

## LEGAL ASPECTS OF THE TREATY ON STABILITY, COORDINATION AND GOVERNANCE IN THE ECONOMIC AND MONETARY UNION

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**Abstract:** *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (“Fiscal Compact”) was concluded by Heads of State or Government of 25 EU Member States in March 2012 as another instrument the objective of which is strengthening the fiscal discipline and stabilization of the euro area as a whole. Similar to the preceding initiative – the Euro Plus Pact – this treaty also envisages deeper coordination of economic policies of the participating Member States. It is, however, a legally binding agreement in which not all EU Member States participate and which was concluded outside the framework of the EU law. The article deals with legal but to some extent also economic aspects of the Fiscal Compact and it focuses in particular on four problematic issues: 1) its relationship to EU law and ensuing obligations for the Member States; 2) the use of EU institutions for its implementation; 3) its relationship to the Czech Constitution and evaluation of its constitutional classification; 4) the question to what degree it changes the functioning of the economic and monetary union within the euro area.*

**Keywords:** *European Union, euro area, Fiscal Compact, primary law, EU Treaties, economic and monetary union, coordination of economic policies, fiscal discipline, rule of balanced budgets, economic convergence, debt brake, excessive deficit procedure, reverse qualified majority vote, EU arbitration proceedings, Euro Summit, transfer of competences, Czech Constitution*

### INTRODUCTION

At a meeting of the informal European Council that took place on 30 January 2012 in Brussels, discussions on the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, often called the “Fiscal Compact” or the “Fiscal Treaty” (hereinafter also the “Treaty”) concluded after intensive negotiations over an extremely short period of time. The Treaty is based on a statement by the euro area Heads of State or Government on strengthening fiscal discipline and coordination of economic policies, adopted in the European Council on 9 December 2011 after attempts to reach an agreement among all 27 EU Member States on a limited change to EU Treaties had failed. Its aim is to strengthen the fiscal discipline and coordination of economic policies of the EU Member States and primarily of the euro area countries. The Czech Republic fully endorses this goal, as the stabilization of the euro area is in its interest due to its close economic relations with the euro area. The Treaty, concluded outside the framework of the EU law, should apply exclusively to those Member States whose currency is the euro; it will apply to the other Contracting Parties once they adopt the euro (or more precisely, when their derogation or exemption from the common currency is abrogated). However, even prior to this moment these Contracting Parties can accept as binding all or part of the Treaty’s provisions that relate to fiscal responsibility and economic convergence (opt-in). Should the Czech Republic accede to the Treaty, it would accept a legal obligation that its effect would be binding from the moment it accepts the euro.

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At the core of the Fiscal Compact is the rule of balanced budgets (the “golden budget rule”), according to which government budgets of Contracting Parties shall be balanced or in surplus within set criteria, where in some specific cases it would be possible to deviate from this rule (see below for details). The Treaty also contains several provisions regarding closer cooperation and coordination of Contracting Parties in the area of economic policy to ensure smooth functioning of the economic and monetary union, where this coordination will be based on current EU Treaties and will utilize, among other things, the institute of enhanced cooperation and broadly defined measures for the euro area countries under Article 136 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup>

The Fiscal Compact must be viewed as a part of a broader set of instruments, the common objective of which is to ensure the stability of the euro area as a whole. This includes the Euro Plus Pact, adopted by the European Council in March 2011, and more importantly the European Stability Mechanism (ESM), which is being created on the basis of an international agreement between euro area countries, also concluded outside the framework of the Union Treaties – the Treaty Establishing the European Stability Mechanism. The Fiscal Compact’s relationship to the ESM is addressed in its preamble, where the Contracting Parties declare financial assistance within the scope of new programmes under the ESM to be conditional, as of 1 March 2013, on the ratification of the Fiscal Compact by the affected Contracting Party, and after the expiry of the period for implementation of Article 3(2) of the Treaty (one year after it has come into force), also by compliance with the requirements of the said Article. In short, as of the aforementioned dates only those euro area countries that ratify the Fiscal Compact and implement the rule of balanced budgets would be eligible for financial assistance under the ESM. A similar provision was also included in the preamble of the Treaty Establishing the European Stability Mechanism.

## 2. PROBLEMATIC ISSUES IN GENERAL

The idea of conclusion of the Fiscal Compact outside the EU law framework, which emerged from the meeting of the European Council on 9 December 2011 with the aim of deepening economic integration, can be viewed as a pragmatic solution to the problem of lack of consensus on amendments to the EU Treaties of 27 EU Member States. However, it also raises some legal questions that must be analysed in greater detail. These are mainly the following problematic areas:

### 2.1 The relationship of the Fiscal Compact to EU law and ensuing obligations for the Member States

The EU Member States can of course, in their international legal capacity, accept other obligations outside the EU Treaties framework, including in a limited formation of a certain group of states and in areas where the EU already exercises its policies. This *de facto*

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<sup>1</sup> This is a relatively broad legal mandate, however only for euro area countries.

means deeper integration within a certain group of Member States. However, if such cooperation takes place outside the framework of the EU Treaties, they impose clear limits on it. Member States must above all not act in violation of the principle of sincere cooperation defined in Article 4(3) of the Treaty on European Union (TEU), i.e. they must especially refrain from all measures that could threaten the Union's objectives. It must also be kept in mind that such an intergovernmental agreement could contain only rules complementing the EU Treaties in areas where there are yet no provisions, i.e. they could only be a certain kind of supplement to the EU Treaties, not deviation from provisions already contained in these Treaties. Agreements concluded outside primary EU law must not hamper the attainment of objectives defined in the EU Treaties, violate the basic principles of EU law or contradict provisions of the EU Treaties or acts of secondary EU law adopted on the basis of these Treaties.

If we take into account the contents of the Fiscal Compact, then from the point of view of primary EU law the form chosen for the introduction of these measures is highly problematic and unprecedented. This is because primary EU law by itself regulates processes for achieving deeper integration, in which not all Member States would participate. This is the institute of enhanced cooperation within the EU Treaties (Article 20 TEU and Article 326-334 TFEU), which is being used in a number of areas, for example in the area of laws applicable to divorce and legal separation. Outside the scope of EU Treaties and among only the euro area members, the Treaty Establishing the European Stability Mechanism has been concluded; however, in order to ensure compatibility with the primary EU law, this requires an amendment to Article 136 TFEU and therefore also the consent of all EU Member States. The only thing the Fiscal Compact has in common with the aforementioned cases is that it will lead to deeper integration within a certain group of EU Member States. However, it does not have the character of integration within enhanced cooperation, as it contains provisions in areas otherwise regulated by primary EU law, nor is it an agreement between all Member States on a change to the EU Treaties affecting only some of them (the euro area), as it will not require the consent of all Member States (at least the United Kingdom has declared it will not participate in it).

Article 2 of the Treaty addresses the problematic question of its relationship to EU law. It stipulates limits of its application and interpretation, which must be in accordance with the EU Treaties. However, in the case of some of its provisions (particularly Articles 7 and 8), the question is to what degree these conditions are truly being fulfilled. The generally stipulated conditions of compatibility with EU law do not change the fact that the Treaty has a significant indirect influence on primary EU law, especially if we take into account its scope, which overlaps with areas in which the EU already exercises its competences, albeit partially, and will surely continue to do so. (The possibility of conflict with EU law is also evidenced by the fact that during negotiations, the idea of explicitly enshrining the principle of precedence of EU law in this Treaty had been contemplated.)

According to the aforementioned Article 2, the Treaty must be applied and interpreted in accordance with EU law, both primary and secondary. (Most relevant in the area of secondary legislation are the Stability and Growth Pact<sup>2</sup> and the package of legislative instruments on economic governance from November 2011, also known as the *six-pack*,<sup>3</sup>

amending the Stability and Growth Pact). Emphasis is particularly placed on Article 4(3) TEU, which enshrines the principle of sincere cooperation: “*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.*” The Treaty can be viewed as a tool that could help fulfil obligations ensuing for the Member States from the EU Treaties and other acts of EU law. However, its application in practice will be significant as well, as the Contracting Parties would have to take care that they do not take “*any measure which could jeopardise the attainment of the Union’s objectives.*” Inasmuch as in several provisions the Treaty presumes the adoption of other measures through secondary EU legislation (compare for example Articles 5 and 10), it is emphasized that the obligation to apply and interpret the Treaty in accordance with the EU Treaties also includes “procedural law”, which means appropriate provisions of the Treaties on legal acts and their adoption (especially Article 288 TFEU et seq.). Although this fact should be understood automatically, the explicit reference to “procedural law” proves beyond all doubt that for adoption of secondary EU legislation envisaged in this Treaty, the aforementioned provisions of primary EU law apply exclusively.

