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### Parameters of constitutional development: The fiscal compact in between EU and member state constitutions

Besselink, L.F.M.

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# Chapter 2

## Parameters of Constitutional Development: The Fiscal Compact In Between EU and Member State Constitutions

Leonard F.M. Besselink

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**Abstract** The answer to the questions whether the Lisbon Treaty is a quasi-constitutional framework to be revised, and whether the crisis is a matter for amending or just completing the Lisbon Treaty, depends on our understanding of what constitutional change is and entails. In this chapter, the boundaries of constitutional development are drawn broadly to encompass both the EU and the Member States constitutional orders. Also, not only the formal constitution, but also the substantive constitution is taken on board. This enables an analysis of one major response to the crisis, the Fiscal Compact contained in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. This instrument is constitutionally located ‘in between’ the EU and the Member States, and is an excellent object for the type of study proposed. The chapter concludes that we

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L.F.M. Besselink (✉)

Faculty of Law, University of Amsterdam, Oudemanhuispoort 4-6, 1012 CN, Amsterdam,  
The Netherlands

e-mail: L.F.M.Besselink@uva.nl

are in the middle of constitutional change, which—once the dust has settled—may be codified and consolidated in the EU constitutional documents proper, in the style of ‘evolutionary constitutions’.

**Keywords** Constitutional amendment • EU law • EU Member States • Fiscal Compact • Lisbon Treaty • Treaty on Stability Coordination and Governance

## 2.1 Introduction

A central question in this volume is whether the constitutional make-up of the European Union (EU) for which the Member States settled in the Lisbon Treaty is there to stay, or whether it is up for revision, just as most previous settlements proved quite temporary. To address this, it may be useful to take a step back and reflect on the question what the parameters of constitutional development in Europe are. Put in such general terms, this question is too huge to address in this chapter. Instead, I present no more than a few introductory thoughts on how to frame the issue of constitutional development in the European Union, and how, thus framed, crises relate to constitutional developments. We do so on the basis of a fairly summary look at one of the most significant legal instruments ensuing from the present crisis: the Fiscal Compact contained in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Although this instrument is not evidently of constitutional nature in itself, it concerns on the one hand one of the constitutional pillars of the EU: the monetary union, while on the other hand interferes directly with constitutional powers of vital institutions of parliamentary democracy in the Member States: parliaments’ power of the purse.

In this chapter I choose the perspective of constitutional development and constitutional change beyond the legal confines of the EU order, thus including constitutional development and change in the Member States. That is to say, the perspective chosen in this chapter is that of the constitutional relations between the EU and the Member States, since these determine the broader European constitutional order. To justify this, I start with two preliminary remarks, which frame the issues discussed subsequently.

A first preliminary remark concerns the notion of the European constitutional order (Sect. 2.2); then I make a second remark on the relation between crises and constitutional development in general (Sect. 2.3). Building on these two preliminary remarks, it is useful to distinguish between the formal and substantive concept of the constitution (Sects. 2.4 and 2.5), as I do subsequently when discussing some of the developments we have been witnessing recently. Next, I move on to a discussion of the Fiscal Compact (Sect. 2.7), but not before having described the context in which this instrument was devised (Sect. 2.6). The chapter is rounded off with some concluding remarks (Sect. 2.8).

