The Fiscal Compact: Europe's Not Always Able to Speak German

On the Dutch Implementing Act and the Hazardous Interpretation of the Implementation Duty in Article 3(2) Fiscal Compact*

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Fiscal Compact: duty to implement balanced budget rule, automatic correction mechanism and independent budget supervisor in national law – The Netherlands: Act on sustainable government finances – Act does not bind the (budget) legislature – Conformity with the implementation duty in Article 3(2) Fiscal Compact? – The first reading of Article 3(2) – The second reading of Article 3(2) – The genesis of Article 3(2) – Recourse to (Dutch and French) monism?

Introduction

Putting the horses *before* the carriage and employing the national legal orders of the Eurozone states for monitoring and enforcement of compliance with the (structural) budgetary requirements of the European Union's economic and monetary union: that is the main objective of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, better known as the Fiscal Compact. Thus, the Fiscal Compact, one of the instruments to combat the euro

* The title refers to a speech of CDU parliamentary leader Volker Kauder at a party meeting in November 2011: 'Jetzt auf einmal wird in Europa Deutsch gesprochen, nicht in der Sprache, aber in der Akzeptanz der Instrumente (…) Ausgangspunkt der Krise sind nicht die Spekulanten, sondern dass wir uns nicht an Haushaltdisziplin gehalten haben in Europa', <www.youtube.com/watch?v=eUeuCIe9vkQ>; the quoted phrases are pronounced between 4:52 and 6:01 minutes. Thanks to LB for providing this reference.

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crisis, puts the often glorified constitutional autonomy of the EU into perspective.[1] It testifies to the understanding that ultimately, the European Union and its institutions are not capable of keeping the Eurozone states within the agreed budgetary parameters: the states have to do it themselves. To this end, the Compact obliges the contracting parties to anchor a balanced budget rule in their national law. They also must install an automatic correction mechanism, to be triggered in case of a significant deviation of the budget rule. Moreover, the Compact assumes the existence of an independent national budget supervisor. Therefore, if not yet existent, this supervisor will have to be created.

The Netherlands has a solid financial reputation. The underlying budgetary policy is a product of politics, not one of constitutional law. If one leaves aside European Union law, the freedom of the budgetary legislature under national constitutional law traditionally is unrestrained. The Fiscal Compact now seems to require a fundamental restructuring of the constitutional Dutch budgetary landscape. However, if one takes cognizance of the Act on Sustainable Government Finances (*Wet Houdbare Overheidsfinanciën*; hence: HOF Act),[2] the Act of Parliament implementing the Compact's budgetary arrangement, one notices that Dutch budgetary law has not changed that much.

This contribution examines the question whether the Netherlands has correctly implemented the budgetary arrangement of the Fiscal Compact. It consists of two parts, which in turn are divided into several sections each. The first part sets the scene. It focuses on the implementation of the balanced budget rule and the automatic correction mechanism in the HOF Act and analyses its legal effects. The second part deals with the different readings of Article 3(2) of the Fiscal Compact, in which the implementation duty is formulated. The contribution is rounded off with some concluding remarks.

Implementation of the compact's budget rules in the HOF Act

The invisible referral to the balanced budget rule

The Fiscal Compact's balanced budget rule does not come out of the blue. Although marginally stricter, as we will see, it is conceptually similar to the balanced budget rule which is contained in Regulation 1466/97 as amended by Regulation

[1] *See also* LB & JHR, 'Editorial: The Fiscal Compact and the European Constitutions: "Europe Speaking German"', *EuConst* (2012) p. 165.

[2] At the moment of this writing, the bill, as amended by the *Tweede Kamer* [Lower House], has not yet been passed by the *Eerste Kamer der Staten-Generaal* [Senate], but there is no doubt at all that it will pass shortly. For the text of what will become the HOF Act, *see Kamerstukken* [parliamentary papers] 2012-2013, 33 416, A; this text is definitive as the *Eerste Kamer* has no competence to amend bills; Art. 85 *Grondwet* (Netherlands Constitution).

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1175/2011 (hence: Regulation 1466/97); this regulation is part of the so-called Stability and Growth Pact.[3] The conceptual identity, and more generally the analogy between the budgetary arrangement in the Fiscal Compact and the rules in secondary Union law, lie at the basis of the way in which the Netherlands has implemented the Fiscal Compact.

In contrast to the more (in)famous 3% budget rule in the 12th Protocol 'on the excessive deficit procedure', the budget rules in Regulation 1466/97 and the Fiscal Compact do not relate to the *de facto*, but to the so called *structural* budget. This is the factual budget stripped of temporary measures and cyclical effects. The structural budget rules are of a preventive nature. They have to ensure that the states have a sustainable budget over the medium term and do not run up an excessive deficit, i.e., a *de facto* deficit of more than 3% gross domestic product (GDP). At the same time, these budget rules leave the member states a certain margin for investments and anti-cyclical policy in times of economic crises.[4]

Article 2a of Regulation 1466/97 prescribes that the Eurozone states have a medium term (budgetary) objective with a maximum structural deficit of 1% of GDP. In November 2012 the Dutch Government has set a medium term objective for the Netherlands with a maximum of 0.5% of GDP.[5] According to the Fiscal Compact, the budgetary position of the general government of the Eurozone states has to be balanced or in surplus.[6] This rule is deemed to be respected 'if the annual structural balance of the general government is at its country-specific medium-term objective as defined in the revised Stability and Growth Pact with a lower limit of a structural deficit of 0.5%'; the deficit may rise to 1% of GDP if the government debt is 'significantly below' 60% of GDP and 'risks in terms of long-term sustainability of public finances are low.'[7] The balanced budget rule in the Fiscal Compact is thus slightly more strict than the one in Regulation 1466/97 and the required medium-term objective for those states which have a government debt above 60% of GDP, such as the Netherlands at the moment, equals the current medium-term objective of the Netherlands.

The balanced budget rule in the Fiscal Compact not only needs to be adhered to by the Eurozone states, but also to be implemented in national law.[8] The

[3] Regulation 1466/97 is the so called 'preventive arm' of the SGP, which further consists of Regulation 1467/97, also amended in 2011 (the 'corrective arm') and a Resolution of the European Council. The Regulations by which Regulations 1466/97 and 1467/97 have been amended are part of the so called 'six-pack' , i.e., five regulations and one directive which have entered into force in November 2011 and which have tightened up the SGP considerably.

[4] Arts. 5(1)(10) and 6(3)(4) Regulation 1466/97; Arts. 3(1)(c) jo. 3(3) Fiscal Compact.

[5] Information provided by the Dutch Ministry of Finance to the author.

[6] Art. 3(1)(a) Fiscal Compact.