Any eventual conflict of the Treaty with EU law should be prevented by Article 2(2), which restricts its application in situations when the Treaty would be applied in a manner incompatible with the EU Treaties or other sources of EU law. This implicitly proves, among other things, the thesis that the Treaty does not take the place of provisions included in EU law, but that it shall be applied alongside them – for otherwise a conflict between the two could not even arise. The application of the Treaty must not only be in accordance with the EU Treaties and secondary EU legislation, but also with case law and

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<sup>2</sup> Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies as amended, particularly by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011, and Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure as amended, particularly by Regulation (EU) No 1177/2011 of the European Council of 8 November 2011.

<sup>3</sup> 1) Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23. 11. 2011, pp. 1–7),

2) Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23. 11. 2011, pp. 8–11),

3) Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 306, 23. 11. 2011, pp. 12–24),

4) Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306, 23. 11. 2011, pp. 25–32),

5) Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 306, 23. 11. 2011, pp. 33–40),

6) Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306, 23. 11. 2011, pp. 41–47).

general principles formulated by the Court of Justice of the European Union, including the principle of precedence in application of EU law, though this is not mentioned *expressis verbis* in the final text of the Treaty. In practice this means that in case of conflict between the Treaty and the EU law, it will not be possible to apply the relevant provisions of the Treaty. Potential (non)compliance of the Treaty's application with the EU law shall be subject to review by the Court of Justice, particularly within the scope of proceedings dealing with infringements of the EU Treaties.

## 2.2 The issue of using EU institutions for cooperation based on an intergovernmental agreement outside the framework of primary EU law

Considering that the Fiscal Compact is not an international agreement in which all EU Member States participate, the use of EU institutions within its framework seems at least contentious. From the perspective of EU law, it is unacceptable for an international agreement outside the framework of primary EU law to in any manner grant EU institutions new competences or affect existing ones (either by restriction or extension) unless it is explicitly or implicitly allowed in the primary law itself. At the same time the Treaty, although it is outside the architecture of EU Treaties, presumes that some of its provisions will be closely interconnected with secondary EU legislation based on current primary EU law (the Treaty alone could not be the legal basis for this purpose). From a legal perspective this interconnectedness can be problematic as well, especially in relation to defining competences of EU bodies.

In accordance with the principle of conferral, “*the Union shall act only within the limits of the competences conferred upon it by the Member States*” (Article 5(2) TEU) and “*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation*” (Article 13(2) TEU). However, as will be shown later, the Treaty presumes significant participation of EU bodies in its implementation. In this context it is necessary to mention the judgment of the Court of Justice of 30 June 1993 in joined cases *C-181/91 and C-248/91 Parliament v. Council and Commission* (the so-called Bangladesh case), where in point 12 the Court clearly expressed the principle that EU institutions are in their conduct bound exclusively by EU law: “*acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court.*” The conclusions of this judgment are fully applicable not only to the Court of Justice itself, but *per analogiam* also to all other EU institutions, which may act only within their competences and policies defined by the EU Treaties. The conferral of new tasks and competences upon EU institutions outside this framework, based on an international agreement concluded by some EU Member States, should not be acceptable in light of this judgment of the Court of Justice.

As stated above, the Treaty addresses this problem through close interconnection with EU law, where some of the competences of EU bodies envisaged by the Treaty are already enshrined in current EU legislation and some are yet to be defined in new legislative acts. This is particularly the case for Article 5, which presumes competences of

the Commission and the Council during the approval and monitoring of budgetary and economic partnership programmes of Contracting Parties that are subject to the excessive deficit procedure. The required legislation has however not yet been adopted within EU law, and until this happens the new competences of the Commission and Council cannot be exercised, despite being stipulated in the Treaty. This would be in direct contradiction of the principle of conferral expressed in Article 5(2) and Article 13(2) TEU. However, the Treaty defines some tasks and competences for EU institutions that, although not powers of a purely executive nature, cannot be deduced from any provision of current EU law and are not expected to be included in future EU legislation. This is the case of the Commission's competences pursuant to Article 3 to propose a time frame for convergence towards the medium-term objective for a given country and common principles for Contracting Parties' implementation of correction mechanisms and further pursuant to Article 8, which charges the Commission with assessment of the fulfilment of the Contracting Parties' obligations stipulated in Article 3(2), where based on its conclusions Contracting Parties may be obliged to take recourse to the Court of Justice (use of the Court of Justice as such presents no issue, as it is permitted by Article 273 TFEU).

It is true that the aforementioned cases do not involve powers to make binding decisions or perform other activities directly related to obligations of EU Member States – Contracting Parties. However, even in these circumstances it is very disputable whether such activity of EU institutions is in accordance with the aforementioned Article 13(2) TEU. Without it being necessary to reach categorical conclusions regarding this issue, it is clear that in practice EU bodies will participate in the application of an international agreement outside the framework of the EU Treaties with implied approval of EU Member States, however controversial such practice may be in principle.

### 2.3 Evaluation of the Treaty's contents from the perspective of the constitutional order of the Czech Republic and its constitutional classification

At the constitutional level, it is necessary to analyse the issue of constitutional classification of the Treaty taking into account the concrete constitutional mode of its eventual subsequent ratification process. Analysis of some of the Treaty's provisions shows that this Treaty presents a real transfer of some of the Czech Republic's powers to EU bodies and thus is subject to Article 10a of the Czech Constitution.<sup>4</sup> The Treaty is outside the legal framework of the EU and therefore no transfer of powers from the Czech Republic's bodies to an international organization (the EU) should occur. However, in reality the Treaty defines new tasks for EU bodies, and its application by the Contracting Parties, which are EU Member States, can be seen as a significant change in the manner of exercising powers transferred to the EU. Although the Treaty mostly leaves definition of competences of EU bodies to EU law, in some cases it itself grants them new competences on the grounds that this should be some form of *ad hoc* use of these institutions based on authorization by the Contracting Parties.

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<sup>4</sup> Constitutional Act of 16 December 1992 No 1/1993 Coll., Constitution of the Czech Republic, as amended by later constitutional laws.



This is particularly the case of Article 8, which regulates the role of the Commission in the prejudicial phase of proceedings at the Court of Justice, where the Commission is invited to prepare a report on the fulfilment of obligations pursuant to Article 3(2) by Contracting Parties, based on which Contracting Parties may be obliged to submit the case to the Court of Justice. Such a task of the Commission, which will result in lawsuits being submitted to the Court of Justice independently of the will of the Contracting Parties, but precisely based on the Commission's initiative, is not envisaged in primary EU law. The granting of jurisdiction over fulfilment of the obligation to implement the rule of fiscal responsibility in national law to the Court of Justice in Article 8 does not constitute granting of a new power in contradiction of primary law, because the Court of Justice already in general has this authority based on Article 273 TFEU. However, as will be discussed in the section dedicated to Article 8, from the perspective of the Czech Constitution this is undoubtedly a transfer of competence to an international institution pursuant to its Article 10a. The generally defined power of the Court of Justice pursuant to Article 273 TFEU to settle disputes between Member States that are related to the subject matter of EU Treaties must be supplemented by a special arbitration agreement that will define the specific case in which the Court of Justice will be authorized to decide. Seeing that the Constitutional Court of the Czech Republic defined conditions of the transfer of powers of the Czech Republic to an international organization or institution pursuant to Article 10a of the Czech Constitution by, among other things, the fact that this transfer must meet criteria of sufficient precision and delimitation (Judgment Pl. ÚS 19/08, "Lisbon I"), the competence of the Court of Justice to decide previously unspecified future disputes between the Czech Republic and another EU Member State pursuant to Article 273 TFEU cannot be considered already transferred based on the Treaty of Accession of the Czech Republic to the European Union. On the contrary, in this light it is necessary to consider only the appropriate arbitration agreement, envisaged in Article 273 TFEU, to be a transfer of powers to decide specific cases – disputes between the Czech Republic and another EU Member State – to the Court of Justice. The Treaty is precisely such an arbitration agreement, which from the perspective of the Czech constitutional order must be considered an international treaty pursuant to Article 10a of the Czech Constitution.