## 2.2 A European Constitutional Order

When reflecting on constitutional change and development in the EU, we cannot limit ourselves to discussing the EU law framework without taking on board the nexus with the Member States. This is not only because of the primary role they play in formal amendment of the founding Treaties and their importance in EU economic and financial decision-making and policy. It has a more profound relevance. It follows from the starting point I take in understanding the European constitutional order as a *Verfassungsverbund*, as Ingolf Pernice has coined it; that is to say, as a composite order composed of the component orders of the European Union and the Member States, as well as other, more partial or functional, legal orders or ‘regimes’, such as those of the European Convention on Human Rights and the World Trade Organization.<sup>1</sup> The European Union and its institutions cannot (successfully) claim full political autonomy. Constitutionally, the EU order presupposes in many respects those of the Member States. And whenever we are dealing with issues which are either squarely within or merely touching upon the scope of the EU as a legal and political order, the Member States’ orders and their institutions in their turn presume the existence of the EU order and its institutions. It is precisely this entwinement of the various orders which is a constitutional characteristic for the European situation as it exists. Viewing the constitutional situation in terms of such a composite order entails the necessity of not merely looking at constitutional developments at either the EU or the national level, but that we need to have an eye for how these interact, which is what we intend to do in this chapter. Another effect of viewing the constitutional situation in terms of such a composite order is that it allows us to look beyond the formal constitution as we find it in the founding Treaties. It allows us to take on board other instruments—like the Fiscal Compact—and also practices and the role of actors beyond the Treaty texts, all of which are decisive for the substance of the constitutional order,<sup>2</sup> even though in this chapter we can look at the latter (the political practice) only to a quite limited extent.

## 2.3 Constitutional Development and Crises

The slogan ‘never waste a good crisis’ might have been invented by a constitutional lawyer. There is an intimate and intricate relation between crises and constitutional development.

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<sup>1</sup> I elaborate my views on this concept and its relevance to European constitutional law in Besselink 2007.

<sup>2</sup> One of the few studies which takes a broader look at constitutional development in the EU, is Christiansen and Reh (2009).

By and large, there are two ways of dealing with crises in the two main European constitutional traditions: the tradition of ‘revolutionary’ constitutions and the tradition of ‘evolutionary’ constitutions. The archetype of revolutionary constitutions may historically have been France, and became dominant on the European continent. The German and Italian constitutions are prominent examples of this tradition. The ‘evolutionary’ constitutional tradition we find more in the margins of Europe. The UK is the archetype and other constitutional systems which belong to it are mostly the Nordic countries and the Netherlands.

At the basis of the ‘revolutionary’ tradition lies a political cataclysm, a catastrophe like a major war or revolution, a real crisis which proves foundational for a constitution that is based on a grand design and a clean slate (a *nie wieder* of some kind). In this revolutionary tradition true political crises with a systemic impact are more likely to be resolved by amending the formal constitutional system under some kind of institutional rearrangement that is presumed to steer and control the political process, than in the ‘evolutionary’ tradition. The latter is based on an incremental process of change in which the substantive constitutional arrangements are decisive and formal amendment primarily reflects or codifies the changes (it codifies rather than modifies).

The European Union, I submit, is bound to be a constitutional order of the ‘evolutionary’ type. This is intimately connected to the interwovenness of the European constitutional orders into an encompassing order. If this hypothesis is correct, this would allow for practical development, which as an evolutionary response to crisis phenomena *precedes* possible eventual formal amendments. Instead of a qualitative institutional overhaul based on some constitutional grand design,<sup>3</sup> a kind of constitutional big bang, we are more likely to face a more gradual, small step, mainly pragmatic and incremental series of responses which one day may translate into adapting the formal constitutional design to the realities which have evolved on the ground.

## 2.4 Formal and Substantive Constitution

In the two previous sections, we have implied the existence of a substantive alongside a formal constitution. This is particularly relevant if we consider the ‘economic’ constitution. The economic constitution is in most liberal democratic States highly, if not entirely, implicit in the formal constitution. Before the present public debt crisis proved to be as deep and enduring as it is, the German constitu-

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<sup>3</sup> E.g. Cohn-Bendit and Verhofstadt (2012), simultaneously published in Dutch, English, German, Italian and Spanish, of which the titles all resemble the Dutch version (English: *For Europe!—Manifesto for Postnational Revolution in Europe*, interestingly not published in the UK but in München by Carl Hanser Verlag, 2012).

