The United Kingdom and the Fiscal Compact: Past and Future

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United Kingdom perspective on the Fiscal Compact – December 2011 Brussels summit veto – European Union Act 2011 – Legal obstacles to accession to Fiscal Compact – Legal obstacles to incorporation into EU treaties – Relevance of legal conditions and political motivations – Legal obstacles to implementation of balanced budget rule – Interpretation of Article 3(2) – Parliamentary Sovereignty – Challenges to United Kingdom's political constitution

Introduction

This article will explore a number of legal questions raised when the Treaty on Stability, Coordination and Governance, or Fiscal Compact, is assessed from the perspective of the UK. Initially, the background and effects of the Fiscal Compact will be outlined. The UK's existing relationship with the Fiscal Compact will then be established, and what can be gained from a UK-focused assessment of the treaty explained. Since the UK's future position with respect to the Fiscal Compact is still, in principle, open to further change, the legal considerations which would underpin any prospective alteration of this position will be examined. In particular, the article looks back, to then look forwards, for the UK's *past* relationship with the Fiscal Compact is likely to have crucial implications for our understanding of the possibility of any *future* relationship.

Three substantive topics are considered. First, the circumstances of the UK's December 2011 veto, a key event in the development of the Fiscal Compact, is discussed, with the affect that the 'referendum locks' contained in the (then re-

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cently enacted) domestic European Union Act 2011 had on the wielding of this veto explored. Secondly, the potential applicability of the same referendum locks to a future UK change in position in relation to the Fiscal Compact (whether in the form of accession to the intergovernmental agreement, or as part of incorporation into the existing EU treaties) is assessed. Thirdly, the manner in which the UK might implement the balanced budget rule, contained in Article 3 of the Fiscal Compact, if it were to decide to do so, is evaluated. In so doing, the question of whether the UK's constitutional tradition is such that it would be inevitably excluded from implementing a balanced budget rule in national law will be addressed, and the broader meaning and effect of Article 3(2) will be considered. The article concludes by reflecting on whether the legal obstacles to a UK change of position with respect to the Fiscal Compact – which, it is argued, are far from insurmountable – will be decisive in determining the nature of any future potential relationship. Instead, it is suggested that political considerations – and in particular, issues concerning the fundamental nature of the UK constitution – should ultimately shape any future developments.

The Fiscal Compact: Background and effects

The Treaty on Stability, Coordination and Governance, or Fiscal Compact, was signed by the governments of 25 European Union Member States on 2 March 2012, and entered into force on 1 January 2013, upon its ratification by twelve eurozone Member States.[1] The treaty is an international agreement created in response to the eurozone sovereign debt crisis, and sought in particular to foster budgetary discipline, strengthen the coordination of economic policy, and improve governance within the euro area.[2] The status of the Fiscal Compact as an international agreement means that it formally stands outside the existing EU treaties, and yet, given its intentions and subject matter, there is inevitably a significant degree of overlap between the treaty and provisions which form part of the EU legal order. In particular, the Fiscal Compact sought to augment and refine a range of obligations imposed on Member States in EU secondary legislation, including the Stability and Growth Pact,[3] itself strengthened by the 'Six Pack' of five regula-

[1] Art. 14(2) Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). At the start of February 2014, Belgium was the only contracting party which was still to ratify the treaty, and deposit its instrument of ratification with the General Secretariat of the Council of the European Union; *see* <www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&lang=en&aid=2012008&doclang=en>, visited 17 Feb. 2014.

[2] Art. 1(1) TSCG.

