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The variable geometry of the euro-crisis:
A look at the non-euro area Member States

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**THE VARIABLE GEOMETRY OF THE EURO-CRISIS:
A LOOK AT THE NON-EURO AREA MEMBER STATES**

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Constitutional Change through Euro-Crisis Law

This paper was first delivered at a conference held at the European University Institute in October 2014 presenting some initial results of the project on Constitutional Change through Euro Crisis Law. This project is a study of the impact of Euro Crisis Law (by which is meant the legal instruments adopted at European or international level in reaction to the Eurozone crisis) on the national legal and constitutional structures of the 28 Member States of the European Union with the aim of investigating the impact of Euro Crisis law on the constitutional balance of powers and the protection of fundamental and social rights at national level. An open-access research tool (eurocrisislaw.eui.eu) has been created, based on a set of reports for each Member State, that constitutes an excellent resource for further, especially comparative, studies of the legal status and implementation of Euro Crisis law at national level, the interactions between national legal systems and Euro Crisis law and the constitutional challenges that have been faced. The project is based at the EUI Law Department and is funded by the EUI Research Council (2013-2015).

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Abstract

This paper analyses how non-euro MS are affected by a set of euro-crisis measures and how their position towards the Eurozone has evolved. After briefly exploring the origins of differentiated integration in EMU, the paper describes the relevance of Euro-crisis law for the non-Euro MS, for example through parts of the Six Pack and the Fiscal Compact. We then look at specific legal topics that arise in relation to EMU and the non-euro MS, such as reforms of fiscal governance, the decision to be bound by the whole of the Fiscal Compact, the inclusion of non-euro MS in important decisions regarding the Eurozone, the obligation to join the euro and the possible consequences of Eurozone membership. We find that there are vast differences within the group of non-Euro MS with regard to the applicability of Euro-crisis law, the way the measures are ratified and/or transposed and the attitude towards the Eurozone and further integration. Euro-crisis law also affects non-Euro MS on a constitutional level, both directly and indirectly, by sponsoring certain budgetary objectives and by favouring certain actors over others during the budgetary process. Finally, the differentiated nature of EMU has also significantly complicated the euro-crisis measures.

Keywords

Euro-crisis law, differentiated integration, constitutional law, Six Pack, Fiscal Compact.

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Introduction¹

During the Eurozone crisis and the further integration of the Eurozone Member States (MS), the gap between the so-called ‘ins’ and the ‘outs’ has increased. It is argued in this paper that the Eurozone crisis and euro-crisis law have made the differentiated status of European integration substantially more complex. On the one hand, the Eurozone crisis has led to different obligations among Eurozone MS, the conditionality imposed on Greece, Ireland and Portugal being a prominent example.² On the other hand, euro-crisis law has led to a unique patchwork of different legal obligations applying to the non-Eurozone MS. This unique patchwork and the legal issues and questions following from it will be the topic of this paper.

This paper analyses the legal position of non-euro MS. It approaches these ‘outs’ as a distinct group, notwithstanding the differences between them. The official status of the MS within this group differs, with the special positions of UK and Denmark in relation to EMU being regulated in separate protocols. But also the group of MS with a temporary derogation is less than uniform, with regard to both their legal obligations and their desire to join the euro. Indeed, it seems that this group is best defined in the negative: they are MS who are *not* a member of the Eurozone.

Section 2 will firstly briefly provide a legal and historical overview of differentiation in the field of EMU. Section 3 will then give an overview of the different obligations of non-Eurozone MS following from euro-crisis law. In section 4 a number of specific legal questions will be discussed that relate to non-Eurozone MS and that have emerged in particular during the Eurozone crisis. A distinction will be made between questions that relate to the current derogation situation of these ‘outs’ (section 4.1), to the possible moment of entry into the Eurozone (section 4.2), and finally to the period after adoption of the euro (section 4.3). Section 5 will conclude.

A few comments before proceeding to the main text; firstly, the composition of the group of non-euro MS has changed during the euro-crisis. Estonia, Latvia and Lithuania have joined the Eurozone and thus left the group, whilst Croatia joined the EU without joining the Eurozone (yet). Whereas attention is warranted for the first two countries because their experiences might foreshadow the path of other MS who want to become an ‘in’, Croatia will receive little attention in this paper because it was not involved in the construction of EU measures, nor has it implemented the relevant measures; at least little information was available. It must further be noted that the country-reports – on which this paper largely builds – were not yet available for Denmark, Lithuania and Bulgaria.

Secondly, whilst the euro-crisis is usually thought to have started in 2010, three non-euro MS already requested assistance during the financial crisis of 2008. The EU provided balance of payments assistance to Latvia, Hungary and Romania. This would not fall under the euro-crisis and therefore not under the purview of this Article, but it is impossible to accurately assess the reforms implemented in these countries without taking account of these events.

Finally, the Eurozone crisis raises institutional questions relating to variable geometry, such as the desirability of a Eurozone assembly, and the possibility to use EU institutions outside the treaties to the benefit of a limited number of MS.³ These institutional questions – although certainly relevant - are

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² Another difference is the initial Slovakian opt-out from the Greek aid package. See the report on Slovakia prepared by Tomas Dumbrovsky for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under IV.1. All the country-reports referred to in this paper are available at the project website: www.eurocrisislaw.eui.eu.