tion's balanced budget rule was a relatively rare phenomenon<sup>4</sup>; so are the provisions in some Central and Eastern European States, which describe the nature of the economy or set out some principles on the basis of which the economy is organized.<sup>5</sup> Mostly, we can cull aspects of the economic constitution of a state from programmatic provisions on the social nature of the state, and from fundamental rights provisions of a socio-economic nature, such as those on the right to strike, the protection of private property and expropriation in the public interest, and from some of the case law on such provisions. The economic constitution, to the extent that it is evident from action of public authorities, is mainly formed by and embedded in practices of a political and legislative nature and not least through administrative and regulatory practice. The formal constitution may show, so to say, the epiphenomena, the symptoms and traces of those practices and bears the marks thereof in the form of social rights, *Staatsziele*, economic rights provisions, recognition of social forces and the like. At EU level we see them in Treaty provisions on the economic freedoms, the 'social market economy' and 'market economy',<sup>6</sup> and 'services of general economic interest' and 'services of economic interest',<sup>7</sup> as well as in some provisions of the 1989 Community Charter on Fundamental Social Rights of Workers (signed by the UK in 1998) and the EU Charter on fundamental rights (entered into force as primary law with the entry into force of the Treaty of Lisbon in December 2009). This relation between the substantive economic constitution and the formal constitution is complex and marked by a fundamental tension. In most European countries and in the EU itself the economy is not inherently a state affair but a matter for non-state society, a matter of 'freedom' and 'freedoms' that grant the economy some form of autonomy. However, at the same time, the formal constitutions presume to steer and perhaps dominate that economic sphere. In short, the balance between societal autonomy and State autonomy is delicate, and is weakly entrenched in a formal

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<sup>4</sup> Articles 115 and 109, 109a *Grundgesetz*, introduced in 2009.

<sup>5</sup> E.g. Article 20 Polish constitution: 'A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.' Article 19 Bulgarian constitution: '(1) The economy of the Republic of Bulgaria shall be based on free economic initiative. (2) The state shall establish and guarantee equal legal conditions for economic activity to all persons and legal entities by preventing any abuse of a monopoly status and unfair competition, and by protecting the consumer. (3) All investments and economic activity by persons and legal entities shall enjoy the protection of the law. (4) The law shall establish conditions conducive to the setting up of cooperatives and other forms of association of persons and legal entities in the pursuit of economic and social prosperity.' Article 55 Slovak constitution: '(1) The economy of the Slovak Republic is based on the principles of a socially and ecologically oriented market economy. (2) The Slovak Republic protects and promotes economic competition. Details will be set out in a law.'

<sup>6</sup> Articles 3 TEU and 119, 120, 127 TFEU.

<sup>7</sup> Article 14 TFEU and Protocol No 26 on services of general interest to the Lisbon Treaty (*OJ* 2012 C 326/308).

constitutional arrangement. In the relationship between the EU and the Member States' constitutional orders, the persistence of the tension is particularly caused by the EU's genetic proclivity to guarantee the transnational autonomy of market forces with a view to optimizing economic wealth through the abolition of obstacles to free movement of economic factors and actors, thus reducing the possibility for Member States autonomously to pursue economic policies in accordance with local political preferences, especially those that are aimed at redistributive aspects of wealth and welfare. Resentment against the EU has as a consequence been proven to be easily mobilized whenever EU measures aiming to master the crisis hit the various Member States. However, although EU resentment has now become constitutional in the sense of endemic, this is not the topic of this chapter. What is relevant, is that the EU has used measures of negative and positive economic integration as a dominant policy area towards establishing and developing an internal market, a Europe without borders, a Europe of economic freedom, whereas the redistributive social policies have been left to the Member States and have always been pursued by fiscal measures and the budget as one of the main instruments. The crisis which has been unfolding since 2008 until this day has made the tensions between these various EU and Member States' policies and their different entrenchment in their respective constitutions acute. Let us sketch some of the broader context of this crisis.

## **2.5 Formal Developments in the Instruments**

We now turn to a brief discussion of how the development of the constitutional relations between Member States and the EU is reflected in the various formal instruments used and developed during the crisis, before focusing in on the Fiscal Compact. Mapping the various formal instruments, we are confronted with a complex of rules of primary, secondary EU law and separate treaty law, which are mutually overlapping, repetitive, supplementing and perhaps even contradictory. Their impact on Member States' constitutional powers is enormous.