[7] Art. 3(2)(d) Fiscal Compact.

[8] Art. 3(2) Fiscal Compact.

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Netherlands has done so by a rather indirect referral to the rule in the HOF Act, an ordinary Act of Parliament. Since 1994 the Dutch budget is based on a so called 'trend-following budgetary policy' (*trendmatig begrotingsbeleid*). The crux of this policy is that the (authorized) expenditures for the various ministerial departments are maximized for a number of years and neither a financial setback nor a financial windfall allows for an increase of the expenditures. The HOF Act now makes it a legal obligation for the Dutch minister of finance to conduct such a policy as regards 'expenditures and receipts of the central government and the social funds.'[9] He has to do so in accordance with, among other things, not only the 3% of GDP rule from the 12th Protocol, but also with 'the [medium-term budgetary objective] for the structural EMU-balance in force.'[10] It is by this provision that the Fiscal Compact's budget rule is deemed to be implemented.

As is evident, this provision in the HOF Act does not quantify the balanced budget rule in the Fiscal Compact and it does not even refer to it directly: the implementation is based on the assumption that the Netherlands has a medium-term budgetary objective which conforms to the rule in the Fiscal Compact. The Dutch government has refrained from quantifying the rule in the name of flexibility: in its view, a referral to European budgetary demands without specifying them has the advantage that future changes in the Stability and Growth Pact, such as the tightening up of the rules in 2011, do not require amending the Act.[11] Whatever the merits of this reasoning[12] – to me it seems out of the question that the 0.5% of GDP rule will be tightened up even further in the future – it is hardly

[9] This policy as such is not defined in the HOF Act, only mentioned.

[10] Art. 2(3) HOF Act. The balanced budget requirement concerns not only the central government and the social funds, but also regional and local government (Art. 3(1)(a) jo. Art. 3(3) Fiscal Compact and Art. 2 of the 12th Protocol concerning the excessive deficit procedure). The HOF Act prescribes that the decentralized government bodies (*provincies* [provinces], *gemeenten* [municipalities] and *waterschappen* [district water boards]) and certain legal entities with a statutory task designated later by ministerial decision, have to put in an 'equivalent effort' as regards the respect of *inter alia* the medium-term budgetary objective of the Netherlands. After deliberation with (the representative organisations of) the decentralized government bodies, the minister of finance, in accordance with the minister of the interior and the minister for infrastructure and the environment, determines what is to be considered an 'equivalent effort' in general; the result is split out in a share for the *provincies* collectively, the *gemeenten* collectively and the *waterschappen* collectively (Art. 3). If the *provincies* collectively, the *gemeenten* collectively and the *waterschappen* collectively structurally disregard their share, sanctions may be imposed (Art. 6).

[11] *Kamerstukken* [parliamentary papers] 2012-2013, 33 416, nr. 3, p. 6.

[12] One of the anonymous reviewers of this text wondered whether the potential insertion of the balanced budget rule in the Act itself would not (indirectly) run counter to the ECJ's standing case law that a regulation may not be copied in national law (ECJ 7 Feb. 1973, Case 39/72). This because, as explained before, the Compact's budget rule is conceptually identical to the one in Regulation 1466/97. If this were the case, Art. 3(2) and with it the heart of the Compact would be contrary to EU law. This is an original and important argument, but here I leave it as it is.

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compatible with what the Dutch government, shortly after the conclusion of the Compact, considered to be the surplus value of the implementation in national law: enhancement of the 'visibility of the European budgetary arrangements at the national level' and of 'the national "ownership" of the European agreements': the required explicit acceptance of the rule by national politicians would emphasise that the entailing obligations are not a dictate of Brussels, but voluntarily entered into.[13] The HOF Act hardly can be said to have achieved these goals.

In the memorandum of explanation to the HOF Act, the Dutch government suggests that the HOF Act as a 'binding Act of Parliament […] guarantees that the principle of a balanced budget is respected during the budgetary processes.'[14] Now it must be admitted that the HOF Act is a binding act. When preparing the budget, the minister of finance (but not the government, see *infra*) is bound by the Act to do so in accordance with the Dutch medium-term objective, which supposedly conforms to the Fiscal Compact. But the HOF Act does not set out to bind the legislature and neither could it legally have done so. According to Article 105(2) of the *Grondwet*, the Dutch Constitution, the state budget is laid down by Act of Parliament and it is an unwritten principle of Dutch constitutional law that the legislature cannot bind itself (or its successor).[15] Therefore, even if the HOF Act would have stated that the government in the exercise of its legislative initiative or the legislature should comply with the 'the medium term budgetary objective for the structural EMU-balance in force', it would not have bound the Dutch government when introducing (budget) bills or the Dutch legislature when adopting the budget act (or when setting other rules concerning the revenue and expenditure of the state, as for instance in tax of social security legislation).[16]

[13] Letter of the Dutch minister of finance to the *Eerste Kamer der Staten-Generaal* [Dutch Senate] of 19 March 2012, Annex to *Kamerstukken* 2011-2012, 33 181, A, p. 12.

[14] *Kamerstukken* 2012-2013, 33 416, nr. 3, p. 6.

[15] A case in point is the decision of the *Hoge Raad* [Supreme Court] of 19 Nov. 1999, LJN AA1056 (Tegelen). Another case in point is the *Comptabiliteitswet* [Governments Accounts Act] which *inter alia* gives rules on (the presentation and contents of) budget acts. Both in theory and practice (later) budget acts can and do deviate from these rules; J. Mulder, *Comptabiliteitsrecht van het Rijk* [Acountability Law of the State] (Tjeenk Willink 1995), p. 34; J.L.W. Broeksteeg, 'Begrotingwet, indemniteitswet en slotwet. Over het rechtskarakter van enkele ongewone wetten' [Budget Acts, Indemnity Acts and Final Acts. On the Legal Character of Some Special Acts], in P.P.T. Bovend'Eert e.a. (eds.) *De Staat van wetgeving* (Kluwer 2009) p. 333 e.v.; *see also Kamerstukken* [parliamentary papers] 2012-2013, 33 4000 IX, nr. 3.

[16] According to Art. 81 *Grondwet,* acts of parliament are enacted by the government en the *Staten-Generaal* [both chambers of parliament] jointly. Both the government and the Lower House have the right to introduce bills (Art. 82 *Grondwet*), except when it comes to budget bills; their introduction is the prerogative of the government (Art. 105(2) *Grondwet*).

