

Is it worth the effort? The European Commission’s proposal for integrating the substance of the ‘Fiscal Compact’ into the EU legal order

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Abstract

The contribution deals with the perspective of incorporating the TSCG into the legal order of the European Union, with particular attention to the proposal for a Directive presented by the European Commission on 6 December 2017, in the context of the so-called ‘Saint-Nicholas’ EMU Package. After having briefly recalled the legal nature of the TSCG, the specific provision laid down in Article 16 thereof – setting out an (alleged) obligation to take the necessary steps to incorporate the ‘substance’ of the stability treaty into the legal framework of the EU – is examined. The Commission’s proposal is then summarized and critically assessed, highlighting some problematic issues, such as the narrow scope of the envisaged integration of the TSCG, the choice of a more than questionable legal basis and the limited involvement of the European Parliament. Finally, several conclusions are drawn, on the basis of the analysis carried out.

Introduction

On 6 December 2017, the European Commission presented a set of proposals and communications for deepening the Economic and Monetary Union (EMU),¹ as a further step in the long series of documents and proposals issued on this matter over the last years, including – in recent times – the so-called Five Presidents’ Report of June 2015² and the Reflection Paper on the deepening of the EMU of May 2017.³ One of the initiatives put forward by the Commission in the “Saint Nicholas” EMU package – as it has been informally renamed, in view of its date of adoption – is aimed at integrating the “substance” of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG – commonly referred to as the “Fiscal Compact” or the stability treaty)⁴ into the EU legal framework. To this end, the Commission issued a proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientations in the Member States.⁵

The purpose of this contribution is to analyse, from a legal standpoint, the perspective of incorporating the TSCG into the legal order of the European Union, with particular regard to the abovementioned proposal for a Directive. After having briefly recalled the legal nature of the TSCG (II), the specific provision laid down in Article 16 thereof – setting out an (alleged) obligation to take the necessary steps to incorporate the “substance” of the stability treaty into the legal framework of the EU – will be examined (III). The Commission’s proposal will then be summarized (IV) and critically assessed (V), before drawing some conclusions (VI).

¹For a general overview of the European Commission’s roadmap, presented on 6 December 2017, see the [Commission’s dedicated webpages](#). For a more detailed analysis of the different proposals, see the Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, Further steps towards completing Europe’s Economic and Monetary Union: A roadmap, 6 December 2017, COM(2017) 821 final.

²JUNCKER, Jean-Claude, in close cooperation with Donald Tusk, Jeroen Dijsselbloem. *Completing Europe’s Economic and Monetary Union* [“Five presidents’ report”]. Brussels, June 2015.

³European Commission, Reflection Paper on the deepening of the Economic and Monetary Union, Brussels, 31 May 2017, COM(2017) 291 final.

⁴Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (2 March 2012).

⁵European Commission, 6 December 2017, COM(2017) 824 final (hereinafter also the “proposed Directive” or the “proposal”).

The TSCG: an international (and provisional) treaty

As is well known, the [TSCG](#) is an international treaty signed on 2 March 2012 by 25 Contracting Parties, i.e. all the then Member States of the EU, except for the UK and the Czech Republic.⁶

The TSCG has been scrutinised in depth by scholars, giving rise to an intense debate on several issues, including – from a legal perspective – the scope of its provisions, their compatibility with EU law, and the consequences of the choice of concluding an international treaty between some of the EU Member States.⁷

An essential provision of the TSCG is the so-called balanced budget rule (sometimes referred to as the “golden rule”)⁸ enshrined in its Article 3(1), pursuant to which the budgetary position of the Member States shall be “balanced or in surplus” (Article 3(1)(a)), i.e. with a lower limit of a structural deficit of 0,5% of the gross domestic product at market prices (Article 3(1)(b)), albeit with certain exceptions. The second paragraph of the same provision lays down the well-known principle according to which the rules set out in paragraph 1 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.”

In addition to the balanced budget rule, the TSCG also sets out other provisions dealing with different aspects of the economic pillar of the EMU, such as: Article 7, which entails a commitment to support the proposals or recommendations submitted by the European Commission where it considers that a Member State of the Eurozone is in breach of the deficit criterion in the framework of an excessive deficit procedure, unless a qualified majority of Member States is opposed (the so-called reversed Qualified Majority Voting - QMV); Article 12, which “institutionalised” the Euro Summit; Article 13, introducing an inter-parliamentary conference composed of representatives of the European Parliament and of the national Parliaments. Moreover, Article 8 TSCG gives the Court of Justice special jurisdiction, pursuant to Article 273 TFEU, concerning the enforceability of the obligation set out in Article 3(2) TSCG.

A large part of the legal doctrine deems that almost all the rules laid down in the TSCG are either a mere repetition of existing EU law provisions (especially, the “[Six-Pack](#)”, which had already been adopted at the moment in which the TSCG was signed, and the “[Two-Pack](#)”, adopted in 2013) or rules that could easily have been adopted through EU secondary law; that is why the stability treaty has been considered “not necessary in any legal sense.”⁹ The European Parliament noted, in this respect, that “virtually all the elements contained

⁶At the time of signature of the TSCG, Croatia had not yet acceded to the EU. That Member State has subsequently acceded to the TSCG (choosing to be bound only by Title V) as of 7 March 2018.