### ***2.5.1 Primary Law***

Primary law has been used as the basis for Council decisions that amount to what the Americans call 'line item vetoes' in the decisions regarding Greece. That is to say, they amounted to detailed interventions in the expenditure by Greek authorities that were previously conceived of as the constitutional prerogative of the national parliament as holder of the power of the purse, for instance obliging Greece to reduce

pharmaceutical expenditure by at least EUR 1 076 million in 2012, a reduction in overtime pay for doctors in hospitals by at least EUR 50 million in 2012, etc.<sup>8</sup>

### 2.5.2 *Secondary Law*

Also such secondary EU law instruments as the ‘Six Pack’<sup>9</sup> and ‘Two Pack’<sup>10</sup> do not only raise questions as to their relation to primary EU law, but also as regards their relation to national constitutional law. One important point would seem to be that the Maastricht Treaty criteria affecting budgetary autonomy were approved by the national parliaments, which thus consented to certain restrictions on their budgetary powers; however, these powers could now be viewed as further limited through secondary law. I must abstain here from an in-depth analysis of the sometimes quite technical differences between the original Treaty-based criteria and the additional criteria which are imposed in the Six Pack and Two Pack measures. The latter criteria concern requirements which are intended to aim at achieving the Treaty criteria. To the extent they are understood as functional towards previously established requirements, they may be viewed as measures restricting the national parliaments’ power of the purse—to which the parliaments had by implication agreed when agreeing with the treaty requirements on the occasion of the approval of the original Treaty. However, an alternative view may be argued to the effect that, by accepting the Treaty requirements, they had not consented to requirements further restricting their constitutional powers. To this author’s knowledge this last point has not been made explicitly in respect of the Six

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<sup>8</sup> See the Council Decision 2011/734/EU of 12 July 2011, addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, *OJ* 2011 L 296/38, and Council Decision 2012/211/EU of 13 March 2012 amending it, *OJ* 2012 L 113/8.

<sup>9</sup> *OJ* 2011 L 306, comprising Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area, Regulation (EU) No 1174/2011 of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Regulation (EU) No 1175/2011 of the European Parliament and of the Council amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Regulation (EU) No 1176/2011 of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances, Council Regulation (EU) No 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, and Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.

<sup>10</sup> *OJ* 2013 L 140, comprising the Regulation (EU) No 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability; and Regulation (EU) No 473/2013 of the European Parliament and of the 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.



Pack and Two Pack measures, and formally it could not easily arise as none of these particular measures are subject to any form of national parliamentary approval.<sup>11</sup> However, the point has been made with regard to the European Stability Mechanism Treaty (ESM Treaty)<sup>12</sup> and Fiscal Compact,<sup>13</sup> and because of the form they take of intergovernmental treaties, the national parliamentary legitimacy deficit is to some extent covered by the national parliaments agreeing to be a party to these treaties. Whether this is sufficient is another matter, as was made clear in the series of judgments of the *Bundesverfassungsgericht* (BVerfG) on these instruments.

## 2.6 The ESM Treaty

That the budgetary prerogatives of national parliaments are restricted, and hence the general role of national parliaments in the process of legitimizing government action (and inaction), was made evident in a principled manner in the cases concerning the ESM and Fiscal Compact, which have so far [November 2012] been decided by the *Bundesverfassungsgericht* in its judgments of 19 June 2012<sup>14</sup> and 12 September 2012.<sup>15</sup>

These judgments have clarified a number of issues. We can here only highlight a few aspects which are of particular importance in the constitutional relations between the EU and Member States. As a general constitutional point it deserves highlighting that both these judgments show that constitutional courts' primary function is not only to *restrain* democratic decision-making; they are also there to tell the democratic institutions to do their work properly. In the judgment of 19 June 2012, the *Bundesverfassungsgericht* declared the procedure followed by the German federal government in the lead-up to the conclusion of the ESM Treaty and Fiscal Compact unconstitutional, because it had not sufficiently informed the