Now it must be added immediately that the budget legislature in the Dutch legal order is bound to the balanced budget rule by the Fiscal Compact itself, which is inserted in that legal order with (at least) supra-legislative ranking. This is due to the Netherlands' adherence to the monistic vision on the relationship between national and international law. We will come back to this later.[17] Here we will only conclude that the Dutch government's claim that the HOF Act itself (legally) guarantees that the balanced budget rule is respected during the budgetary processes simply is not correct; this conclusion is of relevance in view of our treatment of the question whether the Netherlands has correctly implemented the balanced budget rule. We will come to a similar conclusion as regards the automatic correction mechanism in the next section.

The HOF Act, independent budget supervision and the automatic correction mechanism

The Fiscal Compact also obliges the Eurozone to establish an automatic correction mechanism and to have an independent budget supervisor. These obligations are also deemed to be satisfied by the HOF Act. We will begin our discussion with the supervisor.

The Fiscal Compact presupposes the existence of institutions 'responsible at national level for monitoring the observance of the rules',[18] i.e of the balanced budget rule and the rules on the correction mechanism. According to the explanatory memorandum to the Act, this task is allotted to the Council of State (*Raad van State*), the government's most important (legal) advisor and also one of the Netherlands' (highest) administrative courts.[19] The Council's new task is not explicated in the Act, which only states that the Council's advice will have to be sought in case of any corrective plan (*herstelplan,* see *infra*). Advising on the budget is actually already one of the tasks of the Council of State, the seeking of whose advice is mandatory for every bill, so also for budget bills.[20] Furthermore, the Council of State may also of its own accord render advice if it deems this necessary.[21]At the same time, as we will see, the EU Commission and Council play an equally and perhaps even a more important role in this respect. Here the parallel between the budget rules in the Compact and those in secondary Union law which lies at the basis of the HOF Act again comes to the surface (see *infra*).

The correction mechanism has to be triggered automatically in case of 'significant observed deviations from the medium-term objective or the adjustment path

[17] *See* text around n. 76
[18] Art. 3(2) Fiscal Compact.
[19] *Kamerstukken* [parliamentary papers] 2012-2013, 33 416 nr. 3, p. 10.
[20] Art. 73(1) *Grondwet.*
[21] Art. 21 *Wet op de Raad van State* [Act on the Council of State].

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towards it'[22] – the Fiscal Compact does not demand of the Eurozone states that they immediately conform to their medium-term objectives; it is sufficient that they ensure rapid convergence towards these following a time frame to be 'proposed' by the Commission.[23] The correction mechanism has to include the obligation to implement measures to correct the deviations over a defined period of time[24] and shall be created 'on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, the size and the time-frame of the corrective action to be undertaken.'[25] The Commission has published these principles in the Annex to a Communication of 26 June 2012 (hereafter: the Communication).[26] The Compact further states that the correction mechanism has to fully respect the prerogatives of the national parliaments.[27]

Because the Commission is asked, among other things, to propose principles regarding 'the nature' of the corrective action to be undertaken, one would expect the Communication to hold principles on the 'kind' of measures with which a derailed budget should be corrected (for instance reduction of expenditures instead of raising income).[28] However such principles are lacking in the Communication (and also in the HOF Act), probably because they would have been difficult to reconcile with the obligation to fully respect the prerogatives of the national parliaments. Also such principles would have encountered an almost insurmountable constitutional obstacle in Germany,[29] at least if they had been binding. Now in this respect the Compact's text is ambiguous, but arguably this is not the case. Although Article 3(2) of the Compact states that the 'Contracting Parties shall put in place' the correction mechanism on the basis of the Commission's principles, the Commission is only given the competence to 'propose' the principles.[30] The

[22] Art. 3(1)(e) Fiscal Compact.

[23] Art. 3(1)(b) Fiscal Compact.

[24] Art. 3(1)(e) Fiscal Compact.

[25] Art. 3(2) Fiscal Compact.

[26] 'Common principles on national fiscal correction mechanisms', COM(2012) 342 final.

[27] Art. 3(2) Fiscal Compact.

[28] The fifth principle of the Annex, however, does stipulate that '(t)he correction mechanism *may* (emphasis added) give a prominent operational role to rules on public expenditure and discretionary tax measures, including in activating the mechanism and implementing the correction … .'; 'Common principles on national fiscal correction mechanisms', COM(2012) 342 final.

[29] To give EU institutions the competence to decide on the contents of the German budget would violate German constitutional identity; BVerfG, 2 BvR 1390/12 of 12 Sept. 2012, para. 213; *see also* para. 315.

[30] According to the Dutch government the principles need to be taken 'into consideration', which implies that the government considers them not binding; *Kamerstukken* [parliamentary papers] 2011-2012, 33 319, nr. 3, p. 7/8. *See also Conseil constitutionnel*, 9 Aug. 2012, decision 2012-653 DC, point 25: 'that these provisions [of the Treaty] do not define either the procedures according to which this mechanism must be triggered or the measures which must be implemented

Compact thus leaves the answer to the question of who 'adopts' them blowing in the wind.[31]

The Communication does indeed hold the asked principles concerning 'the size and the time-frame' of the corrective action to be undertaken in case of a 'significant observed deviation', and moreover principles on what should be considered as such a deviation. The general tendency of the principles is that the '(n)ational correction mechanisms shall rely closely on the concepts and rules of the European fiscal framework.'[32] The Dutch legislature has gone even further and has outsourced as much as possible to the Union institutions.

According to the HOF Act, the ministers in accordance with the opinion of the (Dutch) council of ministers have to take 'adequate expenditure-reducing and/or revenue-generating measures in case the institution of the European Union which is competent for that purpose decides that the budgetary policy pursued does not sufficiently respect' the Dutch medium term objective.[33] The EU institution concerned is the Council. According to Regulation 1466/97, the Commission shall address a warning to a member state in the event its budget significantly deviates from the adjustment path towards its medium-term budgetary objective. Subsequently, the Council will examine the situation within one month and, if necessary, will adopt a recommendation concerning the necessary policy measures, on the basis of a Commission recommendation.[34] It is the EU Council recommendation that the HOF Act implicitly refers to. The Act further states that the measures that ministers take have to be in accordance with the EU Council's recommendation regarding 'budgetary size and time';[35] that the measures to be taken will be assembled in a corrective plan on which the advice of the Council of State has to be obtained and which has to be presented to parliament in the form of a 'budgetary memorandum';[36] and that parliament shall be informed at least every year about the execution of the corrective plan.[37]

as a result; that they therefore leave the States free to determine these procedures and measures in accordance with their constitutional law.'

[31] The first drafts of the Fiscal Compact prescribed that the contracting parties had to establish the correction mechanism on the basis of 'commonly agreed principles', whether or not on the basis of a proposal by the Commission; Frank Schorkopf, 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Die Entstehung des Vertrages anhand einer Synopse der Entwurfsfassungen', <http://inteurlaw.uni-goettingen.de/inteurlaw/images/stories/Synopse_Fiskalvertrag_Schorkopf_endg.pdf>.