[3] The legal basis for the Stability and Growth Pact is found in Arts. 121 and 126 TFEU.

tions and one directive created in November 2011,[4] and then by a further 'Two Pack' of regulations in 2013.[5]

The substantive detail of this bewildering array of legal instruments doubtlessly presents a challenge even to the economically literate.[6] In the broadest of terms, the reformed Stability and Growth Pact establishes a range of processes and mechanisms which are either preventive or corrective in effect. The preventive 'arm' of the Pact is designed to promote sound, sustainable fiscal policy in EU Member States, while the corrective 'arm' sets out the procedures to be followed where a state is running an excessive structural budget deficit. All Member States are subject to monitoring and surveillance of national fiscal policy by the EU institutions – both preventive and corrective in nature – but eurozone Member States are subject to additional burdens, including the prospect of sanctions being applied where excessive deficits are not adequately addressed.[7]

The Fiscal Compact makes a number of specific contributions to the overall economic governance architecture, but much of this is not novel. For example, a number of provisions simply express aspirations about the future use of powers or procedures already provided for under the EU treaties, such as Article 10 relating to the readiness of the contracting parties to engage in enhanced cooperation, or Article 13 on cooperation between representatives of the European and national parliaments. Further, other provisions merely make reference to activities which were already undertaken informally prior to the enactment of the treaty, such as Article 9 on the contracting parties working jointly to enhance the convergence and coordination of economic policy, or Article 12 formalising practice related to Euro Summit meetings. Finally, a number of provisions do little more than reiterate or anticipate obligations which were, or were to be, part of EU law. This can be seen in relation to Article 4, which makes explicit reference to obligations contained in EU law to reduce government debt to less than 60% of GDP, and Article 5, which refers to the excessive deficit procedures established under the EU treaties, indicating that contracting parties in breach of such rules will need to develop budgetary and economic partnership programmes, the content and format

[4] Reg. 1173/2011 (OJ [2011] L 306/1); Reg. 1174/2011 (OJ [2011] L 306/8); Reg. 1175/2011 (OJ [2011] L 306/12); Reg. 1176/2011 (OJ [2011] L 306/25); Reg. 1177/2011 (*OJ* [2011] L 306/33); Dir. 2011/85 (OJ [2011] L 306/41).

[5] Reg. 472/2013 (OJ [2013] L140/1); Reg. 473/2013 (OJ [2013] L140/11).

[6] Indeed, the complexity and lack of transparency in this field has been rightly criticised by P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *ELRev* (2012) p. 231 at p. 247, and S. Peers, cited in the House of Lords European Union Committee, *The Euro Area Crisis* (25th Report of Session 2010-12, HL Paper 260, 14 Feb. 2012) at para. [98].

[7] *See* European Commission, 'The EU's economic governance explained', MEMO/13/979, 12 Nov. 2013, for a useful, and relatively accessible, summary of the key provisions and mechanisms.

of which were to be defined in future EU legislation (and now implemented as part of the 'Two Pack').

The key innovation of the Fiscal Compact is found in Articles 3 and 8 of the treaty. Article 3(1) establishes a balanced budget rule, which will be 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% of the gross domestic product at market prices'. The relevant EU legislation had previously required a Member State to set its medium-term objective for its annual budget deficit to be between 0% and 1%, and as a result, as both Reestman and Peers have noted, the Fiscal Compact establishes a balanced budget rule which is slightly more demanding.[8] Yet as Peers also maintains, this is not an absolute rule, for three reasons. First, Article 3(1)(b) requires Members States to ensure 'rapid convergence' towards this objective, rather than satisfy it immediately. Secondly, Article 3(1)(c) permits temporary deviation from the balanced budget rule in 'exceptional circumstances', which are defined in Article 3(3)(b) to be either an 'unusual event outside the control of the Contracting Party which has a major impact on the financial position of the general government', or a period of 'severe economic downturn'. In both cases, any temporary deviation must 'not endanger fiscal sustainability in the medium-term'. Thirdly, Article 3(1)(d) permits the medium-term objective to rise to a structural budget deficit of up to 1% of GDP if government debt is 'significantly below 60%' of GDP, and 'where risks in terms of long-term sustainability of public finances are low'.[9]

Yet what is truly significant about the Fiscal Compact is not the substance of the balanced budget rule, but how it is to be implemented. Article 3(2) provides that the balanced budget rule 'shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. Further, a 'correction mechanism' must be included in the incorporation of this rule into national law, which is automatically triggered in the event of 'significant deviations', and will oblige the contracting party 'to implement measures to correct the deviations over a defined period of time'. To ensure that this incorporation of the balanced budget rule occurs, Article 8 of the

[8] J.H. Reestman, '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', 9 *EuConst* (2013) p. 480 at p. 482; S. Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?', 8 *EuConst* (2012) p. 404 at p. 412.