³ See on these questions e.g. P. Craig, ‘Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance’, (2013) 9 *European Constitutional Law Review*; S. Peers, ‘Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework’, (2013) 9 *European Constitutional Law Review*; T. Beukers, ‘Flexibilisation of the Euro Area: Challenges and Opportunities’, (2014) EUI Working Papers, MWP 2014/1; D.

not the subject of this paper, as the paper focuses on legal issues and questions in specific member state(s) (reports). The issue of the use of Union institutions by MS outside the EU legal framework is only relevant here insofar as it hardened the resolve of some non-euro MS – particularly the UK – to oppose the Fiscal Compact.

EMU and differentiated integration

Differentiation has been present in all phases of European integration, and its theory and practice have received plenty of scholarly attention.⁴ In the development of differentiation, the Treaty of Maastricht takes a special position because it sowed the seeds for a deep and continued form of differentiation in the field of monetary policy and related to that, in economic policy.

The split between the ins and the outs in EMU occurred for two reasons. Firstly, it was recognized that the (economic) benefits of membership of a single currency area rested on partly different dynamics than the benefits of membership of the economic area of the European Community. The former requires a higher level of convergence of some key economic indicators. Hence, it was decided that only MS who met certain economic standards could adopt the euro. The other reason was the opposition of the UK towards the project of monetary integration. From the beginning of the negotiations it was clear that the UK would not want to join the single currency and even wanted to block it coming into existence. For monetary integration to progress, the UK had to be given an opt-out. In response to the rejection of the Maastricht Treaty in a referendum in Denmark, that country also received a special status in relation to EMU in a protocol attached to the treaty, albeit under slightly different terms than the UK.

So it was envisioned that not all MS would make the jump to monetary union. For this group the term MS with derogation was introduced in the EC Treaty. This derogation had different effects within the economic part of EMU and for the monetary side. Whereas most provisions on economic union are applicable to the MS with a derogation, the important provisions on monetary union are not. With regard to the multilateral surveillance procedure and the excessive deficit procedure (EDP) described in Articles 121 and 126 TFEU respectively, only the sanctions mentioned in the EDP are not applicable to MS with a derogation.⁵ For example, this means that the no bailout clauses in Articles 123-125 TFEU are applicable to them. For the monetary union, MS with a derogation are not bound by the tasks and obligations of the ESCB, acts of the ECB and the issuance of the euro.

From the Treaty the idea clearly arose that the split in integration would be temporary, save for the UK and later Denmark.⁶ Early on, however, it became clear that that was not a realistic assumption. Sweden held a referendum in 2003 about whether the country should try to join the euro; the proposal was rejected. Many European lawyers have argued that Sweden's refusal to join the Exchange Rate Mechanism (ERMII) – which is necessary before joining the euro – was a violation of EU law.⁷ Whereas Denmark had required a protocol to specify its position before ratifying the Maastricht Treaty, Sweden used the convergence criteria to accomplish a similar feat. There is thus a wide gap

(Contd.)

Curtin and C. Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?', forthcoming in B. de Witte, E. Vos and A. Ott (eds.) *Between Flexibility and Disintegration: The State of EU law today*, Edgar Elgar Publishing, 2015.

⁴ M. Avbelj, 'Differentiated Integration—Farewell to the EU-27?', (2013) 14 *German Law Journal*; B. De Witte, et al., 'The many faces of differentiation in EU law', (Intersentia, 2001).

⁵ Also excluded are the broad economic policy guidelines from art. 121(2) TFEU that concern the euro area generally. See art 139 TFEU.

⁶ Art 140 TFEU.

⁷ Most prominently J.-V. Louis, 'The Economic and Monetary Union: Law and Institutions', (2004) 41 *Common Market Law Review*, 603-605.

between the political and legal realities. The different treaties of accession after 1993 stress the legal obligation for new MS, but make no further effort to bridge the gap with the political reality.⁸

A further change in the framework of euro-differentiation was the introduction of Chapter IV of Title VIII to the Lisbon Treaty, which is titled: “Provisions specific to MS whose currency is the euro”. This treaty chapter includes Article 136, which mandates secondary legislation to strengthen the coordination of budgetary surveillance of the MS and to set economic policy guidelines for them.⁹ The innovative element is that instead of the application of certain provisions being excluded for MS with a derogation, these provisions are made only applicable to MS whose currency is the euro.

General issues in the relation between non-euro Member States and euro-crisis measures

This section briefly describes the main aspects of euro-crisis law and its pertinence for non-euro MS.

Financial assistance mechanisms

Financial support to MS in economic difficulties has taken many shapes during the crisis. In many of the instruments there was no financial contribution by non-euro MS. However, the financial assistance packages to Ireland and Latvia consisted partially of bilateral loans from the UK and Sweden in the case of Ireland in 2010, and Sweden, Denmark and Estonia in the case of Latvia in 2008. Although for the contributing MS the internal procedures for deciding on the assistance may have differed, no constitutional problems seem to have arisen. The EFSM does concern non-euro MS, as it was created through a regulation binding all EU MS, and the loans issued under it are guaranteed by the EU budget, for which all MS are responsible. The EFSF, which was created in the same weekend as the EFSM in May 2010, is a temporary special purpose vehicle, created outside the framework of the EU treaties by the euro area MS. When Estonia joined the euro in 2011 it also joined the EFSF. In 2012 the ESM had come into force with the purpose of replacing the EFSF, so upon entry into the Eurozone in 2014, Latvia only joined the ESM. Lithuania in January 2015 similarly joined both the euro and the ESM.

