THE IMPACT OF THE EUROZONE'S CRISIS ON THE INSTITUTIONAL FRAMEWORK AND NATIONAL LAW OF MEMBER STATES – SOME CONSIDERATIONS

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Abstract

This article focuses on the Treaty on Stability, Coordination and Governance in Economic and Monetary union (the so-called Fiscal Compact Treaty). It especially analyses the selected provisions of this international contract instrument and considers its impact on European primary law and the national law of Member States. In this respect, issues relating to reverse majority voting are examined, de facto the new kind of judicial control, the new obligations for Member States concerning the modification of their legal orders, which were not envisaged by the Foundation Treaties, etc. Other key problems addressed in the article are connected with the future “destiny” of the Fiscal Compact Treaty, including two different scenarios: a) the incorporation of its material scope into primary law or b) termination of the legal force of this act after the expiration of a certain period of time.

Keywords

Treaty on Stability, Fiscal Compact, Excessive Deficit Procedure, Reverse Majority Voting, Financial Sanctions

I. Introduction

One of the main responses of the EU to the Eurozone crisis² consisted of the adoption of the Treaty on Stability, Coordination and Governance in Economic and Monetary Union (the so-called Fiscal Compact Treaty), which entered into force on January 1, 2013, after the process of ratification by the Contract Parties – the 17 states of the Eurozone and those EU states which are not members of it (i.e. all member states of the EU, with the exception of Great Britain and the Czech Republic).

This instrument was not adopted in the form of a modification of primary law (despite the original intentions of Angela Merkel and Nicolas Sarkozy); nevertheless, after it entered

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² For more on this topic, see e.g. Funta (2011) or Kačaljak (2011).

into force, it affected the functioning of the Founding Treaties and national law of Member States to an enormous extent.

The abovementioned instrument was even referred to in the Report of House of Lords of the UK Parliament as “one of the more controversial issues in the Union’s history”.³

The reasons for justifying such a “strong” statement could be found in the content of the Fiscal Treaty, including some revolutionary changes.⁴

From the list of all the changes envisaged by the Fiscal Treaty, these four elements could be considered the most cardinal:

- The establishment of a “Golden Rule” to ensure budgetary discipline
- The policing of the “Golden Rule” at the national level through so-called “debt brakes”
- The policing of national budgetary control at the supranational level through a stricter excessive deficit procedure, including legal penalties and control by the European Court of Justice
- New institutional architecture for euro area governance⁵

We will focus in this contribution on only the two of these which, from our point of view, will have the most impact on European law and the national law of Member States.

II. Stricter Excessive Deficit Procedure, semi-automatic application and reverse majority voting

The most revolutionary and key modification is brought about by art. 7, which introduces the stricter Excessive Deficit Procedure, its semi-automatic application and the reverse qualified voting of the Contracting Parties.

Under this provision, those Contracting Parties whose currency is the euro commit to support any proposal or recommendation submitted by the European Commission where it considers that a Member State of the Eurozone is in breach of the deficit criterion (3% ceiling) in the framework of an excessive deficit procedure. This obligation shall not apply in cases where it is established among the Contracting Parties (by a qualified majority, calculated by analogy with the relevant provisions of the Treaty (art. 126 TFEU), without taking into account the position of the Contracting Party concerned) that the proposal or the abovementioned recommendation does not apply if a qualified majority of them, calculated by analogy with the relevant provisions of the Treaty (art. 126 TFEU), and without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

In other words, Member States must vote by a qualified majority (requiring the votes of roughly two-thirds of Member States) to prevent the automatic application of sanctions, without taking the vote of the fiscally errant Member State into question.⁶ So it can

³ House of Lords of the UK Parliament (2012).

⁴ For the overview of the content of the Fiscal Compact Treaty, see Ibid.

⁵ Ó Broin (2012).

⁶ Ibid.

be concluded that, contrary to the regulation under Article 126 TFEU, which demands the qualified majority for the adoption of the Commission's proposal, in the case of the Excessive Deficit Procedure (EDP) under Article 7 of the Fiscal Treaty, the reaching of a qualified majority is necessary for not adopting the Commission's proposal and not imposing sanctions on the Contracting Party concerned.