⁷For a general analysis of the legal issues of the TSCG, see, amongst others, BARATTA, Roberto. Legal Issues of the “Fiscal Compact”. *Il Diritto dell'Unione europea*, 2012, No.4, p.647-681. Available at: [SSRN](#); CHALTIEL, Florence. Le traité sur la stabilité, la coordination et la gouvernance: du fédéralisme monétaire au fédéralisme budgétaire? *Revue de l'Union européenne*, 2012, No.558, p.293-294. Available at: [Publisher](#) | [WorldCat](#); CRAIG, Paul. The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism. *European Law Review*, 2012, vol.37, No.3, p.231-248. Available: [SSRN](#) | [WorldCat](#); BESSELINK, Leonard F., REESTMAN, Jan Herman. Editorial. The Fiscal Compact and the European constitutions: ‘Europe speaking German’. *European Constitutional Law Review*, 2012, vol.8, No.1, p.1-7. Available at: [Publisher](#) [WorldCat](#); Editorial Comments. Some Thoughts concerning the Draft Treaty on a Reinforced Economic Union. *Common Market Law Review*, 2012, vol.49, No.1, p.1-14. Available at: [Publisher](#) | [WorldCat](#); KOCHAROV, Anna (ed.) Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty. *EUI Working Papers*. Law 2012/09, 2012. Available at: [Publisher](#); LOUIS, Jean-Victor. Un traité vite fait, bien fait? Le traité du 2 mars 2012 sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire. *Revue trimestrielle de droit européen*, 2012, vol.48, No.1, p.5-22. Available at: [Publisher](#) | [WorldCat](#); PEERS, Steve. The Stability Treaty: Permanent Austerity or Gesture Politics? *European Constitutional Law Review*, 2012, vol.8, No.3, p.404-441. Available at: [Publisher](#) | [WorldCat](#); ZARKA, Jean-Claude. Le traité sur la stabilité, la coordination et la gouvernance dans l'Union économique et monétaire (TSCG). *Recueil Dalloz*, 2012, p.893; CANTORE, Carlo Maria; MARTINICO, Giuseppe. Asymmetry or Dis-integration? A Few Considerations on the New ‘Treaty on Stability, Coordination and Governance’ in the Economic and Monetary Union. *European Public Law*, 2013, vol.19, No.3, p.463-479. Available at: [Publisher](#) | [WorldCat](#)

⁸The TSCG itself defines the rule at issue “balanced budget rule”: see recital 3 in the preamble. With particular reference to such rule from a legal perspective see, inter alia, FABBRINI, Federico. The Fiscal Compact, the ‘Golden Rule’, and the Paradox of European Federalism. *Boston College International and Comparative Law Review*, 2013, vol.36, No.1, p.1-38. Available at: [SSRN](#) | [WorldCat](#); VAN MALLEGHEM, Pieter Augustin. (Un)Balanced Budget Rules in Europe and America. In: Maurice ADAMS, Federico FABBRINI, Pierre LAROUCHE (eds.). *The Constitutionalization of European Budgetary Constraints*. Oxford: Hart Publishing, 2014, p.151-180. Available at: [Publisher](#) | [WorldCat](#). On the general difference between the ‘balanced budget rule’ and the ‘golden rule’, see, for instance, BARATTA, Roberto. Legal Issues of the ‘Fiscal Compact’, supra note 7, at p.662.

⁹PEERS, Steve. The Stability Treaty, supra note 7, at p.441.

in the new Treaty can be achieved, and to a large extent have already been achieved, within the existing EU legal framework and through secondary legislation, except for the golden rule, reversed QMV and the involvement of the ECJ.”¹⁰

As to the legal nature of the TSCG, it should be borne in mind that the rules introduced by the stability treaty were initially conceived as an amendment of the EU Treaties; a veto of the UK, however, precluded the use of the simplified revision procedure pursuant to Article 48 TEU.¹¹ Given the situation of urgency, marked by the necessity to reassure the markets promptly, the adoption of an instrument of pure international law seemed to be the appropriate way to overcome the institutional impasse.¹²

In the context described above, the TSCG had a strong political relevance, and in this sense it has been defined as being not only a political symbol, but also a “constitutional symbolism”, aimed inter alia at emphasizing the sovereign nature of the restriction of sovereignty put in place by expressly accepting the balanced budget rule.¹³

It is not possible to discuss here the broad issue concerning the so-called intergovernmental method, as opposed to the Community method (and/or, more recently, to the “Union method”),¹⁴ and, in particular, the wide debate which has developed following the decision taken by the Member States to conclude the TSCG and the treaty establishing the European Stability Mechanism as international treaties inter se, outside the EU legal framework. Suffice it to say that, as observed by many scholars, the relations between the abovementioned treaties and the EU legal order are much closer than they could seem at first sight, so that it could be questioned whether the notion of intergovernmental method is suitable for such treaties.¹⁵

With reference to the TSCG, it should be borne in mind that it was conceived as a provisional instrument, being a “normative vehicle” aimed at circumventing the delimitation of competences of the TFEU, as well as the lack of unanimity, with a view to incorporating it in the EU legal order as soon as possible.¹⁶ Such perspective is made clear, first, by the seventh recital in the preamble of the TSCG, according to which “the objective of the Heads of State or Government of the euro area Member States and of other Member States of the European Union is to incorporate the provisions of [the TSCG] as soon as possible into the Treaties on which the European Union is founded”; and second, by the provision laid down in Article 16 TSCG, which will be examined in the following paragraph.

