



The ‘Fiscal Compact’s’ Weak Points

Conclusions from the Greens/EFA group’s hearing on the fiscal compact of 8 February 2012

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The fiscal compact’s stated chief goals are to reinforce member states’ budgetary discipline, prevent excessive public debt and regain the markets’ trust in sound budgetary policies. These are legitimate and important objectives but the fiscal compact is the wrong means to this end. It undercuts democracy in Europe by establishing new institutions that circumvent the European Parliament and undermines existing EU law. It does not strengthen legal certainty and does not reinforce solidity. Moreover, fiscal consolidation alone will not solve the current debt and economic crises in Europe.

1. Budgetary discipline will not be strengthened

- The debt break, or golden rule, provided for in the fiscal compact (Art. 3) is already part of EU secondary law in the form of the ‘numerical fiscal rules’ (see Art. 5ff. of directive 2011/85/EU). What is more, these rules are set to be enshrined in national law, preferably constitutional, according to existing proposals by the European Commission in the so-called two-pack (economic governance package II).
- The existing stability and growth pact’s weak point was that it was limited to a few budgetary rules, and that the pact’s debt ceilings were not enforced and possible sanctions not imposed. This was not least as a result of the decision-making rules, according to which a qualified majority of member states had to be in favour in order to launch an excessive deficit procedure. The effective implementation of the budgetary rules therefore depended on the political will of national governments to enforce the rules strictly and equally for everyone. This political will was evidently lacking.

As a lesson of this experience, the six-pack introduced, with the backing of the Greens, the ‘reversed qualified majority’. That is, an excessive deficit procedure will no longer require a positive vote by member states but will be launched automatically unless a qualified majority of countries votes against it. This change in voting rules was made on weak legal ground. According to some legal experts it is incompatible with Art. 126 TFEU, which explicitly requires a positive qualified majority in order to launch an excessive deficit procedure.

The ‘reversed qualified majority’ rule for excessive deficit procedures enshrined in the fiscal compact does not change anything in this respect. The legal concerns remain the same – a new treaty cannot contradict existing EU treaties. The fiscal compact cannot therefore overcome the six-pack’s existing weak point in this respect as was intended. Legal certainty can only be achieved by revising the existing EU treaties.

- Unlike the German government wanted, the fiscal compact does not require states to incorporate the debt break into their constitutions. Rather, this should only be ‘preferably’ done by means of constitutional law. It can thus be expected that many countries (including possibly France) will implement the debt break only through ordinary legislation due to the lack of the necessary majorities to change their constitutions. These laws would consequently have less legal force than EU law, which takes precedence over national legislation. The objective of making the debt ceilings permanent and protecting them against undue changes at national level would therefore not be achieved – whereas using EU law would do just that.
- Moreover, the fiscal compact will not tackle the underlying problems for it is based on a purely intergovernmental logic. The Community institutions, which have proved best placed to overcome obstructive national policies and deadlocks, are largely confined to the role of on-lookers in the fiscal compact. Unlike under EU law (e.g. the six-pack), in the framework of the fiscal compact the Commission cannot, for instance, bring actions against member states before the European Court of Justice.

The German government wanted to attribute such a role to the Commission in the fiscal compact – however, this proved impossible due to legal obstacles (not political opposition) because such competences cannot be conferred on the Commission by means of an intergovernmental treaty. It is only possible through a revision of the EU treaties. For the same reason other provisions of the fiscal compact attributing tasks to the Commission (see Art. 3 and 8 of the fiscal compact) face legal difficulties as well. As a result, in the framework of the fiscal compact only member states can bring a case against another member state to the European Court of Justice. That is, it would have to be, for example, Germany that brings an action against Greece. Given the potential tensions between the countries concerned, such a move seems unlikely in practice.

Furthermore, it is controversial whether a case can actually be brought before the European Court of Justice based on Art. 8 (2) of the fiscal compact at all (i.e. irrespective of the question of whether the action is taken by the Commission or a member state). In fact, the debt break is already part of secondary EU law in the form of the ‘numerical fiscal rules’ (see Art. 5ff. of directive 2011/85/EU). As a result, the Court of Justice must, according to some legal experts, reject its jurisdiction for Art. 8 of the fiscal compact because EU secondary law takes precedence over the international law of the fiscal compact. The fiscal compact’s sanctions regime is therefore legally questionable and potentially ineffective.

- Legal enforcement of the fiscal rules is also undermined by the indicators on which the fiscal compact bases the imposition of sanctions. The indicator used, the ‘structural budget deficit’, cannot be measured but only estimated. Corrections of 1 percent of gross domestic product after one year are not uncommon.