Despite the fact that reverse majority voting is not an entirely new mechanism (as it was introduced at the level of secondary law as an extraordinary measure and is in force under Regulation No. 1176/2011)⁷; nevertheless, primary law does not take it into account. This allows for the following acceptance of the evaluation of this procedure: "the voting cartel of the Eurozone's Members gives clear evidence of the link between, or even interference of, this Treaty to the primary law."⁸ The impact of this mechanism is obvious: it means *de facto*, that Eurozone Members will decide on the basis of an international contract instrument which is outside primary law and in accordance with a procedure which is not regulated by their founding treaties.⁹ Any decision adopted in those cases when reverse majority voting is not reached will become binding for all Member States of the Eurozone, and also during subsequent votes by the Council, it means in the framework of European law and Union's procedures.¹⁰

In this respect, the main legal issue to be solved consists of the determination as to whether the introduction of the reverse qualified voting mechanism in fact creates a modification of primary law or not? If we take into the account the fact that modifications of primary law are acceptable only on the basis of Article 48 TEU on the regulation of procedural rules, and that these were not applied, it cannot be excluded that the conclusion that the adoption of the abovementioned regulation circumvents the requirements of primary law.¹¹

Some representatives of jurisprudence deliver an even more radical opinion on this provision: "The Fiscal Compact Treaty (especially article 7) creates an indirect amendment of the Founding Treaty."¹²

Another very important impact of this article in practical terms consists of the possibility of the creation of a "block cartel", where only two countries are capable of approving the proposal. As Steve Peers noted correctly: "France and Germany constitute a blocking minority of Eurozone Member States – so if they support the Commission's view, then art. 7 automatically means that the other Eurozone Member States must also do so – unless France or Germany is itself the subject of the Commission's proposal or recommendation, in which case it cannot vote (see the final words of art. 7). Since non-Eurozone Member States cannot vote on the position of Eurozone Member States (see art. 139(2) (d) and (4) TFEU), this will mean that such measures must be adopted".¹³

⁷ The so-called "six pack", or those Economic governance provisions which modified the pact of the Stability and Growth, Official journal L 306, 23. 11. 2011.

⁸ Section for European Affairs of the Office of the Government of the Czech Republic (2012).

⁹ *Ibid.*

¹⁰ Parliament Institute (2012).

¹¹ Section for European Affairs of the Office of the Government of the Czech Republic (2012).

¹² Ondřejková, Ondřejek (2012).

¹³ Peers (2011).

III. Judicial enforcement under Article 8 of the Treaty and relevant legal issues

The aim of Article 8 of the Fiscal Treaty is to provide enforcement of the rules of the balanced budget of the Contracting Parties (the “golden rules” envisaged by Article 3), which can be considered to be “the core of the Treaty”.¹⁴

Under para. 1 art. 8 *“The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties”*.

The wording of this provision enables the supposition that it is not a formal obligation imposed on the Commission, but only a challenge to do so.¹⁵

Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

In spite of the Draft of the Treaty, which envisaged a more active role for the Commission, active legitimation to bring the matter to the Court of Justice under art. 8 was given to Contracting Parties only (the Member States).

The subject of the challenge could be identified under art. 3 as *the infringement of the obligation to carry out the transposition of the fiscal compact rules* (“golden rules”), especially *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 original proposal of the Draft Treaty envisaged the compulsory regulation at the level of constitutional law, which was changed due to the pressure of Member States to the “soft” formulation *“preferably constitutional or otherwise guaranteed to be fully respected”*.¹⁶

That is why the determination of the concrete form of the transposition of the mentioned rules (constitutional regulation, law or other legally binding norm) is at the discretion of the Contracting Parties.

One of the key legal issues consists of the clarification of the fact of whether the obligations under the mentioned provisions of the Fiscal Treaty as an instrument of International law, which is formally concluded outside the framework of the primary law, means de facto the transfer of sovereign rights or not.

Analysis by the Section for European Affairs of the Office of the Government of the Czech Republic suggests that, from the point of view of the Czech Constitution, this possibility cannot be excluded.¹⁷

¹⁴ Section for European Affairs of the Office of the Government of the Czech Republic (2012).

¹⁵ A similar view was expressed by the Parliament Institute (2012).

¹⁶ Section for European Affairs of the Office of the Government of the Czech Republic (2012).

¹⁷ Ibid., p. 22–24.

The same unambiguous conclusions can be reached in the case of the analysis of EU primary law, as the EU institutions will be used in new procedures and would exercise new powers created by the Fiscal Compact Treaty.¹⁸

Article 8 para. 1 also determines in a very vague form the period for the submission of the Report from the side of the Commission, which is expressed in the formulation “*in due time*”. The content of this non-specified term could be deduced from the period of the transposition given in art. 3 (*one year*) and could be determined as the reasonable time after its expiration.

