fiscal Compact was not considered by the Committee to result in constitutionally significant, additional limitations to the budgetary powers of the *eduskunta*. The obligation to conform to a balanced budget rule as such existed previously and the main contribution of the Fiscal Compact was seen to simply provide national guarantees for its implementation. Since it was deemed possible to fulfil these obligations with an ordinary Act of Parliament and the prerogatives of the Parliament were supposedly not affected, the adoption of the correction mechanism in Finnish law did not as such provoke constitutional problems. See Päivi Leino and Janne Salminen, The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?, 9 *European Constitutional Law Review* (2013) 451–479.

research by *Fabbrini*⁷⁶ demonstrates that the incorporation of the balanced budget rule affects “executives and legislatures and their relationship in different ways depending on the nature of the budgetary process” in a particular state. In a system that is based on the implementation of the balanced budget rule, “the executives are expected to propose, and parliaments ultimately to approve, annual budget laws, which are either at a surplus or on balance or have a deficit not exceeding” the limits set by the Fiscal Compact. At the political-cultural level this might have an impact on the budgetary policies of various EU member states, especially if the political elite has “traditionally been less concerned with the sustainability of public finances”, and has “repeatedly subsidized government spending by raising public debts”.⁷⁷ Those governments that propose heavy budget cuts are seldom in power after the next general election.

The new budgetary provisions also illustrate the effect of these rules on institutional politics at the national level, since they contribute to strengthening the position of some institutions against other institutions in political debates concerning the state budget. These effects are also context-specific. Besides cultural factors, the role of national parliaments varies greatly. Some of them are real decision-makers in the budgetary processes while some are clearly *ex-post* supervisors of the government. For example in the Italian political-constitutional context the “executive enjoys limited constitutional instruments to force Parliament to approve its budget”.⁷⁸ Thus, there the rule may give the government new means to force Parliament to vote in a particular way as far as the budget is concerned. According to *Fabbrini*, the balanced budget rule will have either empowering or constraining effects on the executive branches in the German and Spanish political-constitutional setting, depending on specific political conditions. In the context of the semi-presidential France, the balanced budget “rule is unlikely to strengthen the position of the executive”. Instead, it may provide instruments for parliamentary opposition, perhaps giving a greater “opportunity for the opposition – – to control the activity of the executive”.⁷⁹ In addition, the existence of a constitutional provision of a balanced budget rule makes the provision justiciable in many Member States strengthens the role of courts as the guardians and controllers of fiscal discipline. Contrary to the typical consequences of integration, the balanced budget rule could even strengthen the position of the national Constitutional Courts presuming that they enjoy jurisdiction based on the golden rule.⁸⁰

But at the same time, the introduction of the balanced budget rule also provides new powers for the EU institutions, in particular the European Court of Justice and the EU Commission. The creation of Fiscal Councils and correction mechanisms at national level contribute to a certain overlap between the EU and national levels.⁸¹ Considering the complexity of the governance framework, it would be tempting to argue that once the national mechanisms are in place and fully functional, they could be used to replace EU coordination. However, this would presume a great level of trust in the operation of these mechanisms. The Commission is unlikely to volunteer to a limitation of institutional powers once gained, even when these powers are difficult to exercise. While the role of the EU Court is restricted to controlling whether a Member State has introduced the balanced budget rule, the Treaty does not empower the Court to formally review the national annual budgets in any way. However, the Court could consider the appropriateness of national implementation measures even from the perspective of how the rule is followed in a particular Member State, i.e. the respect the balanced budget rule in the budgetary procedures,⁸² which would place its review firmly in a national context,

⁷⁶ *Fabbrini* (2013). See also *Lenaerts* (2014), 765-766; *Salminen* (2013) 1094–1096.

⁷⁷ *Fabbrini* (2013) 19.

⁷⁸ *Fabbrini* (2013) 20.

⁷⁹ *Fabbrini* (2013) 21.

⁸⁰ *Fabbrini* (2013) 18–22.

⁸¹ See also *Tuori* (2012) 45 and *Lenaerts* (2014) 757.

⁸² *Ohler* (2014) 128–129.

something that the Court might be eager to avoid. In addition, since the budgetary policy and fiscal standards are more and more regulated by EU legislative framework, the courts' – both European and national - role in settling budgetary and other national constitutional questions could grow even wider.