Although non-euro MS are not parties to the ESM Treaty, its creation was nevertheless relevant for them independently of a future membership of the euro area because an amendment to Article 136 TFEU was supposed to precede its coming into force. Although the amendment only addresses euro MS, it required approval by all the MS in accordance with the simplified revision procedure of Article 48(6) TEU. The text of the amendment is furthermore interesting for non-euro MS, as it allows the euro area MS to create a stability mechanism, prompting questions about obligatory accession into the ESM upon entry into the Eurozone (see below).

Fiscal and economic governance

Whereas the first leg of euro-crisis law consists of a collection of mechanisms to provide financial stability, the second leg consists of measures to strengthen the fiscal and economic governance in EMU. The Six Pack is one of the most important parts of this leg and consists of one directive and five

⁸ See for example the treaty of accession of 2003 for the accession of 10 new MS in 2004, Article 4: ‘Each of the new MS 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 EC Treaty.’

⁹ See for a critical appraisal of the introduction of this provision: F. Amtenbrink and J. De Haan, “Economic governance in the European Union: Fiscal policy discipline versus flexibility”, 46 CML Rev. (2003), p. 1075-1106.

regulations adopted in 2011.¹⁰ The acts are based on Articles 121, 126 and 136 TFEU and therefore follow the structure previously set out about the applicability, following the contents of each of the acts.

Regulations 1173/2011 and 1174/2011 are not applicable to non-euro MS, as these regulations set up the system of fines and interest-bearing deposits that accompany budgetary surveillance and the macro-economic imbalances procedure respectively. These regulations are based also on Article 136 TFEU and therefore cannot be applicable to non-euro MS. Only partially applicable to non-euro MS are Regulation 1175/2011 and Regulation 1177/2011, which amend the preventive and corrective arms of the Stability and Growth Pact. These regulations have many provisions that are only applicable either to ‘participating’ or ‘non-participating’ MS, for example in relation to the Stability or Convergence programmes MS have to submit and the procedural steps that are involved in sanctioning non-compliance, respectively. It is furthermore noteworthy how Regulation 1175/2011 (in line with the reform of the SGP in 2005) differentiates with regard to the setting of the Medium Term Budgetary Objective (MTBO). Euro-MS and MS participating in ERMII, must set their MTBO on or below 1% of government deficit to GDP, whilst for the other MS there only has to be a safety margin before the infamous 3% mark is hit. This has resulted in a differentiated application of the economic governance rules to non-euro MS: those who participate in the ERMII and those who do not.¹¹ Fully applicable to non-euro MS are Regulation 1176/2011 and Directive 2011/85. Regulation 1176/2011 sets out the mechanism on the prevention and correction of macro-economic imbalances and deepens the system of multilateral surveillance of Article 121 TFEU. Directive 2011/85 sets out the requirements of budgetary frameworks of the MS and complements the excessive deficit procedure (Article 126(14) TFEU). It includes obligations to maintain a system of reliable macroeconomic forecasts, the use of fiscal rules, a medium-term budgetary framework and an independent fiscal council.

As a result of the protocol on its special position in EMU, the UK is exempted from several obligations in the Six Pack, most notably those on fiscal rules and the fiscal council in Directive 2011/85.

The Fiscal Compact builds upon the rules of the Six Pack. This international treaty, which entered into force on January 1, 2013, was created after it became clear that the UK would block an EU Treaty amendment that would oblige Eurozone MS to adopt a constitutional ‘golden rule’.¹² A weaker version of this obligation is now included in Title III of the Fiscal Compact. The UK, Croatia and the Czech Republic are the only MS that are not parties to the Treaty, and the Czech Republic has announced it will join soon. For non-euro MS who have joined, only Title V of the Treaty (on participation in Eurozone summits) is applicable to them, meaning that the ‘golden rule’ of Article 3(2) does not apply to them, unless a MS submits that it intends to be bound by other parts as well. Once a non-euro MS joins the euro, the whole Treaty will automatically apply to it.

¹⁰ Regulation (EU) 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 [2011] OJ L306/1; Regulation (EU) 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 [2011] OJ L306/8; Regulation (EU) 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 [2011] OJ L306/12; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) no. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the MS [2011] OJ L306/41.

¹¹ Also see Regulation 1176/2011 Articles 9(3) and 13(3).

¹² B. De Witte, 'Using International Law in the Euro Crisis: Causes and Consequences', (2014) ARENA Working Paper, 2014/4.

The euro-plus-pact was adopted in 2011 to foster competitiveness and employment and to improve the sustainability of public finances. It contains policy suggestions in fields that largely fall under the competence of the MS. The participating MS nevertheless promised to report on their implementation in their National Reform Programmes and Stability Programmes in the context of the European Semester. The pact was agreed to in the context of a European Council, when the participants ‘switched hats’. It is not an international treaty and lacks legally binding force. Hungary, the UK, the Czech Republic and Sweden did not join the pact.

Specific legal questions resulting from euro-crisis law for non-euro MS

In this section a number of specific legal questions are discussed that relate to non-Eurozone MS and that have emerged in particular during the Eurozone crisis. A distinction is made between questions that relate to the current derogation situation of these ‘outs’ (section 4.1), to the possible moment of entry into the Eurozone (section 4.2), and finally to the period after adoption of the euro (section 4.3).

Issues relating to the derogation period

New fiscal governance in the non-euro Member States

As set out in section 3, crucial parts of the six-pack are applicable to non-euro MS. These rules potentially have a significant constitutional impact. This section looks at some changes in fiscal governance in non-euro MS. A first thing to notice is that almost all MS researched in this paper have been active in some way in reforming their fiscal policy framework over the last five years, approximately.¹³ Multi-annual planning is usually at the forefront, as is the use of explicit fiscal targets. Not all (proposed) reforms take full account of six-pack obligations.