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<sup>11</sup> Regulation 1175/2011 of the European Parliament and of the Council on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* 2011 L 306/12, which had a long trajectory already before the crisis, in practice means for a number of Member States that they have to change their procedure for adopting the yearly national budget. The IPEX website indicates that 14 Member States (of which 6 do not belong to the eurozone) have scrutinized it under the Subsidiarity Protocol. Of course, this is only a very rough indicator, but nevertheless suggests that national parliaments have not been quite on the ball on every possible occasion and opportunity to follow the legislative steps on a measure that at least potentially touches on their most important constitutional prerogative, the power of the purse. See <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20100526FIN.do#dossier-COD20100280>.

<sup>12</sup> Treaty Establishing the European Stability Mechanism, Brussels 2 February 2012.

<sup>13</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Brussels 2 March 2012.

<sup>14</sup> BVerfG, 2 BvE 4/11, 19 June 2012.

<sup>15</sup> At the moment this text is submitted for publication, the judgment on the merits is still pending.

*Bundestag*.<sup>16</sup> The Federal Constitutional Court nevertheless did not attach further consequences to this declaration of unconstitutionality.

In both judgments, and in line with earlier case law,<sup>17</sup> the principle of democracy, the so-called *Demokratieprinzip* is pivotal. This principle implies, according to the *Bundesverfassungsgericht*, that a significant role of parliament must also exist with regard to the powers of the purse of parliament.<sup>18</sup> In this respect, the judgment of 12 September 2012 suggests that Council decisions such as those addressed to Greece would be unconstitutional under the *Grundgesetz* if such decisions were to be taken with regard to Germany, i.e. a decision of the Council that the Federal Republic must cut its expenditure on salaries of teachers, or on medicine dispensed through pharmacies, or on the *Wehrmacht*, would not be binding.

At first sight this state of affairs might seem to lead to deeply distorted political relations in a Europe. We threaten to end up in a Europe in which on the one hand Germany to a large extent has had the lead in taking painful measures that other Member States' parliaments must comply with, but which measures would be unconstitutional if applied with regard to Germany, so could not be lawfully imposed by Germany's own standards. I admit having some sympathy with those who

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<sup>16</sup> This is in line with an earlier judgment of the BVerfG, 2 BvE 8/11, 28 ~~January~~ 2012, in which it considered for the most part well-founded the application made by two Members of the Bundestag against the new legislation, adopted in connection with the extension of the instruments of the European Financial Stability Facility (EFSF), concerning the transfer of competences of the German Bundestag to a special committee: parliament as a whole, i.e. all member of parliament, must be able to participate in major decisions within its budgetary powers.

<sup>17</sup> Jančić 2010, neatly delineates the development of the BVerfG's stance as follows: 'let there be a European Parliament' (the *Solange I* case), '... unless there is already one' (the *Solange II* case), '... which may not supplant the national parliament' (the *Maastricht Treaty* case), 'and may not affect its duty of transposition' (the *European Arrest Warrant* case), 'and is not and need not be like the national parliament' (the *Lisbon Treaty* case).

<sup>18</sup> BVerfG, 2 BvE 2/08, 30 June 2009, para 246: 'The election of the Members of the German Bundestag by the people only fulfils its central role in the system of the federal and supranational intertwining of power if the German Bundestag, which represents the people, and the Federal Government borne by it, retain a formative influence on the political development in Germany. This is the case if the German Bundestag retains responsibilities and competences of its own of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures (see BVerfGE 89, 155 <207>).' ('Die Wahl der Abgeordneten des Deutschen Bundestages durch das Volk erfüllt nur dann ihre tragende Rolle im System föderaler und supranationaler Herrschaftsverflechtung, wenn der das Volk repräsentierende Deutsche Bundestag und die von ihm getragene Bundesregierung einen gestaltenden Einfluss auf die politische Entwicklung in Deutschland behalten. Das ist dann der Fall, wenn der Deutsche Bundestag eigene Aufgaben und Befugnisse von substantiellem politischem Gewicht behält oder die ihm politisch verantwortliche Bundesregierung maßgeblichen Einfluss auf europäische Entscheidungsverfahren auszuüben vermag (vgl. BVerfGE 89, 155 <207>)); and *ibid.*, para 249: 'Essential areas of democratic formative action comprise, inter alia, [...] revenue and expenditure including external financing' ('Zu wesentlichen Bereichen demokratischer Gestaltung gehören unter anderem [...] Einnahmen und Ausgaben einschließlich der Kreditaufnahme').

