The integration of the Fiscal Compact into EU law

Recent weeks have seen the emergence of a debate in Italy and within the European institutions[1] on the advisability of halting the integration into the European legal framework of the Fiscal Compact, or more specifically Title III of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed in Brussels on 2 March 2012 by 25 (out of the then total of 27[2]) EU Member States and in force since January 2013. As an intergovernmental treaty, the TSCG formally does not form part of the European legal framework. Note that the "transfer" of a set of measures from a treaty signed by the contracting parties as subjects of international law to the EU legal framework is not exceptional (for example, the provisions of the Schengen Agreement, followed a similar path).

The TSCG incorporated a number of fiscal rules already introduced in EU law and committed the contracting States to transposing the structural balance rule into binding provisions in national law at a high level in the hierarchy of legislative sources (preferably constitutional).[3]

In the current debate, the possibility of a proposed amendment of the substance of the TSCG is linked to a clause in Article 16 of the Treaty,[4]

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[1] The "Reflection paper on the deepening of the economic and monetary union" published by the European Commission on 31 May this year, in addressing the strengthening of the architecture of the European monetary union, explicitly cites the issue of integrating the TSCG into European law.

[2] At the time, Croatia was not yet a Member State.

[3] Italy complied with these provisions with the approval of an amendment of Article 81 of the Constitution (Constitutional Law 1 of 2012).

[4] Article 16 of the TSCG recites: "Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union".

which provides for taking the necessary steps – within 5 years of entry into force and on the basis of an assessment of the experience with its implementation – to integrate the substance of the Treaty into the legal framework of the European Union.

This provision incorporates a proposed amendment submitted by the European Commission and the European Parliament during the Treaty negotiations, in which the EU institutions participated as observers. The amendment reflected the unhappiness of the European institutions with the decision-making process – intergovernmental, that is – which was adopted on that occasion to ensure that the fiscal rules involved were binding and "set in stone" in high-level legislation. Under the rules on the functioning of the European Union, the inclusion of these rules in EU law through amendments to the founding treaties would have required the unanimous approval of the Member States and the European Parliament. The clause in Article 16, known as a "rendez-vous clause", thus sought to limit the duration of the harm done to the Union's decision-making practices.

Examining certain interpretive issues concerning Article 16, a number of aspects deserve mention:

- the provision does not specify at which level of the sources of EU law the rules should be integrated. As noted above, inclusion in primary legislation would require an amendment of the Union's founding treaties and could only be achieved with the unanimous approval of all the Member States. It would therefore be theoretically possible for a single State to veto approval of the changes. If, however, transposition were effected through secondary legislation (Regulations), the ordinary EU legislative process would apply, where in general the European Parliament (whose members are elected directly) approves the legislation jointly with the Council (formed by the governments of the 28 Member States), using procedures involving majority approval. The initial onus of transposition would therefore lie on the European Commission (empowered to initiate legislation).

- the clause requiring action to be taken within five years to integrate the substance of the Treaty into the legal framework of the Union carries no penalties. Even more important, if no transposition takes place, the clause imposes no time limit on the "contractual" obligations undertaken in the agreement by the signatories of the Treaty. In other words, the "rendez-vous clause" is not a "sunset clause" limiting the temporal effectiveness of the Treaty to a specified period. As a result, if the rules in the TSCG are not, or are only partially, transposed into the European legal framework, they would continue to legally bind the contracting parties.

- international law generally permits a contracting State to withdraw unilaterally from an intergovernmental treaty. Any Member State that should exercise this

option would no longer be bound by the treaty's provisions. Nevertheless, that faculty is not unconditional but must be based on specific justifications. International law refers to a "clausula rebus sic stantibus", under which withdrawal from a treaty by a State must be justified by a fundamental change of circumstances compared with conditions at the time the treaty was originally signed.

- a detailed assessment of the substance of the TSCG, on the one hand, and European legislation (Regulations and Directives), on the other, finds that, with the exception of a number of limited provisions, the set of fiscal rules in the TSCG is already incorporated in the EU legal framework (see the Box).