Therefore, the institutional implications of the adoption of the balanced budget rules for the political branches and courts of the Member States and the other domestic effects of the rules will vary from one state to another, and are also linked to national traditions and political culture. From a constitutional point of view, the Spanish and Italian developments are of particular interest. They have introduced strong constitutional rules in this field. However, in the Commission European Economic Forecast Spring 2014, Spanish debt was evaluated at 100.2 % GDP in 2014 and expected to increase to 103,8 % GDP by 2015.⁸³ While Italy is currently not subject to an Excessive Deficit Procedure, its debt situation is extremely troublesome, with 135,2 % GDP in 2014 and an estimated 133,9 % GDP for 2015.⁸⁴ These figures illustrate how Europe 'speaking German' is not necessarily 'acting German'.⁸⁵

Effects of the 'Double Insurance' - Will the trousers just keep on falling?

Member States' policy advice is not limited to recommendations from the EU institutions. When the effect of the new EU economic policy framework is evaluated, a look from 'outside the box' is also vital. In June 2014 the International Monetary Fund published a Selected Issues Paper addressing this particular question.⁸⁶ The IMF argues that while the recent reforms have introduced many positive elements to the framework, a number of problems persist. In particular, the new rules have not prevented a steady deterioration in public accounts:

Under the SGP, noncompliance has been the rule rather than the exception. Currently, nearly all euro area economies have breached at least one of the fiscal rules.⁸⁷

As far as the design of the framework is concerned, the IMF refers to the growing complexity of the system and the incomplete separation of powers, which contribute to rule design problems and governance failures, which in their turn may have contributed to poor enforcement of the Stability and Growth Pact.

Therefore, while many of the recent reforms might look impressive on paper, it is not evident that they are sufficient in economic terms. The excessive deficit procedure may have contributed to a certain stabilisation of Member State economies post-crisis. While in 2012 ten Member States had a budgetary deficit under three percent, in 2013 17 Member States fulfilled the criteria. However, the average public debt-GDP ratio has soared to 95 percent in 2013, almost 30 percentage points above the pre-crisis level.⁸⁸ Debt levels in some individual Member States are approaching dangerously high levels. This contributes to a low level of confidence in the existing enforcement mechanisms embedded in the Stability and Growth Pact.⁸⁹ This is problematic, keeping in mind that the original ambition of the framework of economic governance, which related specifically to the need to create trust and peer pressure. It is fair to ask what function the framework has, if trust remains fundamentally lacking, or whether market mechanisms might do the job just as well, or perhaps better.

⁸³ The figures are available at the DG ECFIN website http://ec.europa.eu/economy_finance/eu/countries/spain_en.htm .

⁸⁴ For the figures concerning Italy, see http://ec.europa.eu/economy_finance/eu/countries/italy_en.htm .

⁸⁵ Besselink and Reestman (2012).

⁸⁶ International Monetary Fund. Euro Area Policies. 2014 Article IV Consultation, IMF Country Report No. 14/199 of 26 June 2014.

⁸⁷ Ibid, at 93–94.

⁸⁸ Ibid.

⁸⁹ See Céline Allard, Toward a Fiscal Union for the Euro Area, *IMF Staff Discussion Note 13/09*, September 2013, 11.

At the EU level the dilemmas are relatively clear. Economic policies involve numerous national sensitivities closely related with the sovereignty of Member States. The EU institutions, in particular the Commission, would at least to a certain extent, benefit from clear rules that would be easy to enforce in a politically challenging situation. However, the more detailed the rules become, the more problematic they become from the point of view of EU competence. Ambiguity has in many ways been intentional, but it also contributes to blurring responsibilities between the EU and national level. But economic governance also highlights many fundamental questions relating to power. The power to take economic policy decisions seems to be something many players are keen to possess –but when things get rough, it turns into power that many feel reluctant to use, and would gladly see the responsibility for taking difficult decisions redirected somewhere else. The importance of these questions is stressed by how many of these decisions are based on uncertain facts and are made without a clear knowledge of the outcome. Responsibility for decisions also involves responsibility for possible policy mistakes. It is difficult to see how the ultimate budgetary power and the related responsibility could be anywhere else than at the national level in the current stage of development of the Union.

The effect of national reforms may depend on their background and the way in which the introduction of the balanced budget rules was seldom preceded by a wider national discussion concerning the way in which the rules will be enforced in practice or the availability of remedies.⁹⁰ Many of the reforms ultimately give power to the courts, both at the EU and, depending on the national institutional settings, at national levels. Even if this is some ways a traditional solution in the EU constitutional framework, the relevant question should be whether it is appropriate that key decisions on economic policy are pushed to the courts, if policy-makers at EU and national levels cannot be trusted to take good decisions at the right time.

Therefore, the relevant question would still seem to be whether the current “belt and braces” rules are the appropriate approach for preventing crisis. There are both legal and political reasons for reconsidering some of the solutions made during the crisis, and economic indicators would seem to support these findings. Maybe the trousers are just too loose?

⁹⁰ Contiades and Fotiadou (2012) and Fabbrini (2013).