The provision laid down in Article 16 TSCG

Pursuant to Article 16 TSCG:

¹⁰European Parliament resolution of 2 February 2012 on the European Council of 30 January 2012 (P7_TA(2012)0023).

¹¹See, for instance, BARATTA, Roberto. Legal Issues of the ‘Fiscal Compact’, supra note 7, p.651 et seq.

¹²CRAIG, Paul. The Stability, Coordination and Governance Treaty, supra note 7, at p. 233, points out that Angela Merkel and Nicolas Sarkozy, who had committed themselves to change the founding Treaties, “could not be seen to back down in the light of the UK veto and accept change in the form of EU legislation”. The author adds that there is a paradox in the solution eventually adopted, provided that if the provisions in the TSCG had been enshrined in EU legislation, they would have partaken of the normal attributes of EU law.

¹³BESSELINK, Leonard F.M. Parameters of Constitutional Development: The Fiscal Compact In Between EU and Member State Constitutions. In: ROSSI, Lucia Serena and CASOLARI, Federico (eds.). *The EU after Lisbon. Amending or Coping with the Existing Treaties?* Heidelberg: Springer International Publishing, 2014, p.21-35, at p.31. Available at: [Publisher](#) | [WorldCat](#)

¹⁴Speech by the German Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010. On the “Union method”, see, for instance, Editorial. In search of the Union Method. *European Constitutional Law Review*, 2015, vol.11, No.3, p.425-433. Available at: [Publisher](#) | [WorldCat](#)

¹⁵See, amongst others, DE GREGORIO Merino, Alberto. Legal Developments in the Economic and Monetary Union During the Debt Crisis. *Common Market Law Review*, 2013, p.1613-1646. Available at: [Publisher](#) | [WorldCat](#). With particular regard to the TSCG, see ALLEMAND, Frédéric and MARTUCCI, Francesco. La nouvelle gouvernance économique européenne. *Cahiers de droit européen*, 2012, p.17-99 and p.409-457, at p.435 et seq. Available at: [Publisher](#) | [WorldCat](#); LOUIS, Jean-Victor. Un traité vite fait, bien fait?, supra note 7. It should be noted that Article 2 TSCG explicitly states, inter alia, that the stability treaty shall be applied and interpreted in conformity with the EU Treaties, in particular Article 4(3) TEU, and with EU law.

¹⁶See MARTUCCI, Francesco. La longue marche vers le cadre budgétaire intégré de la zone euro. *Revue de l'Union européenne*, 2018, No.616, p.157-165. [Publisher](#)

“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 contracting parties envisaged, in principle, a development similar to that of the Schengen and Prüm treaties, concluded between some of the Member States, and subsequently incorporated in EU primary or secondary law.¹⁷ The provision concerning the incorporation of the TSCG in the legal framework of the EU was one of the major requests made by the members of the European Parliament involved in the negotiation of the treaty.¹⁸ Accordingly, the European Parliament has repeatedly asked for the substance of the TSCG to be brought under the EU Treaties, and therefore within the institutional framework of the Union, in order to ensure an effectively legitimate and democratic governance of the EMU.¹⁹

The binding force of Article 16 TSCG, however, can be called into question, since a rule enshrined in a treaty concluded between a group of Member States cannot, in itself, bind the non-participating Member States and the EU institutions (notably, the European Commission and the European Parliament).²⁰ Moreover, no specific mechanisms of compliance with such provision are laid down in the stability treaty.²¹ According to some scholars, the intrinsically temporary nature of the TSCG – clearly emerging from Article 16 – would allow the contracting parties to exercise their right to denunciation or withdrawal, on the basis of Article 56(1) of the Convention on the Law of the Treaties, signed in Vienna on 23 May 1969, which admits the possibility of exercising such a right, by way of exception, where it may be implied by the nature of the treaty.²² However, Article 16 does not set an “expiry date” for the TSCG (as it had been the case, for instance, for the Treaty establishing the European Coal and Steel Community), but rather a deadline for incorporating it into the EU legal order, which does not seem to constitute a binding statutory term. Indeed, in the absence of such a “transposition”, the treaty continues to be in force even after the lapse of the five-year term set in Article 16. Therefore, it seems that there would be no grounds for exercising the abovementioned exceptional right.²³

It should also be noted that, pursuant to Article 16 TSCG, the necessary steps to integrate the treaty into the EU legal framework shall be taken by the contracting parties “on the basis of an assessment of the experience with its implementation.” In principle, such an assessment may be negative, thus leading to question the appropriateness of an incorporation of the stability treaty.²⁴

What is certain is that, as the TSCG entered into force on 1st January 2013, the five-year term set in Article 16 expired at the beginning of this year, apparently without any particular consequence. No official initiative of the Member States for incorporating the “substance” of the treaty into the EU legal framework has been made public; as anticipated, an initiative in this direction was taken by the European Commission, which put forward a proposal for a Council directive on 6 December 2017.