From the text of this provision, it follows that, for submission of the matter before the Court, it is quite sufficient for the challenge to be from only one of the Contracting Parties (so joint action by Member States is not necessary).

In fact, taking into account the fact that the Commission has no *locus standi* in these cases, it seems much more important in practical terms to solve those situations when any State would like to bring a matter to the Luxembourg judicial body on the basis of the Commission’s Report. This hypothetical problem was solved by the Arrangements Agreed by the Contracting Parties at the time of signature concerning Article 3(1) of the Treaty. This accompanying document imposes the obligation to bring this action to the three Member States holding the Presidency of the Council (Trio of Presidencies).¹⁹

In the event that the actual Trio does not meet the criteria set up in art. 8(1)²⁰, the duty to bring the matter to Court will be supported by the Members of the former Trio of Presidencies, under the same conditions.

Article 8(2) regulates the financial sanctions imposed in those cases where compliance with the judgment of the Court of Justice was not followed. The Contracting Party in such a case may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate to the circumstances which shall not exceed 0.1% of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

From the wording of the provisions of art. 8(2) of the Fiscal Treaty, it is quite obvious that the conditions for the sanction procedure are drawn up in almost an analogical way

¹⁸ Li (2012).

¹⁹ The list of successive Trios of Presidencies is set out in Annex I to Council Decision of 1 December, 2009, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (OJ L 322 of 9. 12. 2009, p. 28, corrected in OJ L 344, of 23. 12. 2009, p. 56).

²⁰ These criteria demands of the Members of the Trio that: 1) they have not been found to be in breach of their obligations under Article 3(2) of the Treaty by a Commission’s report, 2) they are not otherwise the object of proceedings before the Court of Justice under Article 8(1) or (2) of the Treaty, and 3) they are not unable to act on other justifiable grounds of an overarching nature, in accordance with the general principles of international law.

to the case of the procedure under the art. 260 (1, 2) TFEU. In other words, this provision recognizes the active legitimization of the Contracting Party to bring the matter to the Court with the proposal of a financial sanction, which can be made only after the termination of the procedure held under art. 8(1) and the Court's judgment declaring the infringement of the obligations from the side of the Member State concerned.

Nevertheless, and on the contrary, the regulation under art. 260 TFEU, the request for sanction (including the amount of the lump sum of the fine) is submitted not by the European Commission, but by the Contracting Party, i.e. the Member State.

The abovementioned procedure raised some legal questions. Although the fact that, under art. 8(3), the Fiscal pact constitutes a special agreement between the contracting parties within the meaning of art. 233 TFEU, thus exists outside the primary law, the fact, that the Court will be acting under the methodology of the Founding Treaty, raises the question, whether this procedure in practice will not mean *de facto* a widening of the competences at the Union's level, which were not transferred in a proper way (by procedures envisaged by primary law)?

In this respect we absolutely agree with the opinion that "art. 8 of the proposed Treaty caused difficulties because even though the Commission would not bring a case in name, the provisions meant that it might do so in effect, and there is no provision under EU Treaties for the Commission to bring such a case".²¹

IV. Article 16 – "sunset provision" or the way forward?

The last provision, art. 16, of the Fiscal Compact regulates the future eventual prospects of the Treaty. It states that: *"within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union"*.

The analysis of this provision enables an unambiguous conclusion that the arrangement of the international agreement in the form of the act existing outside the framework of the primary law *creates only the provisional and substitution solution*. This fact is confirmed by the obligation of the Contracting parties to try and to do the best for the incorporation of the Fiscal Compact into the Founding Treaty. From the side of some of the Union's institutions it was even expressed the proposal of the termination of legal force of this act after the expiration of a certain period (5 or 7 years), if the incorporation of its material scope into primary law would not be successful (the so-called "sunset clause").²²

At the same time, it cannot be excluded that, in case of the positive result, the same method could be widely used in future in many cases, when the modification of primary law under the procedural rules given by art. 48 TFEU, would not really be attainable.

²¹ Opinion of Prof. P. Craig, House of Lords of the UK Parliament (2012).

²² Section for European Affairs of the Office of the Government of the Czech Republic (2012).

V. Conclusion

The content of the Fiscal Treaty causes some legal problems which were analysed in this text and which evoke strong critical reactions from representatives of jurisprudence.