[9] Peers, *supra* n. 8, p. 411.

Fiscal Compact engages existing EU institutions in an enforcement process.[10] The Commission may report on the compliance of the contracting parties with the Article 3(2) obligation, and if a failure to comply is found, one or more of the other contracting parties will bring the dispute before the Court of Justice under Article 273 TFEU. The other contracting parties are also entitled to bring such proceedings independently of a finding by the Commission, and if found to remain in violation of this obligation, a contracting party may eventually be fined by the Court of Justice, in an amount not greater than 0.1% of its GDP.

Thus, as was noted in an Editorial in this *Review*, the Fiscal Compact serves crucially to 'instrumentalise national constitutional law for the benefit of Union law'.[11] Why might this be? Was it simply a necessary device, given that the Fiscal Compact was ultimately created in the form of an international agreement, and would therefore not necessarily directly bind contracting parties? Dashwood suggests that the balanced budget rule might have been adopted for eurozone members by way of a regulation under Article 136(1)(a) TFEU, and that had this solution been pursued, 'there would have been no need for the special enforcement procedure provided for by Article 8 TSCG'.[12] Similar logic might also extend to the Article 3(2) obligation to implement the balanced budget rule and automatic correction mechanism in national law itself; had the substantive rules been enacted as part of the architecture of EU law, it could be argued that domestic incorporation was an unnecessary gloss. Yet utilising national constitutional law to give effect to the balanced budget rule might be understood to be more than a mere expedient, required because of the legal status of the Fiscal Compact.[13] Instead, it might be argued that national incorporation of the balanced budget rule

[10] This was a matter of some controversy for the House of Commons European Scrutiny Committee, which argued that the use of existing EU institutions for these purposes might be unlawful; *see Treaty on Stability, Coordination and Governance: Impact on the Eurozone and the Rule of Law* (62nd Report of Session 2010-12, HC1817, 3 April 2012) para. [68]-[69]. The subsequent decision in CJEU 27 Nov. 2012, Case C-370/12, *Pringle* v. *Ireland* seems to indicate that the view of the Committee is not sustainable; *see* the discussion in Editorial Comments, 'What Do We Want? "Flexibility! Sort-of..." When Do We Want It? "Now! Maybe..."', 50 *CMLRev* (2013) p. 673 at p. 678-679.

[11] LB and JHR, 'Editorial: The Fiscal Compact and the European Constitutions: "Europe Speaking German"', 8 *EuConst* (2012) p. 1 at p. 5.

[12] A. Dashwood, 'The United Kingdom in a Re-formed European Union', 38 *ELRev* (2013) p. 737 at p. 743, n. 37.

[13] Indeed, the requirement that a balanced budget rule be incorporated in national law by eurozone Member States featured as part of the framework envisaged by the German Chancellor Angela Merkel and French President Nicholas Sarkozy prior to the Brussels summit, when the possibility of amending the existing EU treaties to implement these changes to fiscal governance still remained open; *see* 'Text: Sarkozy and Merkel's letter to Van Rompuy', *Reuters*, 7 Dec. 2011 <www.reuters.com/article/2011/12/07/us-eurozone-france-letter-idUSTRE7B612Y20111207>, visited 17 Feb. 2014.