Another of the Treaty's provisions that involves Article 10a of the Czech Constitution is Article 7, which binds the Contracting Parties to a specific way of voting in the Council when deciding within the scope of the excessive deficit procedure based on Article 126 TFEU, and *de facto* thus interferes with procedural rules enacted in the EU Treaties. As will be discussed later in the part concerning Article 7, the creation of this voting cartel can be seen as an indirect change to the EU Treaties (particularly the TFEU) that actually modifies the Contracting Parties' ability to exercise voting rights as EU Member States in the Council and thus significantly changes the manner in which powers that were transferred to the EU by these states are exercised.

#### 2.4 The question to what degree the Treaty changes the functioning of the economic and monetary union within the euro area

A common currency is one of the objectives of the EU (according to Article 3(4) TEU, "*The Union shall establish an economic and monetary union whose currency is the euro.*").

The Act concerning the conditions of accession of the Czech Republic to the European Union<sup>5</sup> states in Article 4 that each of the new Member States shall participate in economic and monetary union from the date of accession as a Member State with a derogation within the meaning of Article 122 of the Treaty establishing the European Community. By its accession the Czech Republic therefore accepted an obligation to accede to the common euro currency, the fulfilment of which is not specified by a deadline, but by fulfilment of material and procedural conditions. Article 122 of the Treaty establishing the European Community, to which the Act concerning the conditions of accession refers, has been amended by the Lisbon Treaty and its contents are today mainly part of Article 140 TFEU. Pursuant to Article 139 TFEU, the Czech Republic is currently a Member State “with a derogation”. This means it is a state in respect of which the Council has not decided that it fulfils the necessary conditions for the adoption of the euro.<sup>6</sup> Article 140(2) TFEU specifies procedural conditions upon which this derogation may be abrogated. The derogation is abrogated by a decision of the Council (on a proposal from the Commission) after consultation with the European Parliament and after a discussion in the European Council. The Council shall act having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro. A necessary prerequisite for abrogation is that the material conditions set out in paragraph 1 of the same article are met. These are the economic convergence criteria that are further specified in Protocol (No 13) on the convergence criteria.

The material and procedural conditions of the Czech Republic’s accession to the common currency are therefore explicitly formulated in the primary law of the EU. At the same time, however, the functioning of the economic and monetary union will be significantly modified by two international treaties outside the EU legal framework – the Treaty Establishing the European Stability Mechanism and Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Even though accession to these treaties is not explicitly stated as a legal condition for adopting the euro, it is possible to almost with certainty claim that it will be a real and political condition (preliminary or subsequent) for euro area members of the Council to decide to abrogate the derogation.<sup>7</sup> It is therefore possible to conclude that based on the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (and also on the Treaty Establishing the European Stability Mechanism), not only does the functioning of the economic and monetary union

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<sup>5</sup> Official Journal L 236 of 23. 9. 2003, p. 33.

<sup>6</sup> Special status of Member States that have negotiated protocols regarding the economic and monetary union (UK, Denmark) is not affected by this definition.

<sup>7</sup> This is expressed especially in recital 7 of the preamble of the Treaty Establishing the European Stability Mechanism: “All euro area Member States will become ESM Members. As a consequence of joining the euro area, a Member State of the European Union should become an ESM Member with full rights and obligations, in line with those of the Contracting Parties.” The procedure of accession of a new Member State to the Treaty Establishing the European Stability Mechanism is defined in its Article 44 in conjunction with Article 2. The accession of a new euro area member to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union is indirectly asserted through, among other things, the conditionality of financial aid from the ESM, as has already been described at the beginning of this article, because if the state accedes to the ESM and binds itself to contribute its share into this mechanism, then it will logically be interested in the possibility of also receiving funds from it in case of need.



change significantly, but so do the conditions for the Czech Republic's accession to the common euro currency. Apart from the conditions set by primary EU law, it is *de facto* necessary to accede to the aforementioned international treaties and fulfil the obligations ensuing from them.

Without questioning in any way the Czech Republic's obligation to accede to the common currency, it is possible *per analogiam* to apply the general principle of international law *rebus sic stantibus* codified in the Vienna Convention on the Law of Treaties<sup>8</sup> (esp. Article 62). The use of this principle is contingent precisely on a significant change of relations in comparison to relations existing at the time of the conclusion of the treaty that was not anticipated by the contracting parties. For this reason, it is surely legitimate to contemplate the decision on the adoption of the euro to be contingent on a referendum, which would however require the adoption of an appropriate constitutional act.

### 3. MEASURES INCLUDED IN THE FISCAL COMPACT

#### 3.1 The rule of balanced budgets and related measures aiming to strengthen fiscal discipline

The cornerstone of the Fiscal Compact is the rule of balanced budgets (the “golden budget rule”) enshrined in Article 3. It is however necessary to point out that most of the obligations specified in this provision already apply to EU Member States based on the revised Stability and Growth Pact. The essence of this arrangement in the new Treaty and the main difference compared to the Stability and Growth Pact is primarily the fact that based on the Treaty, the Contracting Parties will be obliged to enshrine this “debt brake” in their national legislation, preferably at the constitutional level,<sup>9</sup> with its implementation in national law being subject to review by the EU Court of Justice.

The rule of balanced budgets enshrined in Article 3 establishes restrictions on government budget deficits<sup>10</sup> and represents a certain tightening of rules enshrined in Article 126 TFEU and Protocol (No 12) on the excessive deficit procedure. This rule primarily states that government budgets of Contracting Parties must be balanced or in surplus, and is considered to have been fulfilled if the annual structural balance of the general government<sup>11</sup> is less than 0.5 % GDP in market prices. This means the tightening of an already applicable rule enshrined in the revised Stability and Growth Pact, which sets a limit of 3 % GDP. On the other hand, the Treaty refers to structural balance, i.e.

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<sup>8</sup> Published in the Collection of Laws of the Czech Republic under No. 15/1988 Coll.

<sup>9</sup> The original intent was to enshrine the obligation to adopt these rules at the constitutional or equivalent level; however a number of Member States, including the Czech Republic, considered this problematic from the constitutional point of view.

<sup>10</sup> The term “government” must be understood in the light of definitions of terms according to Article 3(3) of the Treaty, which among others refers to the definitions included in Protocol (No 12) on the excessive deficit procedure. According to this protocol the term “government” means “*general government, that is central government, regional or local government and social security funds, to the exclusion of commercial operations, as defined in the European System of Integrated Economic Accounts*”.

<sup>11</sup> The term “annual structural balance of the general government” is defined in Article 3(3) of the Treaty as “*the annual cyclically-adjusted balance net of one-off and temporary measures*”.

net of the effects of the economic cycle and one-off and temporary measures, whereas the Stability and Growth Pact involves the total balance, i.e. both structural and cyclical. Another condition for meeting the “golden rule” is that this structural balance corresponds with the country-specific medium-term objective (MTO). This medium-term budgetary objective is newly defined in the revised Stability and Growth Pact, namely in Article 2a of Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by Regulation (EU) No 1175/2011. Pursuant to Article 9(1) of revised Regulation (EC) No 1466/97, based on assessments by the Commission and the Economic and Financial Committee, the Council shall, within the framework of multilateral surveillance under Article 121 TFEU, examine the medium-term budgetary objectives presented by the Member States in their convergence programmes, and assess whether the adjustment path towards them is appropriate. Based on the aforementioned Regulation, the Commission may issue a warning, and if a serious situation persists, the Member State concerned receives a Council recommendation to adopt corrective measures pursuant to Article 121 TFEU.

Contracting Parties are also obliged to ensure rapid convergence towards their medium-term objectives. In accordance with Article 3(2)(a) of revised Regulation (EC) No 1466/97, each participating Member State presents its medium-term budgetary objective and the adjustment path towards that objective to the Commission and Council. However, according to the Treaty, it is the Commission who proposes the time frame for convergence towards the medium-term objective “*taking into consideration country-specific sustainability risks*”. It is necessary to point out that while the Commission is only to “propose” the mentioned convergence time frame, this competence does not ensue from the cited Regulation or from any other EU legislation. Assessment of the progress of a given Member State in fulfilling and maintaining its medium-term objective should be done based on a general assessment of the structural balance and expenses net of the effects of discretionary measures on the revenue side.<sup>12</sup> Overall assessment is further defined in Article 5(1) of revised Regulation (EC) No 1466/97. Similarly as in the case of Regulation (EC) 1466/97, specification of the “structural balance” may be seen problematic as well.