In Poland, the Constitution of 1997 enshrines a debt limit of 60% and prohibits Parliament from suggesting amendments to the proposed budget of the Government that would lead to a higher deficit.¹⁴ These constitutional obligations were further operationalized in secondary legislation, such as the Public Finance Act of 2009, which was amended in 2011 and again in 2013. This legislation sets out progressively stricter steps to be taken when public debt approaches the 60% limit.¹⁵ The latest reforms limit government expenditure growth on a year-to-year basis and cap the deficit. The act also defines the process for multi-annual budgetary planning. Given the existing (constitutional) budgetary framework in Poland, it is not surprising that the latest reforms hardly raised fundamental questions.

This was different in the Czech Republic, where a proposed set of constitutional amendments is awaiting adoption.¹⁶ The ‘Fiscal Constitution Bill’ was proposed in 2012 by the government, partly to implement the obligations from the Six Pack, partly in relation to future obligations arising from the Fiscal Compact. The political opposition contested the proposed constitutional amendments and a change in government therefore also put the adoption of the amendments on hold. Part of the discontent with the amendments is the result of fear of loss of parliamentary discretion in deciding on taxes and expenditures.¹⁷ The proposed amendments would create a ‘debt-brake’, i.e. obligatory corrective measures to be taken when public debt reaches a certain level, ranging from 45-60%. The

¹³ At least the following: Sweden, Poland, Czech Republic, UK.

¹⁴ See the Report on Poland prepared by Granat for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under II.1 (available at eurocrisislaw.eui.eu).

¹⁵ See Granat, Report on Poland, under III.3.

¹⁶ See the Report on the Czech Republic prepared by Dumbrovsky for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under III.2 (available at eurocrisislaw.eui.eu).

¹⁷ Ibid.

amendments would also introduce the obligation for all decentralized public authorities to work within a multi-annual budgetary framework (which is already applicable to the central government). Given the existing constitutional division of powers, the imposition of this obligation requires constitutional revision.¹⁸

In Sweden, there already existed a fiscal policy framework that contained many of the elements that would later be part of the Six Pack, such as a fiscal council and a multi-annual budgetary framework, which is binding upon the government in the preparation of the budget, and a surplus fiscal target for the central government. Parts of this fiscal policy framework were not binding legal rules, but ‘well-established practice’.¹⁹ The budget committee, consisting of members of all political parties and tasked with evaluating the necessary changes in light of the Six Pack, stated on the one hand that the practice might be viewed as ‘sufficiently binding’, but on the other hand that a constitutional change might be introduced to ‘better reflect’ some practices.²⁰ Only minimal legislative changes, relating to economic and budgetary forecasting, have been adopted so far.

The impact of the new European economic governance expands beyond the Six Pack obligations on the budgetary framework of the MS. Also, the new macro-economic imbalances procedure can have a significant impact on non-euro MS. When the Commission, after an in-depth review, and the Council conclude that an excessive imbalance exists, specific corrective actions are suggested to the MS, which shall submit a corrective action plan in response. Even without the threat of sanctions this can have a substantial impact on the economic governance of the non-euro MS. The topics under investigation in the economic reviews and recommendations furthermore appear to be of an open-ended nature, as evidenced by a country specific recommendation to Hungary in 2013 to address concerns about the independence of the judiciary.²¹

The application of some parts of the Six Pack to non-euro MS raises questions about legitimacy and subsidiarity. What is the necessity of applying these measures to this group of MS, which does not have the euro as its currency? Some measures can be considered to be common sense, such as multi-annual planning, but other measures can be politically contentious, such as the Medium Term Objective of government deficit or the creation of a fiscal council. It is clear that these far-reaching obligations reflect the existing obligations of non-Eurozone MS under Article 121 and 126 TFEU; already before the crisis non-Eurozone MS were bound by many rules and obligations of economic union (again, with the exception of sanctions). Nevertheless, given the fact that the split between the ins and outs is likely to continue to exist in the near future, and since in many MS the budget is a primary tool for exercising democratic control, it is not at all clear whether the invasive measures are indispensable for non-euro MS.

The decision to be bound by (almost) the entire Fiscal Compact

Member States that already took this decision (and why):

The Fiscal Compact provides a good illustration of the predominant approach of ‘outs’ to further integration of the ‘ins’. On the one hand, ‘outs’ prefer not to accept far-reaching obligations relating to the single currency until they actually join the euro. On the other hand, they fear being excluded from important institutional settings in which decisions are made on the current and future governance of

¹⁸ Ibid., under VII.1.

¹⁹ See the Report on Sweden prepared by Södersten for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under II.1 (available at eurocrisislaw.eui.eu).

²⁰ Ibid., under VII.1. There was one dissenting opinion from the Left Party.

²¹ Council Recommendation of 9 July 2013, C 217/37. The recommendation can be found here: www.ec.europa.eu/europe2020/pdf/csr2013/hungary/csr2013_council_hungary_en.pdf (last accessed 12 May 2015). We thank Emmanuel Mahieux for bringing this Country Specific Recommendation to our attention.

the euro.²² In the case of the Fiscal Compact this has resulted in the fact that Title III, which arguably is its most important and far-reaching part, is binding only on Eurozone MS and on those ‘outs’ that explicitly decide to be bound by it,²³ while the institutional Title V on Euro Summits (‘Governance of the euro area’) is binding – read: provides entitlements – on all contracting parties (see on this latter issue section C below).