¹⁷In this respect see, for instance, CUCCHIARA, Maria Francesca. *Fiscal Compact e Meccanismo Europeo di Stabilità: quale impatto sull'equilibrio istituzionale dell'Unione? Il Diritto dell'Unione europea*, 2015, vol.20, No.1, p.91-136.

¹⁸See BARATTA, Roberto. *Legal Issues of the 'Fiscal Compact'*, supra note 7, at p.660, footnote 52.

¹⁹See European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (P7_TA(2013)0598) and resolution of 24 June 2015 on the review of the economic governance framework: stocktaking and challenges (P8_TA(2015)0238).

²⁰See, amongst others, ZILLER, Jacques. *Il quadro costituzionale della governance economica europea*. In: ORNELLA Porchia (ed.). *Governance economica europea. Strumenti dell'Unione, rapporti con l'ordinamento internazionale e ricadute nell'ordinamento interno*. Napoli: Editoriale Scientifica, 2015, p.13-31, at p.29-30. Available at: [Publisher | WorldCat](#). On the legal value of Article 16 TSCG, see also FROMAGE, Diane and DE WITTE, Bruno. *The Treaty on Stability, Coordination and Governance: should it be incorporated in EU law?* *Verfassungsblog*, 6 November 2017; GRAF VON LUCKNER, Johannes. *How to bring it home – The EU's options for incorporating the Fiscal Compact into EU law*. *European Law Blog*, 9 April 2018. Consulted on 5 April 2018. Available at: [Publisher](#)

²¹FROMAGE, Diane and DE WITTE, Bruno. *The Treaty on Stability, Coordination and Governance*, supra note 20.

²²MESSINA, Michele. *Strengthening Economic Governance of the European Union through Enhanced Co-operation: A Still Possible, but Already Missed, Opportunity*. *European Law Review*, 2014, vol.39, No.3, p.404-417, at p.413-414. Available at: [Publisher | WorldCat](#)

²³In the same vein, see PEERS, Steve. *The Stability Treaty*, supra note 7, at p.439, according to whom the only possibility for denouncing the TSCG would arise in the case that a contracting party chooses to leave the EU according to Article 50 TEU.

²⁴See TOSATO, Gian Luigi. *Ue: unità del diritto tra Trattato Esm e Fiscal Compact*. *Affarinternazionali*, 22 December 2017. Consulted on 5 April 2018.

The European Commission's proposal

In general terms, the TSCG may be incorporated into (i) EU primary law, by means of a treaty amendment, and/or (ii) EU secondary law, taking into account the legal bases provided by the Treaties.

The European Commission chose the second route by issuing a proposal for a Council Directive – having as legal basis Article 126(14)(2) TFEU – which should apply to all the euro area Member States and to other Member States wishing to participate. Therefore, with regard to the non-euro Member States, the proposed Directive establishes an *à la carte system*, which does not substantially differ, in practical terms, from the rules of application of the TSCG to the Member States with a derogation (on the problems raised by this solution, see *infra*, § V). It should be recalled, in this respect, that to date, the TSCG has been ratified by 26 Member States, i.e. the 25 contracting parties which had originally signed the treaty plus Croatia, which has recently acceded to the treaty.²⁵ Pursuant to Article 14 TSCG, the non-euro Member States which ratified the TSCG are bound, in principle, only by the provisions of Title V of the treaty (concerning Euro Summit meetings and parliamentary meetings), unless they declared that all or part of Titles III and IV (on the Fiscal Compact and economic policy coordination and convergence) would apply to them.²⁶

As to the context of the proposed Directive, the Commission states that Article 3 TSCG “is by far the most substantive provision of the TSCG from an EMU perspective”,²⁷ since it aims to maintain sound and sustainable public finances and to prevent government deficit and debt from becoming excessive. With regard to the other provisions of the TSCG, the Commission considers that they have either been already integrated into EU law (in particular, via the “Two-pack”, as far as the euro area is concerned), or would require changes to the Treaties, or are not suitable for incorporation for various reasons (e.g., in the words of the Commission, “some replicate existing EU law”).²⁸ Therefore, the “substance” of the TSCG which the proposed Directive would incorporate into the Union legal framework “is concentrated in Article 3 TSCG.”²⁹ According to the Commission, the envisaged integration would be advisable for several reasons. First, it would simplify the legal framework, while ensuring more effective and systematic monitoring of the implementation and enforcement of fiscal rules at both EU and national level. Secondly, it would reduce the possible risks of duplications and inconsistencies due to the co-existence of “intergovernmental arrangements” alongside EU law provisions. Thirdly, a coordinated evolution of the EU and national fiscal rules would be facilitated. Finally, and above all, “the integration into the Union legal framework of all inter-governmental instruments created during the crisis would bring greater democratic accountability and legitimacy across the Union.”³⁰