In conclusion, as the rules included in the TSCG are already present (with the specified exceptions) in European law,[5] even if the Treaty is not transposed, the Member States would remain bound by the fiscal rules envisaged in the Treaty, as they are already included in EU law in legally binding provisions (Regulations and Directives already transposed into Italian law), although those measures would be of lower rank than the Union's founding treaties (and therefore subject to amendment by majority vote and open to a ruling of illegitimacy by the European Court of Justice if found to conflict with primary legislation). In addition, the signatories of the TSCG would remain legally bound by its provisions. The significance of the issue of incorporation pursuant to Article 16 of the TSCG therefore appears to be fairly limited from a legal point of view.

On a different – entirely political – plane lies the desire to foster a discussion of the object of transposition (i.e. the set of European fiscal rules) in order to amend the existing framework. This goal could be pursued through the debate over the transposition of the Fiscal Compact, but it could also proceed independently of the provisions of Article 16 of the TSCG.

[5] It is significant in this regard that the European Parliament itself, in a resolution of 2 February 2012 – i.e. following definitive approval of the TSCG – notes that "virtually all the elements contained in the new Treaty can be achieved, and to a large extent have already been achieved, within the existing EU legal framework and through secondary legislation, except for the golden rule, reversed QMV and the involvement of the ECJ" and that therefore incorporation within the "EU legal framework" should have focused on the latter three aspects.

Box – The fiscal rules in the Fiscal Compact and in European regulations

The most significant provisions of the TSCG are reproduced in the Union's two primary legislative instruments enshrining the Stability and Growth Pact, i.e. Regulations nos. 1466/97 and 1467/97, as amended first by the so-called six-pack of 2011[6] and subsequently to the entry into force of the TSCG, with the so-called two-pack of 2013.[7] In a more specific comparison of the rules of the TSCG and those already present or introduced following its entry into force in Regulations nos. 1466/97 and 1467/97, the only differences regard:

1) as part of the preventive arm,[8] the TSCG specifies the medium-term objective (MTO) in terms of the structural deficit of general government with a lower limit of 0.5 per cent of GDP, while in the six-pack that measure is set at 1 per cent;
2) the automatic corrective mechanism in the TSCG,[9] which the countries introduced in their legal systems on the basis of the common principles of the Commission, is not reproduced in the European Union legal framework.

Other provisions of the TSCG are not included in EU law but cannot be transposed owing to their specific nature. One example is the provision requiring the inclusion of the new fiscal rules in national legislation at a high and preferably constitutional level (Article 3, paragraph 2), which clearly cannot be included in a Regulation.

The same holds for the provisions of Article 7 of the TSCG – which calls for euro-area countries to commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure – a rule that cannot be transposed as it calls for a political (behavioural) rather than legal commitment.[10] Or the case of Article 8 of the TSCG, which permits the contracting parties to bring matters to the Court of Justice where a Member State fails to transpose the Treaty rules into its national law within one year of the entry into force of the Treaty. This cannot be transposed into EU law as the Commission has determined that all of the contracting parties had complied with the obligation to transpose the rules into national legislation within the specified time limit.

[6] The six-pack is a package of five Regulations – no. 1177/2011 (on speeding up and clarifying the implementation of the excessive deficit procedure), no. 1173/2011 (On the effective enforcement of budgetary surveillance in the euro area), no. 1174/2011 (On enforcement action to correct excessive macroeconomic imbalances in the euro area), no. 1175/2011 (On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies) and no. 1176/2011 (which amends Regulation no. 1466/97) on the prevention and correction of macroeconomic imbalances) – and a Directive (no. 2011/85/EU on requirements for budgetary frameworks of the Member States.

[7] The two-pack consists of two Regulations: no 473/2013 (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) and no. 472/2013 (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).

[8] These are multilateral surveillance procedures provided for in the Stability and Growth Pact that are intended to ensure – with the specification of parameters for budget planning and policies in normal economic times, taking account of cyclical developments in the economy – that the Member States adopt fiscal policies that are sustainable in the medium term.

[9] See Article 3, paragraph 1e).

[10] As clarified in Annex 6 of the *Vade Mecum on the Stability and Growth Pact* of the European Commission, 2017 edition.