Nonetheless, there are exceptions to this general approach. Three non-Eurozone MS for example have already decided to become bound by extra parts of the Fiscal Compact even before joining the euro. Romania and Denmark have decided to be bound by the entire Fiscal Compact, also meaning the optional Titles III (including the obligation to adopt a Balanced Budget Rule) and IV (on economic policy coordination and convergence), whereas Bulgaria has decided to be bound by Title III.²⁴ This creates an interesting case of differentiation among outs in terms of legal obligations. Why have three outs decided to be bound early by these optional titles? In particular, why have Bulgaria, Romania and Denmark decided to be bound by the important Balanced Budget Rule, which touches upon fundamental national constitutional issues? If they felt pressure to do so, it is not the pressure put for example on Ireland²⁵ through the condition posed for ESM support of ratification of the Fiscal Compact and fulfilment of the requirements related to the Balanced Budget Rules (fiscal responsibility for solidarity),²⁶ as Romania, Bulgaria and Denmark do not qualify for ESM support until they join the euro and the ESM.

In the case of Romania the decision to be bound by the entire Fiscal Compact seems to have been taken solely by President Băseșcu,²⁷ and has been the subject of fierce criticism.²⁸ In the initially proposed mandatory amendment of the constitution to implement the Balanced Budget Rule he is said to have seen an opportunity to ‘open’ the Constitution for amendment. This would have created a possibility to operationalise the positive results of the November 2009 referendum. The proposals that were then put to a referendum, including a unicameral Parliament with 300 seats, had not yet been put in place because of lack of political support in the Parliament.²⁹ Băseșcu’s support for the Fiscal Compact was further bolstered by his conviction that it represented a necessary step towards European integration, rather than an intrusion into national sovereignty.³⁰

In the end, however, Romania decided to implement the Balanced Budget Rule through an ordinary law,³¹ even though it can be argued to follow from the Romanian system of legal sources “that, in order to comply with the provisions of Article 3 (2) of the Fiscal Compact, in Romania the amendment of the Constitution would have been imminent” (sic).³²

²² What is telling is the Polish position on sovereignty in relation to the Fiscal Compact: The Polish Secretary of State in the Ministry of Foreign Affairs in reply to concerns that the Fiscal Compact limits the sovereignty of Poland stated that sovereignty for Poland means having an impact on the institutional, social and economic architecture of the EU. See Granat, Report on Poland, under IX.3.

²³ On the Polish intention not to be bound by the optional Titles of the Fiscal Compact before entry into the euro area, see extensively Granat, Report on Poland, under IX.3.

²⁴ On the basis of Article 14(5) Fiscal Compact.

²⁵ See the Report on Ireland prepared by Coutts for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department (available at eurocrisislaw.eui.eu).

²⁶ ESM Treaty, preamble nr. 5.

²⁷ See the Report on Romania prepared by Vita for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under IX.1 (available at eurocrisislaw.eui.eu).

²⁸ *Ibid.*, under IX.3.

²⁹ *Ibid.*, under IX.1.

³⁰ *Ibid.*, under IX.5.

³¹ *Ibid.*, under IX.4.

³² *Ibid.*, under IX.4.

In the absence of a country report on Denmark and Bulgaria, we resort to other sources to highlight some factors that may have determined active participation in the negotiations on the Fiscal Compact, as well as the decision to be bound by optional Titles of the Treaty.³³ In the case of Bulgaria, it is clear that the national preoccupation was not at all with strong fiscal governance (Title III), but very much present with regard to economic policy coordination (Title IV). Thus, there is a strong resistance to commitments for harmonisation of the Bulgarian tax policy, and the concepts of coordination and convergence are considered too vague.³⁴

Among the relevant factors determining the Danish decision to be bound by the entire Fiscal Compact may be the fact that an important part of the treaty negotiations took place under the 2012 Danish Presidency of the EU, and it was also signed under its Presidency. Another element may be the traditional Danish approach to budgetary discipline. Certainly, the successful attempt to downgrade the initial obligation to amend the constitution so as to adopt provisions with 'binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to' (Article 3.2 Fiscal Compact) also made it easier to decide to be bound at an early stage. Amendment of the constitution in order to comply with the Fiscal Compact would have hardly been feasible in Denmark.

Still, even among the outs that decided to be bound early by optional Titles of the Fiscal Compact, Denmark remains an interesting case, because it has a permanent opt-out. The Danish approach to the Fiscal Compact can be interpreted as an indication that Denmark's political elite may be much closer to adoption of the euro than the other permanent out, the UK.³⁵

Legal questions debated in Member States relating to a possible decision to be bound before joining the euro

The Fiscal Compact provided all Contracting Parties with a choice: how to assess the obligations arising from the Treaty? And what conclusions can be drawn from this in terms of the ratification procedure? The nature of the obligations of a Treaty is often a determining factor for the procedure of ratification. For the non-Eurozone MS there is, however, an extra dimension to these choices, since the obligations under the Treaty will change depending on future events.

Generally, treaties that transfer sovereign powers to an international organization require larger majorities in parliament, or even a referendum. For the Fiscal Compact this leads to the following question: has the treaty been ratified in light of the future obligations that can arise from it, or has it been ratified only in light of mandatory Title V of the treaty? And especially in the latter case, what procedure should be followed in case a Member State decides to be bound by other parts of the Fiscal Compact?

