

**Decision n° 2012-653 DC of the Constitutional Council, August 9, 2012** <sup>1</sup>  
(see also under question IX.4).

1. NAME OF THE COURT

Conseil Constitutionnel de la République Française (Constitutional Council of the French Republic)

2. PARTIES

N/A.

3. TYPE OF ACTION/PROCEDURE

Review of conformity with the Constitution of a Treaty before ratification, triggered by the President of the Republic under article 54 of the Constitution, in order to decide whether the Constitution must be amended before ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (thereafter “Fiscal Compact”). Article 54 reads: “*If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution*”<sup>2</sup>

4. ADMISSIBILITY ISSUES

The President is entitled under article 54 of the Constitution to refer to the Constitutional Council in order to determine whether “*an international undertaking contains a clause contrary to the Constitution, [in which case] authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution*”. The international undertaking at stake is the Fiscal Compact Treaty.

5. LEGALLY RELEVANT FACTUAL SITUATION

France signed the Fiscal Compact Treaty on March 2, 2012. Under article 54 of the French Constitution, the *Conseil Constitutionnel* decides whether the Constitution must be amended before ratification of the Treaty (see point 3 above).

Article 3(1) and (2) of the Fiscal Compact, in particular, are crucial in the

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<sup>1</sup> <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-653-dc/decision-n-2012-653-dc-du-09-aout-2012.115444.html> ; (pdf: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-115444.pdf>) (english version : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-653-dc-of-9-august-2012.115501.html> )

<sup>2</sup> <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>

Constitutional Council's assessment of conformity of the Fiscal Compact with the Constitution.

Article 3(1) of the Fiscal Compact provides that the budget of the States' public administrations be balanced or positive.

Article 3(2) of the Fiscal Compact provides that the rules for balanced budgets provided for in article 3(1) "*take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty 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.*"

At the time of the decision, and as recalled by the *Conseil Constitutionnel*, France is already bound by rules for fiscal discipline under EU law (especially article 126 TFEU and Protocol n°12 to the EU Treaties; European regulation of July 7, 1997, modified by two European regulations on June 27, 2005 and November 16, 2011).

## 6. LEGAL QUESTIONS

The *Conseil Constitutionnel* must determine whether the Fiscal Compact "*includes any provision which is anticonstitutional*" (§1 of the decision). The CC has to determine in particular whether article 3(2) of the Treaty creates the need for an amendment of the Constitution prior to ratification. The main angle of enquiry consists in deciding whether the Fiscal Compact encroaches upon "essential conditions for the exercise of national sovereignty".

## 7. ARGUMENTS OF THE PARTIES

N/A.

## 8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Constitutional Council (CC) uses throughout the decision what looks like a form of reservation of interpretation<sup>3</sup> on an international document, to the effect that the provisions of the Fiscal Compact do not run contrary to the Constitution, as long as one out of two options for the fulfilment of its article 3(2) is chosen. The other option is said to encroach upon "essential conditions for the exercise of national sovereignty". The CC organises its reasoning in five parts.

The first part of the decision (§§1 – 3) states the legal question – whether the Treaty provides a disposition contrary to the Constitution (§1) –, while recalling the

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<sup>3</sup> The point is made in particular by Jérôme Roux, « Le Conseil constitutionnel et le traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire : Busiris, Rue de Montpensier. Commentaire de la décision n° 2012-653 DC du 9 août 2012 », in *Revue trimestrielle de droit européen* (2013), pp. 855-876, §24.

commitments of the State in the European construction process (§3). The mention later in §10 of commitments made to that purpose “*or which are closely related to this goal*” (“*ou en étroite coordination avec cette fin*”) appears to echo with this reminder, and to imply that while the Fiscal Compact is an international document, the CC considers it in the light of its role in the European legal framework. Moreover, the CC does notice that the Fiscal Compact, under its article 16, is to be integrated in European Law five years after its entry into force (§3 of the decision).

The second part of the decision (§§4 – 11) deals with the law applicable to the case (“*Sur les normes de référence*”). France’s commitment towards human rights in its internal order is restated (§4), in particular the principle of national (people’s) sovereignty in article 3 of the French Declaration of the Rights of Man and of the Citizen (DRMC), and the exercise of this sovereignty through representation and referendum, as stated in article 3 of the 1958 French Constitution (§5 of the decision). After mentioning the relationship between French law and international law (§§6 – 7), the CC recalls article 88-1 of the Constitution following which the EU legal order is integrated into the national legal order, and distinct from the international legal order (§8). However, §10 underlines that, in order to ratify commitments signed to the effect of pursuing the goal of European integration and that would “*call into question the rights and freedoms guaranteed by the Constitution or run contrary to the essential conditions for the exercise of national sovereignty*”, prior amendment of the Constitution is required. Yet, the parts of the Fiscal Compact that are only restating European commitments already made by France are exempt from constitutional review (§11). Commentators of the decision have pointed out, however, that the CC does review “in passing” (§31) the conformity with the Constitution of Regulation 1177/2011 of 8 November 2011, when it assesses that article 4 of the Fiscal Compact (which reproduces in substance the requirements of the Regulation) is not contrary to the Constitution<sup>4</sup>.