perceive this as a clear sign of the *Diktat*—but on second thoughts this is not quite true if we take on board the overall national constitutional framework.

To clarify this, I must first make some remarks on the Fiscal Compact.

## 2.7 Fiscal Compact

The Fiscal Compact contained in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union,<sup>19</sup> is not of the kind of Schengen or Prüm. It is not further cooperation outside the EU framework, nor is it merely ‘enhanced cooperation’ in terms of the EU Treaties (Articles 20 TEU and 326 ff. TFEU).

The Fiscal Compact is aimed at national constitutional change in the operation of the constitutional institutions of Member States. It is true that the Schengen Conventions required national constitutional amendments, since they affected the exclusivity of relations between States and their own nationals in some Member States. The difference is that the Fiscal Compact is not about citizens *directly*, but strikes at the heart of parliamentary democracy. The power of the purse has, after all, been at the basis of the powers that parliaments have been able to muster towards the executive, powers both determining and legitimating state policies, and the nature and scope of state intervention in society and the welfare state. Moreover, budgetary powers of parliament are historically the root of most other powers of parliament *vis-à-vis* executive powers—the history of the European Parliament confirms this.

### 2.7.1 *Fiscal Compact as Constitutional Symbolism*

The Fiscal Compact was a Franco-German initiative of August 2011 to pacify the markets which were rocking the eurozone, especially by price movements in public debt in Greece, Spain, Portugal and Italy. The ‘Six-pack’ was not enough; a political signal was needed, something with enough symbolic value to contribute to stemming the market sentiment against these countries and thus the eurozone as a whole. The message was immediately picked up, not only in the markets, but also in politics. ‘Now all of a sudden Europe is speaking German’, the CDU parliamentary leader, Volker Kauder, said proudly, referring to the enforcement of budgetary

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<sup>19</sup> Title III, Articles 3–8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; the term ‘Fiscal Compact’ is used either to refer to these particular provisions in this Treaty, or to this Treaty itself.

discipline; ‘the starting point of the crisis is not the speculators but is that we have not applied budgetary discipline in Europe’.<sup>20</sup>

The Fiscal Compact is not only a political symbol, it is also a constitutional symbolism. The EU as an autonomous constitutional order could evidently not achieve its objectives on its own, through the secondary legislation it was in the course of passing, even though this secondary legislation contained many provisions quite similar to the provisions we now find in the Fiscal Compact and essentially achieves the same objectives. While the ‘Six pack’ Directive 2011/85 had already obliged Member States to implement numerical fiscal rules (without specifying their form),<sup>21</sup> the proposal for the first Regulation of November 2011 even contained a provision prescribing that the Member States incorporate a balanced budget rule preferably at constitutional level<sup>22</sup>—which became in somewhat amended form<sup>23</sup> Article 3(1) one of the core provisions of the Fiscal Compact.