On top of other criticism, it is pointed out that the Fiscal Compact Treaty goes beyond the existing powers of EU institutions and also takes precedence over the parliamentary procedures of the Member States. The official justification for this is that budgetary deficits are such an exceptionally serious matter that there was a need to depart from normal operating procedures. In all these respects, it is doubtful whether the Fiscal Compact Treaty is contrary to the principle of the rule of law.²³

Despite the fact that the abovementioned controversial provisions (for instance, reverse majority voting, de facto new kind of judicial control, new obligations for the Member States concerning the modification of their legal orders, which were not envisaged by the Foundation Treaties) are not so “legally pure” from the point of view of the procedural rules given by primary law, nevertheless it is quite obvious that the Union must look for new, more flexible mechanisms in order to ensure its “survival” in emergency situations. This means finding such methods as will enable the Union to be more effective, ready to act and able to react promptly in the eventuality of a crisis. This tendency to seek more flexible models had been already started by the Lisbon Treaty, which introduced the simplified revision procedure of primary law.²⁴

Nevertheless, even this simplified pattern was shown to be insufficient and unsatisfactory at the time of the crisis. The legal regulation of the relevant material in the form of the Fiscal Treaty indicates a new tendency in the modification of primary law – the application of the international treaty at the level of the Union and its consequent incorporation into the framework of European law (with the same subjects and the same material scope). This so-called “provisional application” of the future provisions of the *acquis communautaire* may create new measures to overcome the pressure of a crisis situation. The question is whether it would not lead in wider consequences to the gradual demolition of the existing concept of European integration and its substitution by an entirely new construction and rules?

References

- Funta, R. (2011). Economic Law and Economic Crisis. Where Do We Go From Here? Economic, Legal and Political Dimension. *DANUBE: Law and Economics Review*, 2(1), 65–71.
- Kačaljak, M. (2011). The Debt Crisis and the Means of Enforcing the Budgetary Discipline of EU Member States. *DANUBE: Law and Economics Review*, 2(4), 63–79.
- House of Lords of the UK Parliament (2012). *The Euro Area Crisis*. 25th Report of session 2010–2012, European Union Committee. Retrieved from <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldeucom/260/260.pdf>.

²³ Li (2012).

²⁴ For the analysis of this procedure, see Piris (2010).

Li, C. (2012). Eurozone Sovereign Debt Crisis and Fiscal Compact Treaty: Towards the Creation of the European Fiscal Union? In *Beyond Lisbon Treaty: Re-examining EU institutions and Governace*. Conference Proceedings, Institute for European and American Studies Taipei, Academic Sinica.

Ó Broin, P. (2012). The Euro Crisis: The Fiscal Treaty – An Initial Analysis. Working Paper 5, Institute of International and European Affairs. Retrieved from <http://www.iiea.com/blogosphere/the-fiscal-treaty--an-initial-analysis>.

Ondřejková, J, Ondřejek, P. (2012). Několik poznámek ke způsobům změn primárního práva EU a ústavním aspektům eventuálního přístupu ČR ke Smlouvě o fiskální unii [Some notes about the ways of the changing of the primary law and constitutional aspects of the eventual ascession of the Czech Republic to the Fiscal Union]. *Jurisprudence*, (5), 24–32.

Parliament Institute (2012). *Komentář k návrhu Smlouvy o stabilitě, koordinaci a správě v hospodářské a měnové unii* [Commentary to the Treaty on Stability, Coordination and Governance in Economic and Monetary Union], study No. 3130. Retrieved from <http://www.psp.cz/doc/00/08/28/00082877.pdf>.

Peers, S. (2011). *Draft Agreement on Reinforced Economic Union (REU Treaty)*. State-watch Analysis. Retrieved from <http://www.statewatch.org/analyses/no-164-reu-treaty.pdf>.

Piris, J.-C. (2010). *The Lisbon Treaty. A Legal and Political Analysis*. Cambridge: Cambridge University Press.

Section for European Affairs of the Office of the Government of the Czech Republic (2012). *Smlouva o stabilitě, koordinaci a správě hospodářské a měnové unii. Sekce pro evropské záležitosti Úřadu vlády ČR* [Treaty on Stability, Coordination and Governance in Economic and Monetary Union]. Retrieved from http://www.euroskop.cz/gallery/64/19439-analyza_uv_final.pdf.

Section for European Affairs of the Office of the Government of the Czech Republic (2012). *Smlouva o stabilitě, koordinaci a správě v hospodářské a měnové unii, Analýza Sekce pro evropské záležitosti Úřadu vlády ČR* [Treaty on Stability, Coordination and Governance in Economic and Monetary Union]. Retrieved from http://www.euroskop.cz/gallery/64/19439-analyza_uv_final.pdf.