The third part of the decision (§§12-34, “*Sur les stipulations relatives au Pacte Budgétaire*”) is the most substantial, and deals with the provisions under Title III of the Treaty on the “Fiscal Compact” – the title that gave the Treaty its common name. The CC starts by stating the provisions of French constitutional and human rights law providing for the prerogatives of the Government and the Parliament in legislative and more specifically budgetary matters (§§12-13). The following question then appears to be whether or not the rules on balanced public finances, especially article 3(1) of the Fiscal Compact, run counter to essential conditions for the exercise of national sovereignty. After taking stock of the already existing EU rules on balanced public finances in §§14-16 (art.120 and 126 TFEU and the annexed Protocol n°12; Regulation of 7 July 1997, amended by Regulations of 27 June 2005 and of 16 November 2011), the CC concludes that the provisions of art.3(1) of the Fiscal Compact only reassert and strengthen commitments already made, that “*they do not*

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<sup>4</sup> Jérôme Roux, *op.cit.*, §9.

*result in the transfer of any powers over economic or fiscal policy and do not authorise any such transfers*”, to the effect that they do not infringe upon these essential conditions (§§14-16).

What is arguably the most complex development of the decision pertains to the scrutiny by the CC of the means by which the rules on balanced public finances of art.3(1) would take effect in French law, through the interpretation of article 3(2) of the Fiscal Compact. After recalling the obligation for the State to abide by the Treaty once ratified, the CC interprets article 3(2) as stipulating an alternative (§19), whereby the rules laid down in article 3(1) “*take effect under national law either ‘through provisions of binding force and permanent character, preferably constitutional’ or through provisions ‘otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes’*”. On the one hand, the CC recognises that the first option would require introduction in the national legal order of rules that would be binding on Budget Acts and Social Security Financing Acts (§20); such rules would in turn require constitutional amendment, as they would introduce changes to the prerogatives of the Government and Parliament in budgetary matters, as well as to the principle that Budget Acts are to be enacted annually, as derived from art.34 and 47 of the Constitution (§21). On the other hand, the CC considers that the second option offered by article 3(2) of the Fiscal Compact does not require the introduction of binding provisions within the national legal order, the Member States remaining free to determine the provisions sought to have the effects required in article 3(2), while the rules of article 3(1) would not require a guarantee in the national legal order of a higher force than ordinary legislation (§22). Yet, even under the second option offered by the Fiscal Compact, article 3(1) requires that the rules on balanced public finances must have a permanent character and apply to all government services (§23). Moreover, the CC recalls its own continuing role in the review of the respect of the principle of faithfulness in public accounting (§27, also alluded to in §13), and that it would “*tak[e] account*”, in doing so, “*of the opinions of independent institutions established in advance*” - such institutions as referred to under art.3(2) of the Fiscal Compact<sup>5</sup>.

The CC then hints at which norm of the national legal order would fit the purpose of fulfilling the requirements of article 3(2) of the Fiscal Compact if the second option

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<sup>5</sup> Commentators have recognised that the judicial review of the principle of sincerity in public accounting could thus be strengthened – noting, however, that the principle of sincerity was never used by the CC to annul a Budget Act or Social Security Financing Act. See Eric Oliva, « Le pacte de stabilité devant les juridictions constitutionnelles - Décision du Conseil constitutionnel, n° 2012-653 DC, 9 août 2012, *Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire* », RFDA, AJDA (2012), pp.1073 and following : « *Le juge constitutionnel confère une normativité renforcée aux règles d'équilibre en les liant au principe de sincérité budgétaire lui-même renforcé par l'avis des institutions indépendantes mises en place par la loi organique. Il est ainsi probable qu'à l'avenir les lois de programmation pluriannuelle, les lois de finances et les lois de financement de la sécurité sociale, feront en matière de sincérité l'objet d'un contrôle plus poussé qu'auparavant* » ; also footnote (89): « *jusqu'à présent le principe de sincérité n'a jamais donné lieu à une annulation* ».

set out above were chosen: Programming Acts (§24 and already mentioned by the CC in §13), which have no binding force over Budget Acts or Social Security Financing Acts, may be used to that end. However, The *Conseil Constitutionnel* still recognizes the need for these norms to be of a “permanent character” (§23), as art.3(2) of the Fiscal Compact states that mechanisms of deficit control are “*guaranteed to be fully respected and adhered to throughout the national budgetary processes*”. Thus, the Fiscal Compact requirement for a Medium Term Objective, reduction deficit Trajectory, automatic correction mechanism and independent body may be enshrined in an organic law, providing a permanent framework for the Programming Acts that would in turn set the objectives of the Budget Acts and Social Security Financing Acts.

As such a solution allows for the implementation of the Fiscal Compact without constitutional amendment, the CC does not see a reason under article 8 of the Fiscal Compact to allow for the European Court of Justice to review the correct implementation of the Treaty in French Constitutional law (§30) – which would be a control of conformity of the Constitution with a Treaty by the Court of Justice.

After recognizing in the fourth part of the decision that “*the other provisions of the Treaty*” are not contrary to the Constitution, the CC concludes in the fifth part that the Treaty does not run counter to the Constitution, under the conditions defined in §§21, 28 and 30.

#### 9. LEGAL EFFECTS OF THE JUDGMENT/DECISION

The Constitutional Council decided that the Fiscal Compact can be ratified without need of prior change the French Constitution.

#### 10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT/DECISION AND ITS BROADER POLITICAL IMPLICATIONS.

This Decision enabled the new center-left Government to choose to ratify the Fiscal Compact with an interpretation of its fiscal discipline requirements that was flexible than was originally understood by the previous Government, which signed the Treaty. It thus enabled a political change in France, away from tougher understandings of fiscal discipline as a solution to the crisis.