Evidently, the Fiscal Compact effectively ‘mutually anchored’ in a constitutional fashion the balanced budget principles on the basis of which the sovereign debt crisis was to be tamed. This ‘mutual anchoring’ has as an effect the ‘self-appropriation’ by Member States of such principles, as they commit themselves through the sovereign exercise of their treaty making power. Paradoxically, this lack of EU autonomy in taking measures to guarantee achievement of the criteria of the monetary union unilaterally, is compensated by the autonomous Member States’ action through the multilateral treaty-making act of concluding the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the Fiscal Compact contained therein. This use by Member States of their autonomous treaty making power has the result of restricting the autonomous budgetary power of national parliaments beyond what the EU founding Treaties since their Maastricht version had always entailed. The significance of resort to Member States concluding a treaty instead of issuing secondary EU legislation, is the evident need to emphasize the sovereign nature of restricting sovereignty.<sup>24</sup> At

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<sup>20</sup> ‘Jetzt auf einmal wird in Europa deutsch gesprochen—nicht in der Sprache, aber in der Akzeptanz der Instrumente, für die Angela Merkel so lange und dann erfolgreich gekämpft hat [. . . Hailing the feat and achievement that the French, who did not want to know the word, have now even recognized the *Schuldenbremse*, albeit under the more elegant term ‘the golden rule’.] Ausgangspunkt der Krise sind nicht die Spekulanten sondern dass wir uns nicht Haushaltsdisziplin gehalten haben in Europa.’ Volker Kauder spoke at a party meeting in Leipzig on 14 November 2011, when the foundations for the Fiscal Compact had been laid. The entire speech is available at <http://www.youtube.com/watch?v=eUeuCie9vkQ>; the quoted phrases are pronounced at 4:52 to 5:07 min and 5:47 to 6:01 min.

<sup>21</sup> Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (*OJ* 2011 L 306/41), Articles 5–7.

<sup>22</sup> Article 4(1) of the Proposal for a Regulation of the European Parliament and of the 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, COM (2011) 821, 23 November 2011.

<sup>23</sup> For a textual history of the various versions of the Fiscal Compact, see Schorkopf (2012).

<sup>24</sup> This is not deny the greatly increased role of the Commission, the most supranational of EU institutions.

the same time it shows the degree of mutual dependence between EU and national constitutional orders.

One constitutional consequence of nationally entrenched balanced budget (and deficit) rules as imposed by the Fiscal Compact entered into by the Member States, is that it is not merely a symbolic limitation or even a farewell to autonomy in the sense of the Westphalian system, nor merely a farewell to Keynesianism (which it is not in fact either, as the Fiscal Compact allows a measure of Keynesian anti-cyclical policy). It is also more practical: if a Member State has a balanced budget rule entrenched, say in its constitution, then line item veto measures would not be redressing merely an infringement of EU law, but would also be redressing an infringement of a national constitutional rule.

This brings us back to the potential unconstitutionality of line-item vetoes, as suggested by the *Bundesverfassungsgericht* in its September 2012 judgment. The logic of saying that line item vetoes are unconstitutional becomes somewhat different due to the ‘self-appropriation’ of the ‘golden rule’ in the form of Member States taking upon themselves the obligation to entrench them in national law. Line-item vetoes (such as in the Council Decisions addressed to Greece) would presumably be resorted to only when there is an excessive deficit: a deficit that is in itself already unconstitutional under national law.

### ***2.7.2 The Obligation to Entrench the Balanced Budget Rule: Formal or Substantive Constitutionalism***

In the terms of Article 3 of the Fiscal Compact as it entered into force, the rule that ‘the budgetary position of the general government of a Contracting Party shall be balanced or in surplus [. . .] shall take effect in the national law of the Contracting Parties [. . .] through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes’.<sup>25</sup> This means that the balanced budget rule may in principle also be sufficiently entrenched outside the national constitution. At the moment, there is considerable uncertainty as to what Article 3 (2) obliges Member States to do in terms of the precise form that national implementing law should take.<sup>26</sup> The convoluted formula ‘provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to’ can be read in a variety of ways. The German way would indeed be to enshrine the balanced budget rule in the constitution. Spain

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<sup>25</sup> Fiscal Compact, Article 3(1), which also provides a further definition of what a budget ‘in balance or in surplus’ means, and Article 3(2).