Besides integrating Article 3 TSCG into the EU legal order, the proposed Directive foresees involving independent fiscal institutions – established at national level – in monitoring (i) compliance with the framework of numerical fiscal rules, as well as (ii) the activation and application of the correction mechanism referred to in Article 3(1)(e) TSCG.³¹ The Commission acknowledges that independent fiscal institutions have already been established in most Member States, as revealed by the report adopted by the Commission itself, pursuant to Article 8(2) of the stability treaty, in order to assess the compliance of the relevant national measures with Article 3(2) TSCG (i.e. the provision concerning the transposition at national level of the balanced budget rule).³² Moreover, as far as the euro area Member States are concerned, independent mechanisms monitoring compliance with fiscal rules are also foreseen by Article 5 of Regulation (EU) No 473/2013, one of the two regulations composing the so-called “Two-Pack”. The proposed Directive is, therefore, unlikely to require new structures; however, “amendments to the current remits of existing independent fiscal institutions coupled with improved access to information and some reinforcement of resources may be warranted.”³³

²⁵See *supra* note 6.

²⁶See the updated list of the signatory Member States, with the respective choices as to the applicability of Titles III and IV. Available at: Consilium.europa.eu. It should be noted that Bulgaria, Denmark and Romania are bound by Title III on a voluntary basis. On this issue, see, for instance, PEERS, Steve. *The Stability Treaty*, *supra* note 7, at p.437-439.

²⁷Commission's proposal, *supra* note 5, at p.3.

²⁸*Ibid.*

²⁹*Ibid.*

³⁰*Ibid.*

³¹Pursuant to which: “in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.”

³²See the Communication and the report adopted by the Commission on 22 February 2017 (C(2017) 1201 final).

³³Commission's proposal, *supra* note 5, at p.5.

With reference to the relationship between the proposal at issue and the TSCG, the European Commission points out that the proposed Directive does not affect the commitments made in Article 7 TSCG (coordination among the euro area Member States and reverse qualified majority voting in the context of the excessive deficit procedure), nor the practice under Article 13 TSCG (inter-parliamentary meetings). As to the consistency with existing EU legislation, the Commission states – quite generically – that the framework put forward in the proposed Directive would be “not only compatible with the SGP [Stability and Growth Pact], but [...] specifically meant to complement it.”³⁴

Among the few provisions contained in the proposed Directive, the core elements are laid down in draft Article 3, which is highly technical in nature. The most relevant part of the said provision is probably its first paragraph, according to which each Member State “shall set up a framework of binding and permanent numerical fiscal rules which are specific to it, strengthen its responsible conduct of fiscal policy and effectively promote compliance with its obligations deriving from the TFEU in the area of budgetary policy over a multiannual horizon for the general government as a whole.” Such framework shall include, inter alia, a medium-term objective to be set in terms of structural balance in order to ensure that the ratio of government debt to gross domestic product at market prices does not exceed the reference value set out in Article 1 of Protocol No 12 on excessive deficit procedures, or approaches it at a satisfactory pace.³⁵

Critical remarks

The European Commission's proposal does not appear convincing in several respects.

With reference to the choice of limiting the scope of the envisaged incorporation to the sole provision laid down in Article 3 TSCG, by means of a narrowly focussed Directive, one could ask whether a broader intervention would have been advisable. On the one hand, a proposal aimed at amending the EU Treaties taking into account also the institutional provisions of the TSCG – for example via the simplified revision procedure provided for in Article 48(6) TEU – would probably have triggered a wide debate on the European economic governance, involving all the Member States, and notably their Parliaments. On the other hand, however, it could be argued that the provisions of the TSCG whose incorporation would require a treaty amendment are extremely limited, or even confined, in practice, to the reversed QMV procedure set out in Article 7 TSCG for the adoption of decisions pursuant to Article 126(6) TFEU, and to the institutional recognition of the so-called Euro Summit provided for in Article 12 TSCG (which, however, would pose delicate “constitutional” problems with regard to the unity of the single institutional framework of the Union).³⁶

In this regard, while it is true that Article 16 TSCG does not provide clear indications as to the legal instruments through which the incorporation should be carried out,³⁷ it is also true that, as anticipated, according to recital 7 of the preamble of the stability treaty, the objective of the Heads of State or Government of the contracting parties “is to incorporate the provisions of [the TSCG] as soon as possible into the Treaties

³⁴Ibid.

³⁵Draft Article 3(1)(a) of the proposed Directive.