[32] Second principle of the Annex; 'Common principles on national fiscal correction mechanisms', COM(2012) 342 final.

[33] Art. 2(4) jo. Art. 2(5) HOF Act.

[34] Art. 6(2), paras. 1 and 2 Regulation 1466/97 jo. Art. 121(4) TFEU.

[35] Art. 2(5) HOF Act.

[36] Resp. Arst. 2(6) and 2(8) HOF Act.

[37] Art. 2(7) HOF Act.

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What first catches the eye in this legal arrangement is that the Commission and finally the Council decide whether or not the correction mechanism needs to be activated: they decide on the presence of a significant deviation[38] and thereby, for instance, also on the presence of an economic crisis which may temporarily justify a deviation; they decide on the scale and timeframe of the corrective measures.[39] This is a kind of double hatting: regarding the Netherlands, the Commission and Council fulfill their monitoring functions not only in the context of Regulation 1466/97, but also in that of the Fiscal Compact. For clarity's sake: this is possible because the Netherlands, like all other states concerned, only has *one* medium term budgetary objective for both instruments mentioned; a deviation from that objective in the context of the Fiscal Compact is therefore necessarily also a deviation in the context of Regulation 1466/97, which allows for the Union institutions' interference.

What is also striking is that the HOF Act obliges the Dutch ministers to come into action to rebalance the budget if the Council issues a recommendation: they have to take 'adequate expenditure-reducing and/or revenue-generating measures'. Now the room for maneuver for the ministers in this respect is rather limited. Within the limits of their competences they can economise, especially by refraining from all kinds of non-obligatory expenditures (new subsidies etc.) which the budgets of their departments authorise. And if these savings are not sufficient, the government may introduce bills in parliament for amending, for instance, tax or social security legislation. But that is as far as the ministers' competences go. In contrast to what the Dutch government states in the memorandum of explanation to the HOF Act, probably in homage to one of the principles proposed by the Commission,[40] the corrective plan does not bind the (budget or any other) legislature on the basis of the HOF Act itself.[41] A second argument employed by the government to assert a potential corrective plan's binding force is that the plan 'would be fully in keeping with what the EU Council of ministers of finance asks of the Netherlands.'[42] This argument is apparently based on the assumption that

[38] Significant is according to Regulation 1466/97 in principle 'a deviation of at least 0.5 % of GDP in a single year or at least 0.25 % of GDP on average per year in 2 consecutive years'; Art. 6(3)(a) Regulation 1466/97.

[39] According to Art. 6(2)(1) of Regulation 1466/97 the Council in its recommendation sets 'a deadline of no more than 5 months for addressing the deviation. The deadline shall be reduced to 3 months if the Commission, in its warning, considers that the situation is particularly serious and warrants urgent action.'

[40] *See* text following n. 50.

[41] *Kamerstukken* [parliamentary papers] 2012-2013, 33 416, nr. 3 p. 9.

[42] Idem.

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the potential Council recommendation is binding, which it is not.[43] In the end a corrective plan in the sense of the HOF Act is nothing more than a political agreement of the Dutch cabinet to adapt the budget. It does not bind the legislature.

The Fiscal Compact's infringement procedure

We have seen that the Dutch government's claims, i.e., that the HOF Act guarantees that the balanced budget rule will be respected during the budgetary processes and that a corrective plan in the sense of the HOF Act binds the (budget) legislature, are incorrect. That begs the question whether one of the government's other claims, that the Netherlands has complied with the implementation duty in Article 3(2) of the Fiscal Compact with the HOF Act, is correct. That question will be dealt with in the next part. This section only certifies that the answer to that question has practical relevance in view of the infringement procedure that Article 8 of the Fiscal Compact establishes. In addition, the infringement procedure has a certain importance for the interpretation of Article 3(2).

Article 8(1) of the Fiscal Compact invites the European Commission to present 'in due time' a report on the compliance of the Eurozone states with Article 3(2). The second sentence of Article 8(1) stipulates that if the Commission finds a non-compliance, 'the matter *will* be brought to the Court of Justice of the European Union by one or more of the Contracting Parties' [emphasis added];[44] the third sentence of the Article 8(1) adds that a contracting party which considers that another party has not complied with Article 3(2) *may* also of its own accord bring the matter to the Court [emphasis added]. According to Peers, the contrast between the words *will* and *may* in these two consecutive sentences of Article 8(1) clearly expresses that there is an obligation for the states to go to court if the Commission in its report has observed a non-compliance.[45] Be that as it may, a judgment of

[43] Art. 289, *in fine*, TFEU. It must be added that if a state does not take appropriate action within the deadline specified in the Council recommendation, the Council may adopt a decision establishing that no effective action has been taken on the basis of a Commission proposal (Art. 6(2)(5) Regulation 1466/97); consequently, the Council, on proposal of the Commission, may in a further decision require the member state in question to lodge an interest-bearing deposit amounting to 0.2% of GDP (Art. 4(1) and (2) Regulation 1173/2011). This does not make the recommendation binding.

[44] The Commission itself may not do this, which is one the differences with the infringement procedure in the Arts. 259-261 TFEU.

[45] Steve Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?', *EuConst* (2012) p. 404 (419). In Art. 2 of a (legally non-binding) Annex to the minutes of the signature of the Fiscal Compact the contracting parties have determined which states will refer the matter to the ECJ: in principle these are the 'Contracting Parties bound by Articles 3 and 8 of the Treaty that are Member States forming the pre-established group of three Member States holding the Presidency of the Council of the European Union in accordance with Article 1(4) of the Council's Rules of Procedure (Trio of Presidencies)'; <www.europolitics.info/pdf/gratuit_en/310236-en.pdf>.

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the Court of Justice is binding. If the Court establishes an infringement, the state in question has to take the necessary measures to comply with the judgment within a period to be decided by the Court. If the state concerned does not comply with the judgment, the payment of a lump sum or a penalty may be imposed in a second procedure (Article 8(2)). Another, potentially more severe, sanction is found in the 25th recital to the Fiscal Compact: financial support for a Eurozone state in distress on the basis of the Treaty establishing the European Stability Mechanism is conditioned by the correct implementation of the balanced budget rule and the rules on the correction mechanism.[46]

So the question of whether these rules are correctly implemented clearly is not simply a theoretical issue. Now that we have set the scene, let us see what the Fiscal Compact actually demands in this respect.