These are relevant questions for a number of reasons. Firstly, the Fiscal Compact obviously leaves the decision on how to ratify the treaty and whether to be bound by the entire treaty to the Contracting Parties. Secondly, an automatic transition of obligations occurs under the Fiscal Compact when a Member State joins the euro. Thirdly, this is combined with a Treaty obligation for MS with derogation to try to join the euro (more on this later). Finally, the nature of the commitments under the

³³ See e.g. Derek Beach, 'The Fiscal Compact, Euro-Reforms and the Challenge for the Euro-Outs', Danish Foreign Policy Yearbook 2013, p. 113-133.

³⁴ 'Parliament okays Bulgaria's participation in EU fiscal compact, but without harmonisation of tax policy', 28 January 2012, available at: http://3e-news.net/en/economy/parliament-okays-bulgaria-s-participation-in-eu-fiscal-compact-but-without-harmonization-of-tax_13140 (last accessed 12 May 2015).

³⁵ In fact, Danish Prime Minister Thorning-Schmidt has clearly advocated Danish membership of the euro area. See e.g. Henriette Jacobsen, 'Danish PM says country should join the euro', *Euractiv*, 21 February 2014, available at: <http://www.euractiv.com/euro-finance/danish-pm-country-join-euro-news-533661> (last accessed 12 May 2015).

Fiscal Compact is fundamentally different under optional Title III (Fiscal Compact) and mandatory Title V (Governance of the euro area).

So how did the ‘outs’ approach these matters? With regard to the three non-euro MS that have already decided to be bound by optional titles of the Fiscal Compact, it is interesting to note that Bulgaria, Denmark and Romania all ratified using only a simple majority procedure in Parliament.³⁶ This illustrates that several non-euro MS (like several Eurozone MS)³⁷ have considered, in an overall assessment of the Fiscal Compact, that the obligations following from this treaty do not justify using a special majority for its ratification.

The Hungarian Government initially took the position that it was in the power of the government to ratify the Fiscal Compact, as there is no transfer of powers to the EU. The Hungarian Constitutional Court overruled this statement, on the grounds that the Fiscal Compact transfers powers in connection to the founding Treaties of the EU.³⁸ As a result, the treaty required a two-third majority in parliament.³⁹ It is unclear what (parliamentary) procedure would have to be followed before Hungary could declare itself bound by any other chapter of the Fiscal Compact.

In Poland, opposition members from both chambers of parliament also argued that a two-third majority was required, as it had been for the Accession Treaty to the EU and the Lisbon Treaty.⁴⁰ It was stressed however by the rapporteur in parliament that no competences are transferred and thus that only a normal parliamentary majority was necessary.⁴¹ The Government also stressed that it intended not to be bound by the rest of the Fiscal Compact. The treaty was ratified in accordance with the standard-procedure. A case brought before the Constitutional Court on this issue has been halted on procedural grounds.⁴² During the parliamentary debates, the government took the position that a declaration to be bound by other parts of the treaty would require a new ratification-procedure before parliament.⁴³

Sweden ratified the Fiscal Compact under similar circumstances to Poland. The Government argued that no competences were transferred and that a normal parliamentary majority was required for ratification.⁴⁴ Opposition members disagreed, but to no avail.⁴⁵ The Fiscal Committee also noted that before Sweden could declare itself bound by other parts of the Fiscal Compact, this would require further approval from parliament (supposedly with a three-quarter majority).⁴⁶ Some members of

³⁶ On the Report on Romania prepared by Vita for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under IX.2 and IX.8 (available at eurocrisislaw.eui.eu). For Denmark and Bulgaria see the Table provided by the EP, ‘Table on the ratification process of amendment of Art. 136 TFEU, ESM Treaty and Fiscal Compact’, available at:

<http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/shared/Publications/Fiscal%20Treaty%20ESM%20Overview%20table/art.%20136,%20ESM,%20Fiscal%20compact%20ratification.pdf> (last accessed 12 May 2015).

³⁷ This was the case for example in Estonia, Italy, and the Netherlands.

³⁸ See the Report on Hungary prepared by Dojcsák for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under IX.4 (available at eurocrisislaw.eui.eu).

³⁹ *Ibid.*, under IX.4.

⁴⁰ See Granat, Report on Poland, under V.2.

⁴¹ *Ibid.*, under IX.3.

⁴² *Ibid.*, under IX.7.

⁴³ *Ibid.*, under IX.3 and IX.8.

⁴⁴ See Södersten, Report on Sweden, under IX.3.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

parliament argued that Sweden should receive an official opt-out from EMU before committing to the Fiscal Compact or Article 136(3) TFEU.⁴⁷

The fear of non-euro Member States of being excluded from important euro decisions

Non-euro area MS are traditionally excluded from meetings of the Eurogroup and its preparatory bodies (Eurogroup Working Group, EWG). The Fiscal Compact also entailed a further risk of being excluded at the highest political level, that of heads of state and government, because of the creation – or better yet: official recognition – of Euro Summits. In all of these euro area institutions important decisions are being taken and obligations are created by Eurozone MS that will equally apply to non-Eurozone MS once they join the euro.

In the first draft of the Fiscal Compact, non-Eurozone MS did not participate in Euro Summits, but were only kept closely informed. In the final adopted text the President of the Euro Summit is tasked with keeping all the outs informed of both the preparations and outcome of Euro Summits, thus including both the outs that ratified the Fiscal Compact and those that have not (read: the UK, Czech Republic and Croatia) (Article 12(6) Fiscal Compact). As a result of pressure from certain outs (including Poland, Denmark and Hungary) and helped by several ins that were wary of alienating certain natural allies (such as Germany and Finland), participation of non-Eurozone heads of state and government is provided for in Euro Summit discussions in certain specified circumstances (Article 12(3) Fiscal Compact).⁴⁸ In these instances, the British Prime Minister and his colleagues from the Czech Republic and Croatia are the only heads of government absent from the discussions.