<sup>26</sup> For an overview of the various views and possible interpretations, Besselink and Reestman (2012) and Reestman (2013).

and Italy have followed suit, each in their own way.<sup>27</sup> Other Member States, after ratifying the Fiscal Compact, have implemented the obligation in a ‘non-constitutional’ manner, e.g. France and the Netherlands. Indeed, the provision has been read to make any form of implementation possible, and even a non-legislative one. In such a reading, the provision allows implementation either through ‘provisions of binding force and permanent character’ or alternatively through provisions ‘otherwise guaranteed to be fully respected and adhered to’.<sup>28</sup> In this interpretation, it is sufficient if as a matter of fact the balanced budget rule is complied with in the national budgetary process. This is probably the strongest way of suggesting that the Fiscal Compact obliges Member States to comply with the substantive requirements, while the specific form of such compliance is multifarious. In other words, the substantive constitutional practice is decisive, not the formal entrenchment of it in normative, legal terms.

## 2.8 Concluding Remarks

Let us sum up the various findings of this chapter. There is generally a sense that the crisis which Europe has been facing since 2008 is of such a nature that it not only should, but no doubt will actually lead to constitutional change. We frame the issue of constitutional development in terms of the European order as encompassing the constitutional order of the EU *and* that of its Member States; moreover we not only look at formal but also substantive constitutional arrangements beyond the constitutional texts themselves. Taking this perspective, we can see that change is actually occurring. The Fiscal Compact is clearly aimed at committing the Member States in the eurozone to achieve the objectives of the EU monetary union by incorporating either constitutionally, legally or practically principles which are considered crucial in their constitutional orders. The relevant fiscal rules and principles are part of a broader substantive ‘economic constitution’ of *Member States* as integrated into that of the European order. Thus, *Member States*’ constitutional principles aim at entrenching—at least on the practical level—the fiscal conditions that guarantee attainment of the constitutional *EU* objective of a monetary union. Precisely this interwovenness of the EU and Member States’ constitutional arrangements must lead to the conclusion that constitutional change has occurred, even though the Fiscal Compact itself is not formally part of EU law.

At the same time this interwovenness is delicate: so far this change has been at the expense of the national parliaments in autonomous Member State affairs by restricting their powers of the purse. In a most acute manner that has been witnessed in the case of Greece where the Council basically dictated in great detail, sometimes in terms of budget lines, how budget items had to be revised: ‘line item vetoes’.

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<sup>27</sup> See Ruiz Almendral (2013); Ciolli (2013).

<sup>28</sup> This is the view of Craig (2012), p. 237.

Particularly because of the form of these ‘vetoes’—that of a decision of the Council without any role for the European Parliament—this particular aspect of the crisis shows that it is not merely a financial or fiscal crisis that is facing Europe; it is a crisis of democracy as well. The various calls for changes in the EU monetary and economic ‘governance’ are understandable, as its present weakness in terms of democratic involvement of any parliament in some of the most incisive measures may well threaten the very basis of the EU: democracy (Article 2 TEU).

The crisis and the various instrumental responses to it confirm that constitutional change in the EU is incremental in nature. That the democratic difficulty of the particular changes in the constitutional powers of Member States’ parliaments did not go unnoticed also transpires from the fact that it was found necessary to include a provision on the role of national parliaments in the Fiscal Compact, thus clearly reinforcing the interplay between national institutions and EU law.<sup>29</sup> Even though we should not overestimate its practical importance, there are no self-evident alternatives to holding the Council to account in the process of what has come in place of the original national parliamentary autonomy.

It may well be that the strengthening of the role of the Commission as the enforcer of the various EU and Fiscal Compact obligations of Member States, which we now see happening, will be followed by an increased legitimating role for the European Parliament in practice. Also this I consider as a consequence of the more or less accidental but incrementally greater role of the Commission, linked as it is to the European Parliament under the current constitutional arrangement, not as the consequence of a new constitutional design. And yes, sooner or later these various developments, the famous ‘Europe of bits and pieces’, may become formally codified and consolidated in the EU constitutional documents, the Treaties.

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<sup>29</sup> Fiscal Compact, Article 13: ‘As provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation 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 budgetary policies and other issues covered by this Treaty.’

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