The interpretation of Article 3(2) of the Fiscal Compact

The first sentence of Article 3(2) of the Fiscal Compact states, that 'the rules in paragraph 1 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.' Although paragraph 1 of Article 3 contains rules on the balancing of the budget and the automatic correction mechanism, and the implementation requirements of the second paragraph thus count for both, in the following, for practical reasons, the focus is on the implementation of the balanced budget rule alone.

It is certain that Article 3(2) offers two different modes of implementation. This is testified by the use of the word 'or'. But the first question the Article raises is: which two modes? In this respect Article 3(2) can be read in two different ways.

The first reading of Article 3(2)

In the first reading of Article 3(2), the balanced budget rule has to be inserted in (1) a 'constitutional provision' *or* (2) in a 'non-constitutional provision which is both permanent and binding and which is otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.' In other words, there are three requirements which the implementing provisions must

[46] 'STRESSING the importance of the Treaty establishing the European Stability Mechanism as an element of a global strategy to strengthen the Economic and Monetary Union and POINTING OUT that the granting of assistance in the framework of new programmes under the European Stability Mechanism will be conditional, as of 1 March 2013, on the ratification of this Treaty by the Contracting Party concerned and, as soon as the transposition period mentioned in Article 3(2) has expired, on compliance with the requirements of this Article'; *see also* recital 5 of the preamble to the ESM Treaty.

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satisfy: they must be permanent, binding and guaranteed to be fully respected and adhered to. The basic assumption of this reading is that due to its position at the apex of the national legal order, a constitutional provision meets these criteria; this is the preferred mode of implementation. The alternative Article 3(2) offers is that the budget rule may also be inserted in a non-constitutional provision, but on the condition that this non-constitutional provision in its turn is permanent, binding and guaranteed to be fully respected and adhered to.

Subsequently, to decipher what the status of this non-constitutional provision should be, three questions need to be answered. The first is for whom or what the implementing provision should be binding. Arguably it should be binding for the national budget authority, as this is the authority that should ultimately respect the balanced budget rule. This is also in line with the preferred constitutional mode of implementation: the constitution indeed binds all national authorities, including the budget authority.

The next question is what a provision with a 'permanent character' is. Miguel Maduro, in a debate at the European University Institute, remarked more or less in jest that he does not 'know what permanent provision is' and that 'the closest thing to a permanent rule I know are the eternity clauses in some constitutions, such as the German constitution.'[47] He was closer to the truth than he perhaps imagined. According to the words of Chancellor Merkel on 31 January 2012, directly after the European Summit during which agreement was reached on the text of the Fiscal Compact, it was probably indeed her (Germany's) intention to have the budget rule inserted in an eternity clause ('Es komt darauf an, dass die Schuldenbremsen dauerhaft in die Rechtsordnungen eingefügt werden, dass sie bindend und ewig gelten').[48] However, that was several bridges too far. Not all Eurozone states are acquainted with eternity clauses in their positive constitutional law. Moreover, as is clear from the words 'preferably constitutional', the balanced budget rule does not even have to acquire constitutional status, let alone supra-constitutional status. The exact meaning of the term 'permanent' is hard to determine, as any provision which is not repealed may be said to be permanent. At the same time, it is suggested that the general assumption in legal thinking is that the higher the status of a provision, the more permanent it is considered to

[47] In Anna Kocharov (ed.), 'Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty', *EUI Working Papers*, Law 2012/09, p. 5.

[48] It should be noted that the German text of Art. 3(2) does not not use the term 'ewig', but 'dauerhaft' ('Bestimmungen, die verbindlicher und dauerhafter Art sind'); <http://european-council.europa.eu/media/639244/04_-_tscg.de.12.pdf>; the citation comes from Lukas Oberndorfer, 'Der Fiskalpakt – ein weiterer Schritt in Richtung Entdemokratisierung', in 1 *Infobrief eu und international* (2012) p. 1 (p. 12); <www.wege-aus-der-krise.at/fileadmin/dateien/bilder/inhaltliche_dokumente/Oberndorfer_Der_Fiskalpakt_-_ein_weiterer_Schritt_in_Richtung_Entdemokratisierung_EU-Infobrief_1-2012_doc.pdf>.

be. In that line, the term 'permanent' reinforces the idea that 'binding' means 'binding for the national budget authority.

The third question relates to the phrase 'guaranteed to be fully respected and adhered to throughout the national budgetary processes'. Well then, only a provision which *de jure* binds the budget authority can be said to have the status required for that (although of course even a provision which binds the budget authority is not guaranteed *de facto* to be fully respected and adhered to, not even in the presence of a [constitutional] court with the competence to enforce the provision).

All in all, the quintessence of the first reading of Article 3(2) of the Fiscal Compact therefore seems to be that the national provision in which the balanced budget rule is implemented one way or another has to bind the national budget authority. As we have already seen, in the Netherlands the national budget authority is the (ordinary) legislature, as is the case in most Eurozone states (but not all).[49] Therefore, to comply with Article 3(2), the Netherlands, and all other Eurozone states in which the budget is adopted by act of parliament, should implement the balanced budget rule in at least a supra-legislative provision. (Henceforth I will disregard the nuance between 'binding the budget authority' and 'binding the budget legislature' and in this respect only use the term 'supra-legislative'.)

This reading of Article 3(2) finds support in the 15th recital to the Fiscal Compact, which contains a phrase on 'the Contracting Parties' obligation to transpose the "balanced budget rule" into their national legal systems, through binding, permanent and preferably constitutional provisions.' Also, this interpretation fits well with the general scheme (the 'heavy' infringement procedure in Article 8) and the general aim of the Fiscal Compact (the duplication in national law of the EU's mechanism for monitoring and ensuring compliance with the balanced budget rule).

This is Roux's interpretation of the duty of implementation.[50] The European Commission has also come to the conclusion that the budget rule should be inserted in a supra-legislative provision. In the aforementioned Communication with principles on the automatic correction mechanism, the Commission states that 'the legal status of the correction mechanisms should be such that their provisions cannot be simply altered by the ordinary budgetary law' and that a potential 'corrective plan (…) shall be binding over the budgets covered by the correction

[49] Anyway not in Finland; Hans van den Brandhof, 'The Republic of Finland', in Lucas Prakke and Constantijn Kortmann (eds.), *Constitutional Law of 15 EU Member States* (Kluwer 2004) p. 181 (p. 215).

[50] 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', *RTD* eur. (2012) p. 855 (866-871); *see also* Xavier Magnon, 'La ratification du traité sur la stabilité, la coordination et la gouvernance dans l'Union économique et monétaire (TSCG) peut ne pas exiger de révision constitutionnelle préalable', *RFDC* (2012) p. 854 (p. 860-861).