The Treaty further states that the Contracting Parties may deviate from their medium-term objective only temporarily in exceptional cases, which are defined in Article 3(3) of the Treaty. This definition corresponds with the definition provided in Regulation (EC) No 1466/97, as amended by Regulation (EU) No 1175/2011. If the the ratio of the general government debt to GDP at market prices is significantly below 60 %, which is a criterion contained in Protocol (No 12) on the excessive deficit procedure, the structural deficit of the given state can be as high as 1 % GDP at market prices without violating the aforementioned golden rule, on condition of low risk for long-term

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<sup>12</sup> Discretionary measures on the revenue side should, according to the explanatory memorandum for Regulation (EU) No 1175/2011, serve to compensate for growth in expenditures exceeding their prudent medium-term growth. According to the principle of prudent fiscal policy, annual growth in expenditures should not exceed the prudent medium-term growth rate.

sustainability of public finances. It is however not clear from the provision how this risk will be evaluated.

The obligation to implement the rule of balanced budgets and procedures for their enforcement in national law is enshrined in Article 3(2) of the Treaty, with a specified implementation period of one year from the date the Treaty comes into force. The Contracting Parties are to implement this rule 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. It is therefore left to the Contracting Parties' discretion what legal power of regulations for implementing these rules they shall choose, whether constitutional or lesser, if it meets the listed conditions.

The Contracting Parties are also obliged to put in place at national level a correction mechanism that will be triggered automatically in the event of significant observed deviations from their medium-term objective or the adjustment path towards it. Criteria used to assess whether a deviation is significant are defined in EU law in Article 6(3) of Regulation (EC) No 1466/97, as amended by Regulation (EU) No 1175/2011. The Contracting Parties are to adopt the correction mechanism on the basis of common principles proposed by the Commission. A list of examples demonstrates which elements will be covered by these common principles: the nature, size and time-frame of the corrective action to be undertaken, and the role and independence of the institutions responsible at national level for monitoring compliance with the rule of balanced budgets. Similar to the proposal of convergence time frames, the proposal of common principles for correction mechanisms is also a new task for the Commission (although this is not a genuine power in the sense of executive competences) that does not ensue from EU law. As the approval of government revenues and expenditures belongs among the sovereign powers of the Member States, which are usually carried out by national Parliaments and with which the automatically triggered correction mechanisms according to common principles could interfere, the Treaty stipulates that correction mechanisms must fully respect the prerogatives of national Parliaments.

Article 4 of the Treaty further binds Contracting Parties to reduce the ratio of general government debt to GDP at a rate of 1/20 per year if this debt exceeds the 60 % reference value, which is set out in Protocol (No 12) on the excessive deficit procedure supplementing Article 126(2) TFEU. However, the specified average rate of reducing the general government debt ratio is only a benchmark. Circumstances of reducing the general government debt are further defined in Regulation (EC) No 1467/97, as amended by Regulation (EU) No 1177/2011, which states that the requirement concerning the debt criterion is considered to have been met if the Commission's fiscal forecasts indicate that the required reduction shall be achieved during a three-year period that includes the two years following the last year for which data is available. The general government debt ratio is also considered to be sufficiently decreasing and converging to the reference value at a satisfactory rate, if the difference between it and the reference value decreased over the three previous years at an average annual rate of 1/20 as a benchmark, where this is based on changes over the last three years for which data is available. The rate of reduction of excessive debt can therefore be considered sufficient if the general govern-

ment debt ratio indicator (% GDP) has decreased annually by 1/20 of its excess over the reference value over the last three years. Crucial in this respect are both the fact that the value of 1/20 determines the average rate of reduction for three consecutive years and the fact that this means reduction of the excess over the reference value, not reduction of total general government debt.

Contracting Parties that are subject to an excessive deficit procedure under the EU law are newly obliged in Article 5 of the Treaty to put in place a budgetary and economic partnership programme, which should also include a detailed description of the structural reforms necessary for overall improvement of the economic situation, especially for an effective and durable correction of the excessive deficit. It is clear that the aim of this measure is to ensure complex monitoring of the economic situation in Member States – Contracting Parties that are subject to the excessive deficit procedure. The question remains in what manner this duty will be linked to already existing reporting and evaluation mechanisms within the excessive deficit procedure,<sup>13</sup> excessive macroeconomic imbalances procedure<sup>14</sup> or procedures within the European Semester. The details of linking monitoring to existing mechanisms and the definition of the content and form of these programmes should be specified through new secondary EU legislation. The provision refers to the excessive deficit procedure pursuant to Article 126 TFEU and Protocol (No 12) on the excessive deficit procedure, while however introducing additional obligations for the Member States concerned in the form of implementation of the aforementioned programmes, and at the same time defines, over and above the framework of current EU law, competences of the Commission and Council to approve these programmes. Specifically, Article 5(1) of the Treaty states: *“Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact”*. However, it is necessary to point out that the budgetary and economic partnership programme is a new institute established by this Treaty, and the Stability and Growth Pact in its current form does not regulate (and logically cannot yet regulate) the authority of the Commission and Council to approve these programmes. The cited provision must therefore be interpreted (in accordance with Article 2(1) of the Treaty) so that the authority to approve the budgetary and economic partnership programmes will be granted to the Council and Commission by appropriate secondary legislation that will be adopted based on the EU Treaties. Otherwise this would mean the use of EU bodies or more precisely, granting them new competences in contradiction with primary EU law, especially Article 5(2) TEU (principle of conferral) and Article 13(2) TEU (limits to action of EU bodies as stated above). It can therefore be presumed that new secondary legislation will integrate the authority of the Commission and Council to approve budgetary and economic partnership programmes into current procedures for monitoring in case of ex-

<sup>13</sup> Article 126 TFEU and Protocol (No 12) on the excessive deficit procedure, Regulation (EC) No 1467/97, as amended by Regulation (EU) No 1177/2011.

<sup>14</sup> Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances and Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

cessive deficit, based on Article 126 TFEU, which are further regulated in revised Regulation (EC) No 1467/97.<sup>15</sup>

Article 5 of the Treaty further states that implementation of budgetary and economic partnership programmes and yearly budgetary plans, which must be consistent with them, shall be monitored by the Council and Commission. Yearly budgetary plans are standard annual government or state budgets. In this case, however, the Treaty contains no reference to Union law, which could be problematic from the perspective of definition of supervisory powers of the Council and Commission. Nevertheless, even in this case it can be expected that these powers will be defined by secondary EU legislation, if we base ourselves on the premise that competences of EU bodies can be formally defined only based on the EU Treaties. In this regard it is necessary to point out the proposed Regulation of the European Parliament and Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, which the Commission submitted on 23 November 2011<sup>16</sup>. This legislation will need to be linked with this Treaty and future EU laws regarding budgetary and economic partnership, to among other things define how the Council and Commission will monitor that yearly budgetary plans are in accordance with budgetary and economic partnership programmes.

In order to improve coordination during the planning of bond emissions, the Treaty introduces in Article 6 an obligation for the Contracting Parties to report their public debt issuance plans in advance to the Commission and Council. In this way, these EU bodies will get a better overview of public debt of Contracting Parties. The reporting of planned emissions to the Council and Commission is a joint commitment of the Contracting Parties and cannot be enforced by these institutions in any way. In this case, this is not a new competence of EU bodies.

### 3.2 The mechanism of a reverse qualified majority for decisions within the scope of the excessive deficit procedure

From the perspective of relationship to EU law, probably the most controversial is Article 7 of the Treaty. This provision enshrines the obligation of the Contracting Parties whose currency is the euro to support in the Council proposals or recommendations submitted by the Commission for a Member State of the euro area violating the deficit criterion (3 % GDP) within the excessive deficit procedure in all cases except for the situation when a qualified majority of Contracting Parties of the euro area, calculated similarly pur-

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<sup>15</sup> The Council's and Commission's approval of the programme submitted by a Member State is currently equivalent to Article 8 of Regulation (EU) No 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances (its legal basis is Article 121 TFEU). According to this provision, any Member State for which an excessive imbalance procedure is commenced shall submit a corrective action plan to the Council and the Commission based on the Council's recommendation. If, upon a Commission recommendation, the Council considers the corrective action plan sufficient, it shall endorse the plan by way of a recommendation. If, upon a Commission recommendation, the Council considers the actions or the timetable envisaged in the corrective action plan insufficient, it shall adopt a recommendation for the Member State to submit a new corrective action plan.