Most prominent in its insistence on participation in Euro Summits has been Poland.⁴⁹ Donald Tusk threatened not to ratify the Fiscal Compact if non-Eurozone MS could not participate in Euro Summits.⁵⁰ Several other non-Eurozone countries supported Poland, including Hungary, which joined Poland in its calls to participate in Euro Summits.⁵¹ The possibility of a Polish participation in Euro Summits was finally emphasised as one of the main added values of ratification of the Fiscal Compact.⁵²

Another example related to possible exclusion is the fact that several non-Eurozone MS have, in particular, insisted on participation in negotiations on the creation and deciding on the main characteristics of the ESM Treaty. Thus, Latvia insisted on joining the extended meetings of Eurozone countries on the establishment and character of ESM; understandable considering its intention to join the euro soon after.⁵³ Also in the Polish national debate it has been emphasised that it actively participated in the discussions on the amendment of Article 136 TFEU and the related mechanism.⁵⁴

⁴⁷ *Ibid.*, under V.3 and IX.3.

⁴⁸ “The Heads of State or Government of the Contracting Parties other than those whose currency is the euro, which have ratified this Treaty, shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of this Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.”

⁴⁹ See the Granat, Report on Poland, under IX.1.

⁵⁰ BBC, ‘Euro summit tension over debt crisis plan’, January 30, 2012, available at: <http://www.bbc.co.uk/news/world-europe-16795673> (last accessed 12 May 2015).

⁵¹ See the Report on Hungary prepared by Dojcsák for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under IX.1 (available at eurocrisislaw.eui.eu).

⁵² See Granat, Report on Poland, under IX.3.

⁵³ See the Report on Estonia prepared by Laatsit for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under VIII.1 (available at eurocrisislaw.eui.eu).

⁵⁴ See Granat, Report on Poland, under V.1.

Issues relating to the decision to join the euro

Does euro-crisis law affect the obligation to join the euro?

As mentioned above, the Maastricht Treaty and the Accession Treaties included the obligation for non-euro MS to strive for admission to the Eurozone. It was also noted that this was a legal obligation, which did not correspond with political realities. In practice, MS only join the euro if and when they want to (and when they fulfil the convergence criteria). Until the euro-crisis, the situation was relatively clear: the law was clear; the political reality was equally uncomplicated. Euro-crisis law may greatly complicate the matter, however. In fact, the impact of Euro-crisis law on the obligation to join the euro has been subject to recent academic debate. Tuori and Tuori argue that now “the legal obligation to join must be considered desuetude.”⁵⁵ According to Majone “the view of monetary union as an obligation imposed by the dogma of the *acquis communautaire* seems increasingly outdated.”⁵⁶ What discussions have taken place in non-euro MS?

The Czech Government has contended that the obligation that was agreed to in 2004 is not the same as today.⁵⁷ Euro-crisis law has transformed (the legal framework of) the Eurozone to such an extent that the obligation has become invalid, so the argument goes. Opponents to entry into the Eurozone could go a step further by arguing that no-one is obliged to board a sinking ship, if one were inclined to see the current economic situation in the euro area as such. The opposite argument was voiced in Latvia, where the crisis was held up as one of the reasons – albeit not a legal one – for joining the Eurozone.⁵⁸

In Sweden, some members of parliament asked the government to negotiate an official opt-out from EMU before ratifying the Fiscal Compact and before approving Article 136(3) TFEU, thereby acknowledging the continuing existence of the obligation to join the euro.⁵⁹ However, the manner in which both Poland and Sweden have ratified the Fiscal Compact reinforces the emphasis on the political nature of the decision to join the euro in the future. In the assessment of how to ratify the Fiscal Compact, both countries only took current obligations into account, not those that will arise automatically upon entry into the Eurozone. This means that the full contents of the Fiscal Compact will be considered during the decision-making process on entry into the Eurozone, or when an earlier decision is taken on being bound by the other parts of the treaty. In other words, if entry into the Eurozone would be a decision over which the MS in question has no control, it would have been more difficult to argue for a ratification in which only part of the treaty is considered.

Issues relating to the period after adoption of the euro

Does joining the euro create an obligation to become a member of the ESM?

An interesting legal question that has been the subject of debate in several non-Eurozone MS is whether a Member State which joins the euro is automatically obliged to become a member of the

⁵⁵ Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) 193.

⁵⁶ Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?* (Cambridge University Press 2014) 47.

⁵⁷ See the Report on the Czech Republic prepared by Dumbrovsky for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under VIII.1 (available at eurocrisislaw.eui.eu).

⁵⁸ See the Report on Estonia prepared by Laatsit for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under III.9 (available at eurocrisislaw.eui.eu).

⁵⁹ See the Report on Sweden prepared by Södersten for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, Report on Sweden, under V.3 and IX.3.

ESM.⁶⁰ The EU Treaties do not explicitly provide for such an obligation. At the same time it should be mentioned that whether a member state will join the ESM is most likely to be determined more by political necessity than by a possible legal obligation to do so. Still, from a legal perspective it is relevant to see whether such a legal obligation can be – indirectly – constructed.