³⁶More specifically: the provisions laid down in Articles 4, 5 and 6 TSCG are already covered, respectively, by Article 2(1a) of Regulation (EC) No 1467/1997 as amended in 2011, by Article 9 of Regulation (EU) No 473/2013, and by Article 8 of the same Regulation; an incorporation of Article 8 TSCG does not appear necessary, as that provision sets out a ‘weak’ version of the infringement procedure in order to enforce Article 3(2) TSCG, which, in any event, has already been transposed in the legal order of the contracting parties (see supra note 32); Articles 9 and 10 TSCG do not seem to have any normative value, as they merely restate the general objectives of economic policy coordination already enshrined in EU primary law; the content of Article 11 TSCG is already covered by several provisions set out in Regulation (EC) No 1466/1997 and in Regulation (EU) No 1176/2011; the inter-parliamentary meetings pursuant to Article 13 TSCG could be deemed to be already covered in principle by Article 9 of Protocol (No 1) on the role of National Parliaments in the European Union.

³⁷See PEERS, Steve. *The Stability Treaty*, supra note 7, at p.440, who adds that, in light of the circumstances which led to the drafting of the TSCG, “it seems more likely that Article 16 envisages an amendment to the primary law of the EU.” One could point out, however, that the circumstances in which the TSCG was negotiated – notably the situation of emergency and the close temporal proximity to the adoption of the Two-Pack proposals on the part of the Commission – may imply that an integration into EU secondary law was actually envisaged. Such interpretation seems to be underpinned by the fact that the TSCG repeatedly refers to EU secondary law provisions, thus showing a complementarity with such provisions (in particular: the Stability and Growth Pact, the “Six-Pack”, and the “Two-Pack”), rather than with EU primary law.

on which the European Union is founded”,³⁸ even though such formulation may also be interpreted as a reference to the EU legal order in general terms.

It is widely acknowledged that, at the present time, it would be difficult to meet the political conditions for a treaty amendment, even though the UK veto that led to the adoption of the TSCG will soon be superseded, due to the withdrawal of that Member State from the EU.³⁹ Nevertheless, in the case of concerns about the possibility to achieve the unanimity required to amend the Treaties, a broader proposal could have been put forward by means of enhanced cooperation, pursuant to Article 20 TEU and Articles 326-334 TFEU, or through the special euro-area procedure laid down in Article 136 TFEU.⁴⁰ It is true that enhanced cooperation should be adopted only as a last resort, and that a proposal based on Article 136 TFEU could bind only the euro-area Member States. However, both enhanced cooperation and Article 136 TFEU are explicitly mentioned in Article 10 TSCG, according to which the contracting parties “stand ready to make active use, whenever appropriate and necessary” of such tools.

It should be stressed, in any event, that the European Commission's proposal does not overcome the “problem” of unanimity, because – quite surprisingly – the legal basis of the proposed Directive requires a unanimous vote of the Council. Indeed, pursuant to Article 126(14)(2) TFEU: “The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace [Protocol (No 12) on the excessive deficit procedure].”

The choice of that legal basis – which, according to the Commission, would be the only available legal basis in the Treaty⁴¹ – is highly questionable, first, not only because of the requirement for unanimity, but also in view of the very limited (consultative) role of the European Parliament in the procedure laid down in the provision at issue. Although the Commission states that it “will take due account of the views of the European Parliament in the process”, it would be difficult to argue that the proposal represents a real improvement in terms of democratic legitimacy of the European economic governance.

Moreover, it must be pointed out that, from a legal point of view, the provisions of the proposed Directive are not intended to replace Protocol No 12, which should be the purpose of the procedure laid down in Article 126(14)(2).⁴² Therefore, the question arises as to why the third subparagraph of the same provision – allowing the Council, on a proposal from the Commission and after consulting the European Parliament, to lay down “detailed rules and definitions for the application of the provisions of the said Protocol” – has not been used as a legal basis for the proposal, with reference, in particular, to the budgetary framework: in this respect, a simple amendment of Council Directive 2011/85/EU on requirements for budgetary framework of the Member States, on the basis of Article 126(14)(3) TFEU, would probably have been a more appropriate legislative solution. Similarly, to the extent that Article 3 TSCG concerns the medium-term budgetary orientation, an amendment of Regulation (EC) No 1466/97, on the basis of Article 121(6) TFEU – pursuant to which the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure – would have been preferable.

More generally, Article 126(14) could have been used as legal basis in conjunction with Article 136 TFEU, with a view to applying the proposed Directive only to the Member States whose currency is the euro. In this respect, while it is clear that the aim of the *à la carte* system laid down in Article 4 of the proposed Directive is to allow all the other Member States to join the euro area Member States, several doubts arise as

³⁸Emphasis added.

³⁹However, it could also be argued that the withdrawal of the UK offers the opportunity to carry out a (more) general amendment of the EU Treaties.

⁴⁰On this matter, see, amongst others, MESSINA, Michele. Strengthening Economic Governance, *supra* note 22; GRAF VON LUCKNER, Johannes. How to bring it home, *supra* note 20, according to whom all the conditions for establishing enhanced cooperation could be met in the case at issue.

⁴¹See European Commission's Communication, Further steps towards completing Europe's Economic and Monetary Union: A roadmap, 6 December 2017, *supra* note 1, at p. 7.