<sup>16</sup> COM(2011) 821 final.

suant to appropriate provisions of the EU Treaties, is opposed to it. The position of the Contracting Party concerned is not taken into account. The result of this contractual obligation of EU Member States adopted outside the EU Treaties will be the factual establishment of a reverse qualified majority vote, which already exists in secondary EU law in the aforementioned *six-pack*, but in the case of this Treaty the mechanism should affect the decisions of the Council directly pursuant to Article 126 TFEU, specifically its paragraphs 6, 7, 8, 9, 11 and 12.

The commented provision, which in a legally binding manner regulates a sort of “voting cartel” of euro area members, is clear evidence of the interconnection or even interference of this Treaty with the primary EU law. In principle this is automatic adoption of a proposed measure or recommendation of the Commission against the relevant euro area Member State within the excessive deficit procedure, unless the qualified majority of Contracting Parties whose currency is the euro are opposed to it. The euro area Member States will thus decide, based on an international agreement outside the framework of the EU law, in a manner that is not regulated by the EU Treaties, how they will subsequently vote as Member States in the Council. If the Commission’s proposal is not rejected by a qualified majority of the euro area Member States, then this Treaty explicitly obliges even the outvoted Contracting Parties to vote in the Council – thus already within the scope of EU law and procedures – for the adoption of such measure.

Though this is not a direct formal change of the voting procedure contained in Article 126 TFEU, the same effect is indirectly achieved as the euro area Member States bind themselves to support (and adopt) the Commission’s proposal, if a qualified majority of them does not vote against it. Such a procedure, which is euphemistically termed only a rule of behaviour (*règle de comportement*), in reality means a factual change of the voting procedure regulated by the EU Treaties and interference with the voting rights of the EU Member States in the Council. In this manner, the need to change the voting procedures in the Council in primary EU law is circumvented, and the same result is achieved by concluding the Treaty, whose Contracting Parties will not be all the EU Member States. From a material point of view this is clearly an interference with primary EU law, and it is necessary to pose the question whether concluding such an obligation outside the EU legal framework is not in contradiction of the obligations ensuing from the EU Treaties, especially with the principle of sincere cooperation and the principle of equality of the Member States enshrined in Article 4 TEU. From the perspective of the Czech Constitution, it is clear from the stated facts that Article 7 presents a significant change in the exercise of powers that the Czech Republic transferred to the EU.

It is possible to fully agree with the conclusions of the Institute of International and European Affairs, which states that the proposed way of voting via a reverse qualified majority is “*a new procedure, and one that does not exist in the EU Treaties... which is purporting to alter institutional provisions in the EU Treaties outside the Article 48 TEU treaty change process...*”<sup>17</sup> The provisions of Article 7 can be considered an indirect change to

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<sup>17</sup> O BROIN, P. *The Euro Crisis: The Fiscal Treaty – An Initial Analysis*. Institute of International and European Affairs: 2012. Available at: <<http://www.iiea.com/blogosphere/the-fiscal-treaty—an-initial-analysis>>.



the TFEU that will also affect Member States that will not become Contracting Parties to the Treaty, which is in contradiction with Article 48 TEU as well as with international law. According to the Treaty, the participating states will be bound by some factual imperative mandate to vote in a certain manner based on another legal system and a treaty other than the EU Treaties. This clashes with the basic principle of legitimacy, because a state representative will not be able to vote in the Council in accordance with the will of the state and its people, but according to a certain international legal obligation ensuing from another treaty.

The proposed legally binding voting procedure also creates a dangerous precedent for cartel practice of euro area members in other areas that cannot be ruled out in practice. If we state today that in the case of Article 7 of the Treaty there is no material change in primary EU law, then basically nothing would also prevent introduction of such a procedure in other areas through an international agreement outside the EU framework. Such an interpretation would also for example probably not prevent some Member States from signing an intergovernmental agreement that would bind them, should they so agree, to create a blocking minority in subsequent voting on proposals of the Commission in the Council within the scope of EU procedures. Could such an agreement be considered in compliance with EU law? This *argumentatio ad absurdum* clearly proves that the Treaty is not only a supplement, but also a material amendment to the EU Treaties. Regardless of its content or goal, which should contribute to the stabilization of the euro area, the common currency and fiscal discipline, and can therefore be supported from a pragmatic perspective, the chosen legal instruments could paradoxically contribute to the disruption of the EU, especially as they are not of an inclusive nature and are not a solution for all 27 Member States.

From the perspective of the practical impacts of this obligation on Council voting, it must be said that until the system of voting by a qualified majority, based on Protocol (No 36) on transitional provisions is applicable (i.e. until 31 October 2014 or 31 March 2017 based on an option of any Member State), with the current total of 17 members of the euro area it will be possible in practice that even just the two largest euro area Member States (France and Germany) could create a voting cartel and prevent the other euro area members from rejecting proposals or recommendations submitted by the Commission. Nevertheless, within the scope of the “new” system of voting by a qualified majority pursuant to Article 238(3) TFEU, such a situation could arise only with the contribution of at least one other euro area Member State, because without this third state it would be impossible to create a blocking minority and therefore the presumption that a qualified majority is deemed attained would apply.

This fact has also been pointed out by a study of the University of Essex, which states that currently *“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 do so also – 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 noneurozone 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.”*<sup>18</sup>

### 3.3 Judicial review of the implementation of the rule of balanced budgets

In order to ensure the enforceability of the rule of balanced budgets, Article 8 of the Treaty establishes the possibility of judicial review of the implementation of this rule by the Contracting Parties in their national law and eventual imposition of sanctions by the Court of Justice, which will play the role of an arbitration court according to Article 273 TFEU, for failure to fulfil this obligation. This Article states: “*The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.*” The application of Article 273 TFEU, which should mainly serve to protect the autonomy of EU law from international law, has three basic conditions: 1) the dispute in question must be between EU Member States; 2) the dispute must have a connection to the subject of EU Treaties; 3) the arbitration agreement or clause must be applicable, i.e. must be in accordance with general rules of international public law and the rules and principles of the EU law. As far as the first condition is concerned, in the given case only one or more Member States that are Contracting Parties to the Treaty are entitled to bring a case before the Court of Justice and that only against another EU Member State – Contracting Party to the Treaty. These are therefore “disputes between EU Member States”. As for the condition that the dispute must be related to the subject matter of the EU Treaties, this also can be considered fulfilled, as the obligations which may be the cause of the dispute are based on and further complement obligations stipulated by EU law (especially the revised Stability and Growth Pact) and a close connection is also evident from the definition of the subject of the Treaty in its Article 1(1). Finally, as for the third condition, the Treaty, namely its Article 8, can be considered an applicable (special) arbitration agreement in the sense of Article 273 TFEU that is concluded in the international legal capacity of EU Member States without interfering (from a systematic perspective) with powers of EU bodies and EU policies defined by the EU Treaties.

Based on Article 8(1) of the Treaty, it will be possible to commence proceedings at the Court of Justice against a Contracting Party that fails to fulfil its obligations pursuant to Article 3(2) of the Treaty. This is the obligation to transpose the rule defined in Article 3(1) of the Treaty into national law (the “golden budget rule”) and to introduce the automatic correction mechanism, based on common principles proposed by the Commission, within a year after the entry into force of the Treaty. Although Article 3(2) explicitly mentions only the transposition of the rule of fiscal responsibility into national legal systems, it is also possible to imagine an interpretation that the obligation to subsequently uphold these rules for the entire duration would also be subject to the review by the Court of Justice. This issue is still not completely clear, nevertheless for example the Council Legal Service ruled out this extended interpretation.<sup>19</sup>

<sup>18</sup> PEERS, S. *Draft Agreement on Reinforced Economic Union (REU Treaty) – Analysis*. 21 December 2011. Available at: <<http://www.statewatch.org/analyses/no-164-reu-treaty.pdf>>.