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period.'[51] Because, as we have seen, the automatic correction mechanism according to Article 3(2) has to be implemented in the same way as the balanced budget rule, this necessarily implies that the Commission is of the opinion that the latter rule also should be implemented in supra-legislative legislation.[52]

I have always taken the same position,[53] be it that I arrived there via a different route (see *infra*). But I have second thoughts, because the idea that the budget rule should be inserted in at least a supra-legislative provision is not compatible with the genesis of Article 3(2), nor with the text of Article 3(2) insofar as it would actually offer the Netherlands and probably more Eurozone states no alternative to a constitutional mode of implementation at all. This we will see in the next sections.

The second reading of Article 3(2)

In the second reading the two modes of implementation which Article 3(2) of the Fiscal Compact offers are (1) implementation 'in a binding and permanent, preferably constitutional provision' and (2) implementation in a provision which 'otherwise is guaranteed to be fully respected and adhered to throughout the national budgetary processes'. This reading is prompted by the syntax of Article 3(2), which by the use of the comma after 'preferably constitutional' at least in Dutch, English and French indicates that the phrase 'or otherwise guaranteed to be fully respected and adhered to' offers an alternative for implementation in a 'binding and permanent' provision. Let us now try to decipher the meaning of these two modes.

When it comes to the first mode of implementation of this second reading (implementation 'in a binding and permanent, preferably constitutional provision'), the arguments developed under the preceding section regarding the terms 'binding' and 'permanent' allow for the conclusion that the budget rule should preferably be implemented in a constitutional provision, but may also be implemented in another kind of provision, as long as this provision also binds the budget authority. I think there is hardly any other reasonable interpretation possible of this first mode.

The determination of the meaning of the second mode of implementation (hence: the alternative) of this second reading of Article 3(2) (the balanced budget rule 'shall take effect […] in the national law […] through provisions […] guaranteed to be fully respected and adhered to throughout the national budgetary processes') requires somewhat more brain-racking. There are at least three interpretations possible for this alternative.

[51] COM(2012) 342 Final, Annex, fourth principle.
[52] I owe this to Roux, *supra* n. 50, p. 867.
[53] Kauder, *supra* in the first (asterisked) footnote of this article, p. 16.

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The first is Craig's. According to Craig, to comply with the alternative it is sufficient that the balanced budget rule takes effect in the ordinary budgetary processes; there is no need to insert the rule in a statute or constitutional norm.[54] If I understand him well, this means that it is sufficient that a Eurozone state *de facto* complies with the Compact's balanced budget rule. I think this interpretation is not tenable. The text of Article 3(2) in every authentic version of the Treaty that I was able to consult (Dutch, English French and German) clearly calls for a national legal provision in which the balanced budget rule is incorporated.[55] This is corroborated by a systemic interpretation of the Treaty. The infringement procedure which Article 8 installs clearly is meant for single use only;[56] it conducts a one-time check to see whether the Eurozone states have duly implemented the balanced budget rule in the form of adopting a provision in national law.[57] This infringement procedure would be incomprehensible (or beside the point) if the alternative of Article 3(2) did not demand insertion of the balanced budget rule in a national legal provision (or would be complied with if a national budget is balanced [over the years]).

So insertion of the balanced budget requirement (or a referral thereto) in a national provision seems to be the minimum requirement of the alternative. But should this be a supra-legislative provision? An affirmative answer might be deduced from the wording of the alternative. This interpretation, the second of the three, has been my own. As pointed out before, only a provision which *de jure* binds the budget legislature can be said 'to be guaranteed to be respected and adhered throughout the national budgetary processes.' The general scheme and the general aim of the Fiscal Compact can be used as additional arguments.[58]

However, this second interpretation of the alternative is untenable or at least problematic in view of the syntax (the comma) and text ('or') of Article 3(2). A choice between 'implementation in a supra-legislative provision' and 'implementation in a supra-legislative provision' is not much of choice, is it? But this is what it comes to if we conclude that the alternative requires a supra-legislative provision, because earlier in this section we have already concluded the same regarding the first mode of implementation of the second reading.

[54] Paul Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', *European Law Review* (2012) p. 231 (p. 237).

[55] *See also* the 15th recital of the Fiscal Compact.

[56] Cp. Frank Schorkopf, 'Europas politische Verfasstheit im Lichte des Fiskalvertrages', *Zeitschrift für Staats- und Europawissenschaft* (2012) p. 1 (p. 13); <www.zse.nomos.de/archiv/2012/heft1/>.

[57] Albeit that if the ECJ's judgment is not complied with, a second procedure may follow; Art. 8(2) Fiscal Compact.

[58] For these arguments, *see* the paragraph between n. 50 and n. 51.

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The third interpretation of the alternative is that of the *Conseil constitutionnel*, the French Constitutional Council, in its decision on the Fiscal Compact of 9 August 2012.[59] The contrast between the two modes of implementation offered by Article 3(2) enables the conclusion that the national implementing provision does not need to be binding, or at least not for the budget legislature.[60] This interpretation allowed for the French approval and ratification of the Fiscal Compact without prior constitutional amendment, and for the insertion of a reference to the balanced budget rule in an (organic) act which does not bind the French parliament adopting the budget.[61] Thereby the ruling greatly facilitated the acceptance of the Compact, because the newly elected president François Hollande and his Socialist Party were, to put it mildly, not very fond of the treaty and vehemently against the incorporation of a balanced budget rule in the Constitution.[62] The ruling gave them the opportunity to accept what actually had become inevitable in view of the EU's political situation and the euro crisis without too much loss of face.

Although the *Conseil constitutionnel*'s interpretation is not compatible with the wording of the alternative (how can a provision which does not bind the budget legislature be said to be guaranteed to be respected and adhered to throughout the budgetary processes?), it does find support in the genesis of Article 3(2), as we will see in the next section.

The genesis of Article 3(2)

In the first drafts of the Fiscal Compact, the obligation to implement the balanced budget rule in national law was phrased more strictly than in the final version.

[59] Decision 2012-653 DC, point 22; *see also* the 'official' comment on the decision: 'Dans cette seconde branche, les règles de l'article 3 § 1 prennent effet au moyen de règles respectées et observées dans les processus budgétaires nationaux d'une « *autre façon* » que par des « *dispositions contraignantes et permanentes* ». Cette seconde branche s'interprète par *a contrario* par rapport à la première et n'est donc pas '*contraignante*' au sens où elle ne conditionne pas la validité constitutionnelle de la loi au respect d'une norme de droit interne supérieure imposant la règle des 0,5 % de déficit structurel. Le respect des règles figurant au paragraphe 1 de l'article 3 n'est alors pas garanti dans le droit national au moyen d'une norme d'une autorité supérieure à celle des lois'; <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2012653DCccc_653dc.pdf>.