It seems that in no member state such an obligation is being explicitly denied. On the contrary, in Latvia the annotation to the Draft Law on the ESM states that euro area MS have to be members to the ESM.⁶¹ The government of Hungary has argued that the approval of Article 136(3) TFEU imposes no legal commitments on Hungary until it joins the Eurozone in the future.⁶² This must imply an obligation to join the ESM mechanism. Similarly, the Polish Undersecretary of state in the Ministry of Foreign Affairs has argued that the ESM Treaty will not bind Poland unless it joins the Eurozone.⁶³

Still, it is argued here that if the obligation exists, it can only be indirectly constructed. In the following a number of options are explored. Does the obligation to join the ESM follow from Article 136(3) TFEU? It is clearly not the case, as this Article only confirms the competence of MS (as opposed to the Union) to create a stability mechanism. It creates no legal obligation to do so – this is also the convincing position of the Polish Constitutional Tribunal⁶⁴ – making it difficult to base an obligation to join the ESM on this Article.

Does the specific formulation of Article 136(3) TFEU, which confirms the power of the MS to establish a stability mechanism within the euro area, change anything?⁶⁵ Does this formulation mean that the mechanism can only be in conformity with the Treaty if all euro area MS participate? And does this create an obligation for new members of the euro area to join the ESM, because if not the other members would not be in compliance with Article 136(3) TFEU? It is argued that constructing the obligation this way is too far-fetched.

Does an obligation to join the ESM fall under the conditions for the adoption of the euro under Article 139 TFEU and 140 TFEU, combined with the obligation to strive to join the euro? According to the Polish Constitutional Tribunal, the creation of the ESM did not change the conditions for the accession to the Eurozone, as the provisions on the derogation did not change.⁶⁶

Whereas it may not be entirely clear whether new euro MS should join the ESM, it is clear that the current members of the ESM cannot prevent them from acceding. Article 2 ESM Treaty states that membership shall be open to EU MS as from the moment of the abrogation of the derogation from adopting the euro.⁶⁷ New membership requires a change in the contribution key for the subscription of the ESM authorised capital stock that is annexed to the ESM Treaty. Article 11 ESM Treaty states that the contribution key shall be based on the key for subscription to the ECB capital, which is determined

⁶⁰ A further legal question is whether amendment of the Treaty through Article 136(3) TFEU implies an automatic ratification of the ESM Treaty. The Polish Undersecretary of State in the Ministry of Foreign Affairs has explicitly denied this. Similarly, the Senator rapporteur from the governing majority on the ratification act, see Granat, Report on Poland, under V.3.

⁶¹ See the Report on Latvia prepared by Rasnača for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under question VIII.2 (available at eurocrisislaw.eui.eu). Latvia did not ‘join’ the EFSF nor first Greek aid package after it joined the euro.

⁶² See the Report on Hungary prepared by Dojcsák for the ‘Constitutional Change through Euro Crisis Law’ project of the EUI Law Department, under V.3 (available at eurocrisislaw.eui.eu).

⁶³ See Granat, Report on Poland, under V.3.

⁶⁴ *Ibid.*, under V.4.

⁶⁵ “The MS whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

⁶⁶ See Granat, Report on Poland, under V.4.

⁶⁷ Also see Article 44 ESM Treaty on the procedure of application of membership and approval thereof.

according to the procedures of articles 29, 48(3) and 28 of the Protocol on the Statute of the ESCB and of the ECB, which is annexed to the EU treaties.⁶⁸ This means that the contribution key is calculated on the size of the population of a MS, as well as the size of its economy. There is thus no legal ground to refuse membership of a new Eurozone MS. As assistance from the ESM is dependent on the ratification and implementation of the Fiscal Compact, it must also be noted here that membership of the latter treaty is open to all EU MS, without any legal possibility for current MS to block new members.⁶⁹

Conclusion

Differentiated integration is very likely to stay a permanent feature of EMU. This paper has made a start by analysing the effects of a set of euro-crisis measures on non-euro MS. A first conclusion is that the differentiated nature of EMU has greatly complicated the euro-crisis measures. The Six Pack is an almost incomprehensible set of legislation. Secondly, the interests of the group of non-euro MS are divergent, making the claims from this group towards EMU difficult to assimilate. Some want to stay as close as possible to the developments of the Eurozone, whilst others want to impede the introduction of new measures. These positions are closely related to the desire to join the euro in the near future, or not. As always, unpredictable national politics can – quite rightly – make negotiation at the European level more difficult. Thirdly, euro-crisis law impacts on non-euro MS constitutional law. Even if not directly, the cascade of measures influences the constitutional balance of power in MS by strengthening the position of experts in fiscal councils, by improving the reliability of statistics in the budgetary process and by favouring certain types of policies over other in the macro-economic imbalances procedure and the euro-plus-pact. Whereas in the Maastricht Treaty the excessive deficit rules imposed from the outside an obligation with a certain objective, euro-crisis law dictates to MS not only the objective of sustainable economic policy through coordination and convergence, but also the methods and procedures to achieve that goal.

Future measures in EMU will have to take the difficult status of a large group of ‘outs’ into account. As the developments in EMU are far from over, as witnessed by some recent plans for a European New Deal, the interests of non-euro MS will have to be taken into account. So, as more and more of Europe’s constitutional dilemmas centre around euro-governance, differentiation will take up a more important place in the study of EU constitutional law.

⁶⁸ This strongly implies that the ESM board of governors (the Ministers of Finance of the Eurozone MS) may not deviate from the ECB contribution key.

⁶⁹ See the fifth recital of the preamble of the ESM Treaty and Article 15 of the Fiscal Compact.