<sup>19</sup> Council of the European Union – Opinion of the Legal Service: Article 8 of the Draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – Opinion on its compatibility with European Union law. Brussels, 26 January 2012, 5788/12.

Rules stipulated in Article 3(1) of the Treaty must be transposed into national law 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*”. From the perspective of the Czech Constitution and prerogatives of the Czech Constitutional Court as the exclusive guardian of Czech constitutionality, it is important that in the final text of the Treaty the constitutional nature of these rules is not a compulsory attribute. Otherwise, there would be a possible risk that the Court of Justice could review whether the transposition act has constitutional or equivalent character or even theoretically review the constitutionality of the procedure of adopting the transposition act. This would mean unacceptable interference with the Czech Republic’s constitutional system, because this review pertains exclusively to the Constitutional Court. The final version of Article 3(2) of the Treaty provides insurance that the Court of Justice will be able to review only the contents (material correctness) of transposition rules and their binding nature for relevant bodies involved in the national budgetary process.

A lawsuit will be brought before the Court of Justice by one or more Contracting Parties based on a previous Commission report if the Commission concludes that one of the Contracting Parties has failed to comply with Article 3(2) of the Treaty, or any Contracting Party could do so independently of the Commission’s report if it considers that another Contracting Party has failed to comply with the aforementioned article. The Commission is directly *ex contractu* invited by the Contracting Parties to prepare and present to the Contracting Parties in due time a report on laws passed by the individual Contracting Parties pursuant to Article 3(2). If the Commission, after giving the Contracting Party concerned the opportunity to express its opinion, concludes in its report that this party has failed to comply with Article 3(2), the other Contracting Parties or more precisely, “*one or more Contracting Parties*” must submit this case to the Court of Justice. Although the lawsuit will be filed by the parties and not the Commission, the aforementioned construct seems problematic due to the fact that as a result the *locus standi* of the applicants will not be based on the disposition principle, but on the contrary the action will in essence be filed automatically, independently of their will, based only on the conclusions of the Commission (the Contracting Parties will *de facto* act as “agents” of the Commission). Similar to Article 7, this is a kind of rule of behaviour (*règle de comportement*), which in this case aims to indirectly grant the Commission a role it cannot have pursuant to Article 273 TFEU.

Article 8(1) of the Treaty implies that it is unnecessary for all Contracting Parties to bring a joint lawsuit before the Court of Justice; it should suffice for at least one of them to do so. However, from the text itself it is not clear how in this a case a situation where none of the parties would be willing to file the lawsuit would be addressed, because from the wording of “*one or more Contracting Parties*” an obligation for each individual party to do so cannot be deduced. For this reason, along with the Treaty the Contracting Parties also signed an accompanying provision concerning the application of Article 8<sup>20</sup> (hereinafter the “Arrangements”) addressing the procedure of filing lawsuits at the Court of Justice pursuant to the aforementioned article. According to these Arrangements, the lawsuit would be filed “in the interest” of all Contracting Parties (bound by Articles 3 and 8) except for

the defendant. The applicants would be the joint Contracting Parties, which at the date of publication of the Commission's report are the EU Member States constituting the Trio of Presidencies of the Council,<sup>21</sup> if they meet the following conditions: i) they have not been found to be in breach of their obligations under Article 3(2) of the Treaty by a Commission's report, ii) they are not otherwise the object of proceedings before the Court of Justice under Article 8(1) or (2) of the Treaty, iii) they are not unable to act on other justifiable grounds of an overarching nature, in accordance with the general principles of international law.

The last of these conditions seems somewhat unclear. If none of these Contracting Parties meets these conditions, then the obligation to file an action will pass to the previous Trio of Presidencies. If none of these Contracting Parties meets the conditions, then the obligation should probably pass to previous trios, until at least one Contracting Party will be found eligible to file the lawsuit. The Arrangements further presume that the lawsuit must be filed within 3 months from the moment the Commission presents its report. The Contracting Parties in whose interest the lawsuit is filed should be obliged to provide the applicants, upon their request, necessary technical and logistical support and together with the applicants bear costs incurred as the result of the Court of Justice's judgment. If a new Commission report concludes that the defendant's failure to comply with Article 3(2) has ceased, the lawsuit should be immediately withdrawn.

A judgment of the Court of Justice is binding for the parties to the proceedings, which are obliged to take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice. If they fail to do so, Article 8(2) of the Treaty allows for the imposition of financial sanctions, which are again decided on by the Court of Justice as an arbitration court pursuant to Article 273 TFEU. Conditions for the imposition of sanctions are conceived in a similar manner as for the proceedings dealing with infringements of the EU Treaties pursuant to Article 260(1) and (2) TFEU. It therefore presumes independent sanction proceedings that in conformity with Article 273 TFEU can be launched by any Contracting Party if this party considers, based on its own assessment or that of the Commission, that another Contracting Party has failed to take the necessary measures to comply with the judgment of the Court of Justice issued in proceedings pursuant to Article 8(1) of the Treaty. Unlike the original proceedings, in this case the Contracting Parties are authorized, not bound, to commence sanction proceedings, and therefore it is left to their discretion whether they will do so, if the aforementioned conditions exist. Here then, a general reluctance by Member States to file lawsuits against other Member States may occur, mainly due to the fear of disrupting good bilateral relations. From the perspective of Article 273 TFEU, sanction proceedings can also be considered a dispute between Contracting Parties, namely a dispute over whether the affected Contracting Party met its obligations ensuing from a previous judgment of the Court of Justice. Arbitration proceed-

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<sup>20</sup> Arrangements agreed by the Contracting Parties at the time of signature concerning Article 8 of the Treaty.

<sup>21</sup> The list of consecutive Trio of Presidencies is specified in Annex I to the Council Decision of 1 December 2009 (Official Journal L 322 of 9. 12. 2009, p. 28, corrected in Official Journal L 344, of 23. 12. 2009, p. 56).

ings do not rule out the imposition of sanctions, because their goal should be to cease the illegal activity or state of affairs, and not only a declaration that such activity or state of affairs still persists. Article 273 TFEU is no exception in this regard. The only condition is that the Contracting Parties shall agree among themselves in their international legal capacity on the ability to impose sanctions in an arbitration agreement or clause.

In their legal action, the Contracting Party also proposes the form and amount of the financial sanction pursuant to criteria prepared by the Commission within the scope of Article 260 TFEU. The reference to this provision needs to be viewed not as its direct application, which in the case of this Treaty is impossible, but as a clause in an arbitration agreement that the Contracting Parties in bringing the action and the Court of Justice when deciding on the financial sanctions would proceed analogously to the methodology used in the EU Treaties infringement proceedings. The commented provision of the Treaty also presumes the types of financial sanctions that can be imposed to be the same as in the EU Treaties infringement proceedings. Should the Court of Justice conclude that the Contracting Party in question failed to comply with its judgment, it can impose on it a lump sum or a penalty payment appropriate to the circumstances that will not exceed 0.1 % of its GDP. If the currency of the Contracting Party concerned is the euro, then the amount imposed becomes income of the European Stability Mechanism. In the case of other Contracting Parties, amounts shall be paid into the general budget of the EU. The reason for this is the fact that the Contracting Parties to the Treaty Establishing the European Stability Mechanism are only those parties whose currency is the euro. In their case, it is appropriate that the sanctions imposed upon them should be income of this mechanism, as its goal is to contribute to the stability of the euro area (thus these finances are bound in a certain manner).

Article 8 of the Treaty is also relevant from the perspective of considering whether the Treaty would transfer some powers of the Czech Republic to an international organization or institution pursuant to Article 10a of the Czech Constitution. The wording of Article 273 TFEU may seem to imply that based on this article, this power was already transferred by the Czech Republic to the Court of Justice at the moment of its accession to the EU (at that time, an identical provision already existed in Article 239 of the Treaty establishing the European Community): “*The Court of Justice shall have jurisdiction...*”. It is however necessary to realize that this establishes only the general authority of the Court of Justice, after all the aforementioned conditions have been met, to settle disputes between the EU Member States. From the perspective of clear definition of the competences of EU bodies in the Treaties, this specifies that the Court of Justice is eligible to deal with this type of cases in the first place. For the Court of Justice to be able to decide in a specific case, a special arbitration agreement is necessary in each case. It is of course up to the constitutional systems of individual Member States how they will interpret this transfer of powers.