⁴²See also GRAF VON LUCKNER, Johannes. How to bring it home, *supra* note 20. It should be noted, however, that Article 126(14)(2) has already been used as a legal basis for other acts which were not aimed at replacing Protocol No 12, and no objections appear to have been raised in this respect: see [Regulation \(EC\) No 1467/97](#); [Regulation \(EC\) No 1056/2005](#); and [Regulation \(EU\) No 1177/2011](#).

to the compatibility with the Treaties of a mechanism by which a directive can be applied by some Member States on the basis of a purely discretionary choice.⁴³

As regards the content of the proposed Directive, the Commission maintains that the envisaged integration will “simplify the legal framework and allow for continuous and improved monitoring as part of the overall EU economic governance framework”, while taking into account the appropriate flexibility built into the SGP and identified since January 2015.⁴⁴ One could argue that the objective of simplifying the legal framework would be pursued in a more effective way by issuing proposals to amend the existing relevant acts, namely Directive 2011/85/EU and Regulation No 1466/96, as stated above. Be that as it may, the alleged simplification of the legal framework does not appear to be sufficiently reflected – to say the least – in the text of the proposed Directive and in the explanatory memorandum accompanying it. Indeed, on the one hand, the complex and somewhat obscure wording of draft Article 3 of the proposed Directive makes it very difficult to understand the nature and scope of the envisaged integration. Some scholars argued that the latter would be, in effect, just a “fake repatriation” of the *Fiscal Compact*, as reference to Protocol No 12 would result in a much more flexible approach than that taken in the TSCG.⁴⁵

On the other hand, the relations between the proposed Directive, the existing EU law provisions, and the TSCG are not totally clear, and the Commission did not develop a satisfactory analysis in this respect in any of the documents composing the “Saint Nicholas” EMU package.⁴⁶ Such a lack of transparency seriously compromises the accountability of the Commission’s initiative, since the EU citizens are not provided with the possibility to fully understand an intervention in the EMU architecture which is likely to have significant consequences on economic policy decisions at a national level. Moreover, for the reasons outlined above, the appropriateness of the proposal, in legal terms, seems rather questionable: in this respect, the proposed Directive may be regarded as being essentially aimed at sending a political message, rather than at improving effectively the legal framework concerning fiscal responsibility and medium-term orientation in the Member States.

It has been pointed out that, in view of the substantially completed transposition of the balanced budget rule in the national laws of the Member States involved in the stability treaty,⁴⁷ the contracting parties could easily acknowledge that the TSCG no longer serves any purpose and, as a consequence, terminate it by mutual agreement.⁴⁸ This position is based on the consideration that an integration of the substance of the TSCG into the EU legal order would be useless or even counterproductive.⁴⁹ However, it should be borne in mind that if the stability treaty were terminated, the contracting parties would probably regain the

⁴³Article 126(14) TFEU is neither mentioned in Article 139 TFEU, nor in Protocols No 15 and No 16, among the provisions that shall not apply to Member States whose currency is not the euro. It should be noted, in this respect, that two regulations adopted in the context of the Banking Union, namely the so-called SSM and SRM Regulations, set out a mechanism which, in general terms, appears to be similar to the one envisaged in the proposed Directive, given that such regulations apply to the euro area Member States, while the other Member States may join subsequently (see Article 7 of [Regulation \(EU\) No 1024/2013](#), and Article 4 of [Regulation \(EU\) No 806/2014](#)). Also the said regulations have as legal bases provisions that apply to all the Member States: i.e., respectively, Article 127(6) TFEU and Article 114 TFEU. Such forms of ‘atypical’ differentiation in the adoption of secondary legislation call into question, inter alia, the ‘effet utile’ of the provisions laying down specific procedures serving the same purpose (such as the ones on enhanced cooperation and Article 136 TFEU). On these issues see, recently, PISTOIA, Emanuela. *Limiti all’integrazione differenziata nell’Unione europea*. Bari: Cacucci Editore, 2018, p.53-64. Available at: [Publisher](#).

⁴⁴See European Commission’s Communication, Further steps towards completing Europe’s Economic and Monetary Union: A roadmap, 6 December 2017, supra note 1, at p.8. On the latter point, reference is made by the Commission to its interpretative Communication, Making the best use of the flexibility within the existing rules of the Stability and Growth Pact, 13 January 2015, COM(2015) 12 final.

⁴⁵In this vein, see GRAF VON LUCKNER, Johannes. How to bring it home, supra note 20, quoting the title of a presentation made by Professor Bruno De Witte at a recent workshop. It can be noted that the ‘substance’ of the proposed Directive is essentially contained only in two provisions (Articles 3 and 4), while its recitals are quite long.

⁴⁶For some considerations on this point, see ECALLE, François. Que penser de la réforme des règles budgétaires européennes proposée par la Commission? *FIPECO*, 6 January 2018.

⁴⁷See the abovementioned Communication and report adopted by the Commission on 22 February 2017, supra n. 32.

⁴⁸TOSATO, Gian Luigi. Ue: unità del diritto tra Trattato Esm e Fiscal Compact, supra note 24.