[60] It is noteworthy that according to the CC's ruling the implementing provision does need to be permanent to conform to the alternative; idem.

[61] Art. 1 of the Loi organique n° 2012-1403 du 17 décembre 2012 relative à la programmation et à la gouvernance des finances publiques: 'Dans le respect de l'objectif d'équilibre des comptes des administrations publiques prévu à l'article 34 de la Constitution, la loi de programmation des finances publiques fixe l'objectif à moyen terme des administrations publiques mentionné à l'article 3 du traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire, signé le 2 mars 2012, à Bruxelles'; *see* on the reasoning of the CC in this respect Roux, *supra* n. 50, p. 868 (note 45).

[62] 'Je ne modifierai pas la Constitution pour la règle d'or budgétaire' was one the election promises of candidate Hollande; <http://videos.lexpress.fr/actualite/politique/hollande-je-ne-modifierai-pas-la-constitution-pour-la-regle-d-or-budgetaire_1108629.html>.

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The drafts required that the rule was inserted in 'member states' constitutions or by legislation of an 'equivalent level'.[63] The obligation was toned down, according to some on the initiative of Ireland and Finland, 'to avoid complex constitutional amendment procedures',[64] according to others due to pressure of Luxembourg, which made it known that it would not insert the budget rule in its Constitution, but would pass it by a simple Act of Parliament, to which Germany would have assented.[65] It is noteworthy that the constitutional mode of implementation in Ireland would have required a referendum;[66] in Finland two readings in parliament and interceding general elections, unless the constitutional amendment proposal were to be declared urgent by parliament with at least five-sixths of the votes cast, in which case it could have been immediately adopted with at least two-thirds of the votes cast;[67] and in Luxembourg two readings in the Chamber of Deputies separated by a period of not less than three months, on the conditions that the amendment is adopted in both readings with a majority of members of the Chamber and the second reading is not substituted by a referendum on request of more than a quarter of the deputies or 25,000 registered voters.[68]

The wish to have the implementation duty toned down was undoubtedly supported by the Netherlands for the following reasons. In accordance with its Article 14(2), the Fiscal Compact has entered into force on 1 January 2013. Already a year later, on 1 January 2014, the budgetary arrangement has to be implemented.[69] If inserting the budget rule in the constitution requires two readings in parliament and in between them the dissolution (of one of the chambers) of parliament and thus new elections, as is the case in the Netherlands,[70] it would have been practically impossible to write the balanced budget rule into the constitution in due time. Moreover, even if it were practically feasible, we may assume that the required general elections were not a very attractive perspective, because these elections certainly would turn out to be a referendum on the EU and the euro

[63] *See* Schorkopf, *supra* n. 31.

[64] Peadar O'Broin, 'The Euro Crisis: The Fiscal Treaty – An Initial Analysis', *IIEA Working Paper* No. 5, p. 8/9.

[65] J.C. Zarka, 'Le traité sur la stabilité, la coordination et la gouvernance dans l'Union économique et monétaire (TSCG)', *Dalloz* (2012) p. 893 (p. 896, note 27).

[66] Despite the toning down, Ireland had to subject the Compact to a referendum because it is considered to transfer sovereignty to Union institutions; Oireachtas Library & Research Service, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact Treaty) – briefing note for Members,* 2 March 2012, p. 23/24; <www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/others/dailbrieflFiscaltreaty270412.pdf>, visited 27 Sept. 2013.

[67] Art. 73 Finnish Constitution.

[68] Art. 114 Luxemburg Constitution.

[69] Art. 3(2) Fiscal Compact.

[70] Art. 137(3) *Grondwet;* it is the same in Belgium (Art. 195 Belgian constitution).

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– leading European politicians are not very fond of referendums since the fiasco of the European Constitutional Treaty. Besides, except for the United Kingdom, constitutional amendments require qualified majorities and one may doubt whether these could have been found, at least in the Netherlands, where a constitutional amendment has to be accepted in the second reading with a two-thirds majority of the votes cast. In this respect, it should be noted that until after the general elections in September 2012, when it entered into a coalition government with the *VVD* (the Dutch Liberals), the *PvdA* (the Dutch Labour Party) was opposed to the Compact and even the required simple majority in parliament for the approval of the Compact could not be mustered.[71]

I am not familiar enough with the constitutional systems of Ireland and Luxembourg to say this with regard to them, and it probably does not count for Finland (where the budget is not established by statute),[72] but if the toning-down of the implementation duty in Article 3(2) is meant to accommodate countries with very rigid constitutions such as the Netherlands, then the interpretation of Article 3(2) as requiring implementation in at the very least a supra-legislative provision is not convincing. Dutch constitutional law does not know of any category of (organic) laws with a status in between that of the *Grondwet* and those of Acts of parliament, i.e., supra-legislative and infra-constitutional. If the Compact required implementation in at least a supra-legislative provision, then the toning-down of the implementation requirement would be useless for the Netherlands: in the Dutch constitutional situation this would necessarily imply insertion of the rule in the *Grondwet*.

It might be added that even in countries which do know a category of acts with a supra-legislative and infra-constitutional status, the insertion of the balanced budget rule in such an act might require a constitutional amendment. The acts concerned owe their intermediate status to the constitution, and the constitution presumably has limited their substantive domain to a few enumerated issues. So if the constitution does not somehow already allow such an intermediate act to limit the freedom of the budget legislature,[73] insertion of the budget rule in such an act would require a constitutional amendment (creating that competence) anyway.

[71] <www.nrc.nl/nieuws/2012/03/13/pvda-zegt-nee-tegen-3-procent-begrotingseis-eu-geen-kamermeerderheid> [PvdA says no against 3% budgetary requirement EU; no majority in Lower Chamber], visited on 27 Sept. 2013.

[72] *Supra* n. 49; *see* on the Finnish implementation the contribution in this issue by Päivi Leino and Janne Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?'

[73] As is the case in Spain, *see* Violeta Ruiz Almendral, 'The Spanish Legal Framework for Curbing the Public Debt and the Deficit', *EuConst* (2013) p. 189 (p. 195).

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A choice made with recourse to (Dutch and French) monism?

The interpretation of the implementation duty in Article 3(2), finally, is anybody's guess. If one favours the interpretation that the balanced budget rule needs to be inserted in at the very least a supra-legislative provision, one disregards the genesis of Article 3(2); and if one favours the interpretation that implementation in an ordinary act of parliament is sufficient, one disregards the Article's text and context. Here the swiftness with which the Fiscal Compact was negotiated seems to take its toll.[74] The mix of the (partially) incompatible wishes to have the balanced budget rule established in national law as firmly as possible and at least in supra-legislative legislation, to have it implemented speedily, to avoid referendums and probably more generally to accommodate the constitutional objections of certain contracting parties, together with the disregard of their (or other contracting parties') constitutional realities, has led to a provision of which the 'true' meaning is impossible to detect with any intellectual certainty.