From the perspective of the Czech Constitution, however, the thesis that the authority of the Court of Justice to decide all previously unspecified future disputes between the Czech Republic and another EU Member State has already been transferred based on the Treaty of Accession to the EU<sup>22</sup> seems to be difficult to defend. At the time the

Accession Treaty was signed, it was not and could not be known in which future cases the Czech Republic would authorize the Court of Justice to decide its disputes with other Member States. If we accept the thesis that this power, defined only by a very broad and nonspecific attribute of the dispute's relation to the subject matter of EU Treaties, has already been transferred *en bloc* to the Court of Justice, then such transferred power could scarcely meet the criteria of sufficient precision and delimitation defined by the Czech Constitutional Court in its Judgment Pl. ÚS 19/08 ("Lisbon I").<sup>23</sup> From the perspective of the Czech Constitution, it is therefore necessary to consider the conclusion of an appropriate arbitration agreement (or an international treaty including an arbitration clause) as the moment of transfer of the power to the Court of Justice to decide, based on Article 273 TFEU, specific cases related to the subject matter of the EU Treaties. It is clear from these facts that the Fiscal Compact is an international treaty in the sense of Article 10a of the Czech Constitution.

### 3.4 Measures in the area of coordination of economic policies and convergence

The Treaty also includes several provisions concerning closer cooperation and coordination of Contracting Parties in the field of economic policy, aiming to ensure the proper functioning of the economic and monetary union, where this coordination should be based on the current EU Treaties. These provisions are mostly very general and are more of a political declaration than enforceable rules. The first of them is Article 9, binding the Contracting Parties to jointly strive for economic policy that through enhanced convergence and competitiveness fosters the proper functioning of the economic and monetary union and economic growth. This should not entail the creation of some sort of autonomous common economic policy, but solely coordination of economic policies based on the TFEU. To pursue this goal, the Contracting Parties are to take *"necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability"*. These objectives are identical to the four main objectives of the Euro Plus Pact adopted by the European Council in March 2011.

Another of these provisions of the Treaty is Article 10, which contains the obligation of Contracting Parties to use in matters that are essential for the functioning of the euro area, whenever appropriate and necessary, measures pursuant to Article 136 TFEU and the institute of enhanced cooperation pursuant to Article 20 TEU and Articles 326-334 TFEU. This is basically just an expression of support for initiatives that can already be utilized independently of this Treaty, purely within applicable EU Treaties. Article 136 TFEU represents a very broad legal authorization to adopt measures specific for those

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<sup>22</sup> Official Journal L 236, of 23. 9. 2003.

<sup>23</sup> In point 135 of this Judgment the Constitutional Court states: *"However, the constitutional law limits for the transfer of powers contained in Article 10a of the Constitution also indicate the need for clearer delimitation (and thus also definiteness and recognizability) of the transferred powers, together with sufficient review, which the Czech Republic, as a sovereign state, can exercise over the transfer of powers."*



Member States whose currency is the euro. It enables the Council to adopt almost any measures for the euro area if their adoption is in accordance with relevant provisions of the EU Treaties and their general goal is to ensure proper functioning of the economic and monetary union in order to: a) strengthen the coordination of budgetary discipline of euro area members and its surveillance, or b) set out economic policy guidelines for these states, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance. Thus as far as the use of Article 136 TFEU is concerned, Article 10 of the Treaty can contribute to further deepening and extension of secondary EU legislation in the area of economic and monetary union, restricted solely to the euro area, but this can also occur quite independently of this Treaty. It is also necessary to realize that it is not the Member States, but exclusively the Commission, that can submit to the Council a proposal based on Article 136 TFEU; the Member States – Contracting Parties of the Treaty – will at most only be able to ask the Commission to do so. As for utilization of enhanced cooperation, this is also an institute envisaged in the primary EU law, for which clear rules have been established. This can above all be only such cooperation between Member States that aims to strengthen the integration process and that is performed within the objectives and powers of the EU (except for exclusive ones) in accordance with relevant provisions of the EU Treaties and that uses the institutional structures and mechanisms of the Union. The aim of enhanced cooperation is to enable some Member States to integrate within the EU at a more rapid pace while ensuring that this cooperation is open to the other Member States at any time in case of their future interest, under previously stipulated conditions. As opposed to measures pursuant to Article 136 TFEU, enhanced cooperation initiated based on Article 10 of the Treaty cannot be restricted only to euro area members nor to Contracting Parties. It is expected that enhanced cooperation initiated by this Treaty could for example be used in the area of tax harmonization (where it is difficult to gain the approval of all Member States due to the condition of unanimity). Since in both cases these are institutes with a potentially very broad reach, a clear limit of their use is also emphasized in the form of unacceptability of undermining of the internal market as the cornerstone of the European integration. The functioning of the internal market could be possibly affected especially by some measures that could be adopted through enhanced cooperation.

Finally, Article 11 of the Treaty expresses the will of the Contracting Parties to strive for a more closely coordinated economic policy and for this purpose specifies their commitment to discuss and, where appropriate, mutually coordinate in advance all planned major economic policy reforms, where the aim of such discussion and coordination is to benchmark best practices. Since the Treaty is outside the framework of the EU Treaties and as such must not interfere with EU law and powers of EU bodies defined by the Treaties, it is necessary for involvement of EU bodies in coordination of economic policies, as envisaged in Article 11, to be executed only to the extent that ensues from EU law. It is possible to understand from the Treaty's preamble that the Commission shall submit a legislative proposal regulating the coordination of major economic policy reform plans of Member States. The question remains, however, to what degree procedures pursuant to Article 120 TFEU et seq. (coordination of economic policies) will be

used in this coordination or whether these will be different mechanisms based on other provisions of the EU Treaties (for example on Article 136 TFEU applicable only for the euro area).

## 4. COMMON AND INSTITUTIONAL PROVISIONS OF THE TREATY

### 4.1 Euro Summit meetings

In Article 12, the Treaty presumes regular informal meetings of the Heads of State or Government of the Contracting Parties whose currency is the euro in Euro Summit meetings to discuss crucial issues of the economic and monetary union and governance of the euro area. From the perspective of the Union's institutional structure, which is enshrined in the EU Treaties and cannot be altered otherwise than through amendment of the Treaties themselves, as well as from the perspective of the possible transfer of powers of the Contracting Parties to an international organization, it is important that the Euro Summit shall be of only an informal nature. In other words, the Treaty does not create a new body in a legal sense that would have the power to pass any legal acts, despite the fact that a new euro area institution is *de facto* being established, which will even have a president. Taking into account this characteristic of the Euro Summit meetings, it can be assumed that there will be possible only to approve conclusions by consensus and not to vote on the adoption of any decisions or other binding acts.

The Euro Summit meetings will also be attended by the President of the European Commission and the President of the European Central Bank. The Heads of State or Government of the Contracting Parties whose currency is the euro will appoint by simple majority the President of the Euro Summit at the same time as the European Council elects its President and for the same term of office. The Euro Summit meetings are to be held regularly at least twice a year, and more often if needed. Discussions should centre on issues concerning “*specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency*” and other issues concerning the governance of the euro area and the rules that apply to it as well as strategic orientations for the conduct of economic policies to increase convergence in the euro area. The scope of the Euro Summits' agenda is therefore quite broad and exceeds the scope of obligations of Contracting Parties whose currency is the euro ensuing from this Treaty.

The Treaty also ensures a certain, albeit quite limited, level of participation of Contracting Parties whose currency is not the euro at Euro Summit meetings. The meetings can be attended by Heads of State or Government of these Contracting Parties on condition that they have ratified the Treaty and only when some specified issues are to be discussed. These issues are competitiveness, modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future. Contracting Parties whose currency is not the euro will also have the right to participate, when appropriate but at least once a year, in discussions on specific issues of implementation of the Treaty. It is clear from the above that the participation of Contracting Parties whose currency is not the euro at the Euro Summit meetings is very limited, because it is obligatory only once a year, more frequently only if the above mentioned issues are being discussed. It does not

directly ensue from the Treaty whether the participation of Contracting Parties whose currency is not the euro would have the form of observer status (of course with the right to be heard) or whether during the adoption of conclusions of Euro Summit meetings in the extended “euro plus” format, the consensus of all participants would be needed. As these are summits of the euro area where Contracting Parties whose currency is not the euro are only invited if certain issues are being discussed, it seems more likely that they would have active observer status.