⁴⁹See the view expressed by Professor Bruno De Witte, in FROMAGE, Diane and DE WITTE, Bruno (eds). *The Treaty on Stability, Coordination and Governance...*, supra note 20, according to whom “the strict budget deficit norm of 0,5% is, arguably, at this point of time, breached by most of the Parties to the TSCG, but nobody cares, that is”; the TSCG has become very much a ‘limping treaty’, “[a]nd the argument can be made that it should remain limping forever”, provided that “the budget austerity mantra that dominated European politics back in 2012 has now lost its appeal.”

possibility to modify or to repeal the balanced budget rule adopted at a national level pursuant to the (in that case, no longer in force) provision laid down in Article 3(2) TSCG.

Surprisingly enough, as stated above, the explanatory memorandum accompanying the proposed Directive and the December 2017 communication setting out a roadmap for completing the EMU do not provide clarification as to the approach adopted by the Commission on such issues in drawing up the proposal at stake,⁵⁰ making it quite obvious that the TSCG should remain in force as far as all the provisions other than Article 3 thereof are concerned.

Conclusions

The coherence of the EMU legal framework⁵¹ and an increased level of legitimacy and democracy in the institutional structure of the EMU⁵² are certainly important objectives to achieve. However, it seems questionable that the proposed Directive, if adopted, could be a real step forward in that direction. Indeed, the proposal does not tackle many of the issues underlying the TSCG, as it would integrate into the EU legal order only one provision of that treaty, leaving all the other provisions unchanged. Moreover, as stated above, the choice of the legal basis of the proposed Directive raises serious doubts as to both the requirement for unanimity and its lawfulness.

A first (and not encouraging) signal as to the “national feelings” on the proposed Directive, was sent out by some of the national Parliaments of the Member States, which – in the context of the subsidiarity check procedure under Protocol No 2 – expressed negative opinions on the Commission’s proposal.⁵³

In this context, aside from the fact that the proposal does not offer a good example of legislative clarity and transparency, the question arises whether – in view of the critical elements briefly outlined above – the search for unanimity in the Council on the proposed Directive is worth the effort.

More generally, as anticipated, the envisaged incorporation of the TSCG could have been seized as an opportunity to develop a far-reaching reflection on the economic governance of the EU – perhaps leading to a proposal for a revision of the founding Treaties, or at least to a wide-ranging reform proposal through secondary legislation, possibly via enhanced cooperation, or applying Article 136 TFEU, in conjunction with Article 121(6) and/or with Article 126(14) TFEU – with the aim of strengthening democracy, transparency and effectiveness in the budgetary and economic coordination procedures. An in-depth discussion on the very idea of establishing a balanced budget rule at a national level, as well as on the overall rigidity of the EMU budgetary framework, should have been opened at a time when an increase in investments is considered by many economists as a crucial step for a sustainable recovery from the economic crisis. It goes without saying that this would not necessarily lead to denying the pivotal role of fiscal measures in guaranteeing the correct functioning of the single currency area, or the importance of setting limits on national budget deficits in order to avoid that national governments put unethical debt-creating policies in practice, at the expense of future generations.⁵⁴ On the other hand, it would also be desirable to further investigate the relation between an ‘integrated’ balanced budget rule and other relevant interests and principles established in the EU legal framework, such as the social objectives laid down in Article 3(3) TEU and in Article 9 TFEU.

⁵⁰Apart from the abovementioned concise statement that the proposal does not affect the commitments made in Article 7 TSCG or the practice under Article 13 TSCG. See recitals 15-17 of the proposed Directive, *supra* note 5.

⁵¹In general terms, see LOUIS, Jean-Victor. La cohérence de la gouvernance économique. Aspects juridiques. In: *Europe(s), Droit(s) européen(s). Une passion d'universitaire*. Liber Amicorum en l'honneur du professeur Vlad Constantinesco. Bruxelles: Bruylant, 2015, p.361-384. Available at: [Publisher | WorldCat](#)

⁵²See Communication of the Commission, Further steps towards completing Europe’s Economic and Monetary Union: A roadmap, 6 December 2017, *supra* note 1, at p.7.

⁵³See the contributions available on the website of the European Parliament, at the address: Connefop.europar.europa.eu. The main issues raised by some of the national Parliaments concern, for instance: the choice of the legal basis of the proposal; the establishment of independent bodies; the lack of precision as to the definition of the exceptional circumstances that allow for a deviation from the rules on fiscal responsibility; the fact that the proposal is based on economic assumptions that would have proven to be unfounded.

⁵⁴See, in this vein, BARATTA, Roberto. Legal Issues of the ‘Fiscal Compact’, *supra* note 7, at p.678.

A wide debate on fiscal discipline appears even more necessary in view of the fact that, as is well known, the balanced budget rule and the rule concerning the pace of debt reduction (set out in Article 4 TSCG) are not being complied with in practice.

Unfortunately, such a broad reflection process seems to be lacking at the present time, at least at the EU institutional level, and arguably the proposals contained in the "Saint Nicholas" EMU package would, if adopted, provide only partial and probably insufficient solutions to the manifold concerns raised about the current EMU architecture. For the reasons outlined above, the proposed Directive on the integration of the "substance" of the TSCG into the EU legal order is regrettably no exception in this respect.

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