Nevertheless, the Commission, in 'due time', i.e. probably somewhere in 2014, and after that possibly the Court of Justice, will to have to solve the puzzle. May we expect that the Union institutions will take the position that the Netherlands has failed to implement the balanced budget rule correctly? I do not think so, despite the Commission's (implicit) stance in the Communication that a supra-legislative provision is required,[75] and even though the employment of the purposive interpretation method, which the Court of Justice is so keen on, might tip the balance in favour of that interpretation. If the Dutch state were to be condemned, so would be the French and all the other Eurozone states which have implemented or which intend to implement the Fiscal Compact in an 'ordinary law'.[76] For political-institutional and practical reasons I find it highly improbable that the Union institutions will take that route, as it would open a political and constitutional Pandora's box, at least in the Netherlands and France.

Perhaps the Union institutions in their evaluations will have recourse to the fact that the Netherlands and France and at least several other Eurozone states which will implement by an ordinary law (Belgium, Luxembourg) are monistic

[74] In that case the question which Jean Victor Louis used as the title for his article on the Compact certainly has to be answered in the negative as regards Art. 3(2); 'Un traité vite fait, bien fait?', *RTD eur.* (2012), p. 5.

[75] *See* text following n. 50.

[76] *See* the table <en.wikipedia.org/wiki/European_Fiscal_Compact#Fiscal_compliance>, visited 21 August 2013; only five Eurozone states have inserted the (or a similar) balanced budget rule in their constitutions; at least three of them (Germany, Italy and Spain) did so before the Fiscal Compact was signed; *see* on the rules in the countries mentioned, Federico Fabbrini,'The Fiscal Compact, the "Golden Rule", and the Paradox of European Federalism', *Boston College International & Comparative Law Review* (2013) p. 1 (p. 9 et seq.)

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when it comes to the relationship between national and international law.[77] In these states the Fiscal Compact is part of national law with minimally supra-legislative status;[78] so if the budget legislature in these states disregards the balanced budget rule, it disregards the Fiscal Compact not only in its *international* law capacity, but also in its *national* law capacity. Therefore, one may perhaps argue that these monistic states have complied with the duty in Article 3(2) to insert the balanced budget rule in a national legal provision by way of the insertion of the Compact in their national legal orders. This view seems to have been in the back of the mind of the *Conseil constitutionnel* in its judgment on the Fiscal Compact of 9 August 2012. It argued that the implementation in national law required by Article 3(2) is actually superfluous in France because the French authorities, after ratification, would already be bound by the balanced budget rule as a consequence of the Fiscal Compact's incorporation in the French legal order.[79]

Is this a convincing line of reasoning? Not as it is, at least not according the governments and legislatures in the states concerned, because they felt the need to (also) incorporate (a referral to) the balanced budget rule in national legislation. Besides, it will not help those states with a dualistic view on the relationship between national and international law, unless of course these in turn have somehow incorporated or transformed the Compact into (their) national law.

[77] The Netherlands is monistic on the basis of unwritten constitutional law. Additionally, Art. 94 *Grondwet* states that 'statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' On this basis Dutch courts have the obligation to disapply national provisions which violate written treaty provisions if these are 'binding on all persons'. However, the fiscal rules in the Compact arguably do not belong to this latter category; therefore Art. 94 is not applicable in this context.

[78] In the Netherlands according to many authors treaties even have *supra*-constitutional status; *see* for instance J.G. Brouwer, *Verdragsrecht in Nederland* [Treaty Law in the Netherlands] (Tjeenk Willink 1992) p. 248; J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* [Treaty Provisions Binding on Everyone] (Boom 2004) p. 338; P.J. Boon et al., *Regelgeving in Nederland* [Legislation in the Netherlands] (Kluwer 2005) p. 13-14.

[79] Conseil constitutionnel, Decision 2012-653 DC of 9 August 2012, point 18: 'Considering that, as soon as France has ratified the Treaty and it has entered into force, the rules laid down in paragraph 1 of Article 3 will apply to it; that according to the "pacta sunt servanda" rule, France will be bound by these provisions which it will be required to apply in good faith; that the fiscal situation of general government will be required to be balanced or in surplus under the conditions laid down by the Treaty; that pursuant to Article 55 of the Constitution, it will be hierarchically superior to legislation; that it will be for the different organs of State to monitor the application of this Treaty, within the scope of their respective competences; that Parliament will be in particular required to comply with its provisions when enacting finance laws and social security financing laws; that paragraph 2 of Article 3 moreover requires that national legislation be adopted in order to ensure that the rules set forth in paragraph 1 of that Article take effect.'

Concluding remarks

The way the HOF Act has implemented the Fiscal Compact's budgetary arrangement is rather scanty and, at best, not very ambitious. The Act does not quantify the balanced budget rule and it does not even refer directly to the Fiscal Compact. Moreover the Act passes the buck of all kinds of important decisions, which according to the Compact the Netherlands is (allowed) to take itself, on to the Union institutions. To a certain extent that is understandable in view of the analogy between the budget rules in the Compact and those in secondary Union law. However, the Act hardly enhances the visibility of the budget rules for national politicians and the national public or their 'national ownership'. Perhaps even to the contrary, for reading the Act easily gives the impression that rules are imposed by 'Brussels'.

The HOF Act does not bind the (budget) legislature, neither when it comes to the balanced budget rule nor regarding the automatic correction mechanism. If one's interpretation of the implementation requirement in Article 3(2) is that those rules should be inserted in a supra-legislative national provision, that requirement in the Netherlands can only be construed to be met by pointing to the Compact itself, which *within* the Dutch constitutional system is a source of law. However, even if the Union institutions would not accept that rather artificial interpretation of Article 3(2), it is hard to imagine that they will find the Netherlands failing in its duties. This not because Article 3(2) of the Compact is so ambiguous that its true meaning is impossible to determine with intellectual certainty – the Commission and the Court of Justice simply cannot hide behind intellectual doubts; they have to make a choice. My argument is that the judgment that the Compact's budgetary arrangement needs to be inserted in provisions which bind the budget authority would put the political relations in several of the member states and moreover the constitutional relationship of the Union with these member states under high strain. That would not be in the interest of the stabilising and cementing of the economic and monetary union in the face of the euro crisis, which after all is what the Fiscal Compact is there for.

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