The involvement of the European Parliament is addressed through the option to invite its President to be heard at a Euro Summit meeting and the obligation of the President of the Euro Summit to present a report to the European Parliament after each Euro Summit meeting. Significant from the perspective of Contracting Parties whose currency is not the euro as well as EU Member States who are not Contracting Parties to this Treaty is the obligation of the President of the Euro Summit to keep these states closely informed of the preparation and outcome of the Euro Summit meetings.

## 4.2 Participation of the European Parliament and national Parliaments

Article 13 of the Treaty provides for the participation of the European Parliament and national Parliaments of the Contracting Parties in discussions on budgetary policies and other issues covered by this Treaty, and to this end it refers to Title II of Protocol (No 1) on the role of national Parliaments in the European Union attached to the EU Treaties. Pursuant to Article 9 of this protocol, the European Parliament and national Parliaments together determine the organization and promotion of effective and regular interparliamentary cooperation within the Union. Similarly, it is therefore left to the European Parliament and national Parliaments of the Contracting Parties to jointly determine the organization and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss the aforementioned issues related to the Treaty. The aim of interparliamentary cooperation is primarily to support the exchange of views and information on best practices between national Parliaments and the European Parliament at regular meetings of representatives of national Parliaments and representatives of the European Parliament. National Parliaments can send suitable representatives as they see fit without the Treaty anticipating the personal composition of the meetings.

## 4.3 Entering into force and the effect of the Treaty for particular Contracting Parties

Article 14 stipulates conditions for the Treaty coming into force and its territorial applicability or effect in relation to various Contracting Parties. The Treaty is subject to ratification by Contracting Parties in accordance with their respective constitutional requirements, and in order for it to enter into force on 1 January 2013, at least 12 Contracting Parties whose currency is the euro (of a total of 17 current euro area members) must deposit their instrument of ratification with the Depositary (which is the General Secretariat of the Council). This however can also happen sooner, as well as later, on the first day of

the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro.

From the date of entry into force, the Treaty will apply only to the Contracting Parties whose currency is the euro which have ratified it. For other Contracting Parties whose currency is the euro (i.e. those that do not ratify the Treaty until after it comes into force), it will be applicable on the first day of the month following the deposit of their instrument of ratification. Nevertheless, provisions governing Euro Summit meetings and the involvement of national Parliaments and the European Parliament in discussion of issues concerning the Treaty shall be applied from the moment the Treaty comes into force for all Contracting Parties whose currency is the euro.

An important fact is that the Treaty will only be applicable to Contracting Parties whose currency is not the euro from the moment of their adoption of the euro, more precisely from the date when the decision abrogating the given Contracting Party's derogation or exemption from the common currency takes effect. Nevertheless, the Treaty provides for *opt-in* for these Contracting Parties, which can unilaterally declare that they wish to be bound at an earlier date by all or part of the provisions in Title III (Articles 3-8) and Title IV (Articles 9-11) of the Treaty. This option however does not concern Title V of the Treaty, so that Contracting Parties whose currency is not the euro will not be able to become full members of Euro Summit meetings, not even based on *opt-in* (their limited participation is governed by Article 12(3)). It is necessary to point out that in practice this *opt-in* will be quite difficult to perform, because a significant part of secondary EU legislation to which the Treaty refers or the adoption of which it presumes is based on Article 136 TFEU, which is a provision that can be used only for euro area Member States.

In Article 15, the Treaty also enables accession of the EU Member States that were not its original Contracting Parties. The accession is effective upon depositing the instrument of accession with the Depositary, which shall inform the other Contracting Parties. As this option may be used in the future by the Czech Republic, which together with the United Kingdom did not sign the Treaty, Czech negotiators strove to achieve that later accession to the Treaty would not be conditional on the approval of current Contracting Parties. In the end, this requirement was reflected and the Treaty is therefore open unconditionally to all EU Member States.

As a solution in the form of an international treaty outside of the EU legal framework was always perceived as temporary and problematic at a general level, the final article of the Treaty, Article 16, obliges the Contracting Parties to attempt to incorporate the substance of this Treaty, through a procedure anticipated for the amendment of the EU Treaties (Article 48 TEU), into the legal framework of the EU. This should happen within five years, at most, from its entry into force on the basis of an assessment of the experience with its implementation. Just as an aside, it can also be pointed out that some EU institutions even proposed that the Treaty expire after a certain period of time (5 or 7 years) if the incorporation of its substance into primary EU law were to be unsuccessful (a *sunset clause*).

## 5. CONCLUSION

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, often called the Fiscal Compact, presents a new significant tool within the EU. Its aim is to strengthen the fiscal discipline and coordination of economic policies of the EU Member States and ensure the stability of the euro area as a whole, which in the current economic and above all debt crisis in (not only) Europe must clearly be supported. However, the manner and form in which the Treaty does so raises a number of questions, especially regarding its legal status in the EU institutional system and its relationship to EU law.

As has already been stated, the Treaty is not concluded by all EU Member States through procedures for amending the Treaties, on which the EU is based, and therefore must not be in contradiction of them. It especially must not jeopardise the attainment of the Union's objectives in any way, interfere with EU law, its policies and competences of its bodies defined in the Treaties, and with obligations of the Member States that ensue from the Treaties. It is however necessary to realize that the subject matter of this Treaty affects the Union's objectives, policies and law. Since the beginning of its negotiation it was therefore necessary to address a relatively difficult dilemma: the Treaty should regulate the obligations of Member States in areas where the EU law is in effect, its objective is to go further, but it cannot interfere with EU law in any way. Related to this is also the problematic involvement of EU institutions, which can only exercise their competences based on the EU Treaties, but their use is necessary if the envisaged deeper integration is to be effective. This dilemma was addressed in the Treaty by linking a number of proposed measures with secondary EU legislation, either by duplicating the rules contained within it or by referring to them (compare especially Articles 3 and 4); in some cases references are made to secondary EU legislation that is yet to be adopted (e.g. Articles 5, 6 and 11) or in general to the adoption of measures within policies defined by the EU Treaties (Articles 9 and 10). In the case of many provisions, the Treaty's compatibility with EU law is thus ensured simply by the fact that the Treaty contains mainly that which ensues from current EU law or what will subsequently be regulated by it. This primarily applies to rules for balanced budgets and general government debt reduction, which already apply according to the revised Stability and Growth Pact. This naturally somewhat decreases the real significance of the Treaty and its political, rather than legal relevance thus comes to the forefront.

Apart from that, the Treaty of course also contains some measures that do not ensue from current EU law and that truly bring something new. Alas, it is precisely in the case of these measures that more or less problematic areas of conflict arise due to close linkage with EU law. The most serious from this perspective is Article 7, which *de facto* establishes reverse qualified majority voting in the Council when adopting corrective measures within the excessive deficit procedure pursuant to Article 126 TFEU. In doing so, it however indirectly changes the procedural rules contained in the EU Treaties and can be seen as being contrary to the obligations of Contracting Parties – EU Member States ensuing from the Treaties (particularly to the principle of sincere cooperation pursuant to Article 4(3) TEU). Article 8(1), which obliges Contracting Parties to bring a lawsuit before the Court of Justice of the EU if the Commission concludes in its report

that one of the Contracting Parties has failed to comply with Article 3(2) of the Treaty, also seems problematic in relation to EU law. The filing of a lawsuit is thus basically dependent on the will of the Commission and not of the Contracting Parties, whereas according to Article 273 TFEU, the Commission cannot have the *locus standi* as an applicant. All these conclusions thus show that the chosen form of integration in areas falling under EU policies, where an international treaty in which not all Member States participate is used, is on principle an inappropriate, non-systematic and from a legal point of view very problematic solution.

Should the Czech Republic decide to accede to the Treaty and become a Contracting Party, its ratification would require the application of the procedure pursuant to Article 10a of the Czech Constitution, because as has been demonstrated in the case of some of its provisions, it is an international treaty, through which some powers of the Czech Republic are transferred to an international organization or institution. To ratify the Treaty, the consent of both chambers of the Czech Parliament would be needed, requiring a 3/5 majority of all deputies of the lower chamber of Parliament and a 3/5 majority of present senators, unless a constitutional law would stipulate that a referendum is required to ratify the Treaty.