2. Democratic decision-making procedures are compromised

- The Euro Summits created by the fiscal compact are controlled, at European level, neither by Parliament nor by a Court. Moreover, given the significance of the decisions it will take, this body works in an insufficiently transparent manner.
- Establishing the Euro Summit as a new institution whose activities will affect the functioning of existing EU institutions, should normally require, according to primary EU law, the modification of the EU treaties.
- Without a precise legal mandate, it is unclear which competencies the Euro Summit will acquire in practice and what effects this will have on existing EU institutions. The legislative functions of the Council in the field of economic and monetary union will certainly be undermined as its decision will be prejudged by intergovernmental agreements at the level of the Euro Summit. Likewise, the Commission's right of initiative in this area is likely to be weakened.
- Unlike in the EU framework, the European Parliament plays virtually no role in the fiscal compact. In fact, the fiscal compact erodes existing rights of the European Parliament. Notably, the fiscal compact undermines the economic dialogue between Parliament, Council and Commission established by the six-pack, which enables the Parliament to hear and publically hold accountable commissioners and national ministers. As an important innovation, the six-pack provides in particular for the European Parliament to be involved in the excessive imbalances procedures. However, when member states commit themselves always to endorse the Commission's proposals on correcting the deficits, the debate about them in the European Parliament becomes a charade.

3. EU law provides a better alternative

- The Community institutions, i.e. Parliament, Commission and Court of Justice, can only be fully used in the framework of EU law (primary and secondary law). Legal certainty and the effective enforcement of common budgetary rules will not be achieved unless full use is made of the Community bodies.
- Subject to one exception, all measures and modifications included in the fiscal compact and not yet covered by the six-pack (such as lowering the structural budget deficit ceiling from 1.0 to 0.5 percent) can be implemented through the two-pack, which is currently discussed by Parliament and the Council, in a manner guaranteeing enforcement and legal certainty. The only exemption, introducing reversed qualified majority voting in the excessive deficit procedure, cannot be attained by the fiscal compact. As mentioned above, this can only be done by means of modifying Art. 126 TFEU in order to ensure legal certainty. A debt break is already enshrined in EU law and can be reinforced.
- Elements of the fiscal compact, the two-pack or beyond, for which there is no majority among member states or which need unanimity, can be implemented through enhanced cooperation within the framework of existing primary EU law and based upon ordinary EU decision-making procedures. This simply requires nine or more member states, which can advance as a group after approval by a qualified majority in the Council and by the European Parliament. The European

Parliament is fully involved during both the initiation and implementation of enhanced cooperation.

- Not making use of the instrument of enhanced cooperation amounts to intentionally circumventing the reinforced institutional role of the European Parliament after the Lisbon treaty. The Lisbon treaty's intention was precisely to liberate states willing to cooperate further from having to wait until a consensus emerges among all member states. In fact, enhanced cooperation was created exactly for the case at hand, where individual states do not want to or are not able to participate in deeper cooperation. Although most of the fiscal compact's elements could be implemented in the framework of Community law, a group of member states is de facto creating a separate legal order rather than making the case for their ideas in the framework of the ordinary legislative processes.

4. Current debt and economic crises will not be mitigated

- The fiscal compact was drawn up without taking into account the capacity of the states concerned to achieve the agreed budgetary targets. Data recently published by the Kiel Institute for the World Economy indicates that not only Greece but also Portugal is over-indebted, and that Ireland and Italy are threatening to follow suit soon.¹ In order to meet the consolidation requirements set by the fiscal compact, these states would have to implement measures that are hard to realize: extensive privatisation (economically questionable during the crisis), taxation of non-income values (politically difficult in the crisis-ridden states) or additional acts of solidarity such as transfers, investment programmes and interest-lowering guarantees by euro-area partners (politically difficult in the financially solid countries).
- The fiscal compact's focus on austerity undermines the prospect of investments in growth, which in turn makes the consolidation of public finances more difficult. At the same time, necessary means to stabilise the euro which are difficult to realize within the existing EU treaties are absent from the fiscal compact. Notably, eurobonds, in the context of a European redemption fund for example.
- Urgent measures which could be easily taken within the framework of the treaties are not addressed either: more EU funding for investment (transfers) in the crisis-ridden states (e.g. through additional resources from the EIB or further funding from the EU budget), active measures against macroeconomic imbalances also in the surplus countries, increased harmonisation of tax policies, a financial transaction tax etc. Should there be no consensus among member states, most of these measures could be swiftly implemented through enhanced cooperation.

5. Social and environmental targets of Europe 2020 are omitted

- The binding targets of the Europe 2020 strategy – fight against poverty, prevention of climate change, education, research and development, and growth – are absent from the fiscal compact. Rather, the fiscal compact subordinates them

¹ See <http://bit.ly/Ai7MRZ>.

to the consolidation of public finances (Art. 1 (1) of the fiscal compact). In doing so, the fiscal compact repeats a mistake which was also made when the six-pack was adopted, and because of which the Green group in the European Parliament did not support three of the six-pack's six laws.

- The Fiscal compact fails to involve social partners or to establish a link to the European macroeconomic dialogue.

Conclusion

The fiscal compact is a distraction from the key lesson that asymmetrical union does not work. Monetary union not only requires common rules but also common decisions unconstrained from consensus requirements. Rather than acknowledging this fact and adapting the Community rules accordingly, with the fiscal compact member states promote little more than a kludge, which will not rectify the Union's asymmetry and will undermine parliamentary and Community decision-making procedures.

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