makes the commitment 'more visible', enhances 'the legitimacy of the budgetary limitations by emphasising that they are self-imposed', and creates distance between the resultant spending cuts and tax increases and 'Brussels'.[14] This might give the impression that the balanced budget rule is accepted rather than imposed on national authorities, although whether this is simply illusory is a matter for debate. While for some the Fiscal Compact may therefore be 'characterised as a constitutional instrument more than an instrument of ordinary politics',[15] even those sceptical of the legal importance of its substantive provisions have recognised the significance of the requirement of its incorporation into national law. Peers, for example, argues that the relevance of the treaty is 'political (and therefore economic)', in so far as it provides a way for eurozone Member States to justify their financial contributions to bail-out funds, but that an aspect of its broader significance is likely to be 'the impact of the (quasi-)constitutional changes that must be made to implement it at national level'.[16]

The Fiscal Compact therefore raises a range of important questions for constitutional lawyers, because of the manner in which it cuts across a range of varying, but crucial, relationships: that between law, politics and economics; that between national, supranational and international institutions and arrangements; and that between public authority (whether represented by the nation state or the European Union) and private interest (here in the form of the global markets). That being said, given the United Kingdom is notable in this context for standing entirely apart from the Fiscal Compact, why is the treaty of interest from this particular perspective? It is to this matter that we turn in the next section.

The United Kingdom and the Fiscal Compact

As is well known, the UK is not a contracting party to the Fiscal Compact, along with the Czech Republic and Croatia, the latter only acceding to the EU after the treaty was agreed. The 'veto' exercised by Prime Minister David Cameron at the December 2011 European Council meeting ensured that the substantive changes to EU economic governance under consideration at the Brussels summit could not be implemented through amendment of the existing EU treaties. As a result, the provisions of the now in-force Fiscal Compact have no application to the UK. Yet as an EU Member State which is not a member of the euro, the UK could have accepted the substance of what became the Fiscal Compact (whether by ratification of the intergovernmental agreement or, we might presume, allowing amendment of the EU treaties themselves) *without* becoming bound by the

[14] LB and JHR, *supra* n. 11, p. 6.
[15] LB and JHR, *supra* n. 11, p. 7.
[16] Peers, *supra* n. 8, p. 441.

balanced budget rule, or the requirement to incorporate it in national law, considered above. As the final text of the Fiscal Compact makes clear, ratifying non-euro Member States are not bound by the substantive provisions of the treaty, unless and until they declare themselves to be so bound.[17] And this reflects arrangements under EU law more generally. Under the terms of the reformed Stability and Growth Pact, the UK may be subject to certain limited forms of fiscal surveillance and reporting requirements, but is not subject to sanctions for non-compliance, nor to the extended reforms introduced in the 'Two Pack'.[18]

So if the UK is not bound by the provisions of the Fiscal Compact, and would not have needed to be bound by the provisions of the Fiscal Compact had it ratified it, why consider the treaty from this perspective? There are three main reasons. First, the UK's involvement in the genesis of the Fiscal Compact – by exercising a veto, David Cameron played a critical role in the determining the ultimate form that the treaty would take – makes certain aspects of the circumstances in which the Prime Minister acted worthy of reconsideration. Secondly, while the UK is not at present a party to the Fiscal Compact, or subject to its terms, this could change. The treaty itself explicitly asserts that 'it shall be open to accession by Member States of the European Union other than the Contracting Parties'.[19] Further, and perhaps more significantly, the treaty provides that five years after the Fiscal Compact enters into force, 'the necessary steps *shall* be taken... with the aim of incorporating the substance of this Treaty into the legal framework of the European Union'.[20] Whether in either event the UK would become bound by the

[17] Art. 14(5) TSCG. This excludes Title V on 'Governance of the Euro Area', which bound contracting parties from the date the treaty entered into force. Denmark and Romania are non-euro members which have declared an intention to be bound by the treaty in full; Bulgaria has declared an intention to be bound by Title III only, but this includes Arts. 3 and 8 discussed above.

[18] By Protocol No. 15 to the EU treaties, para. 4, the UK obtained a specific exemption from 'the adoption of the parts of the broad economic policy guidelines which concern the euro area generally', but, by para. 5, will 'endeavour to avoid an excessive government deficit'. The Commission can still monitor whether the UK has an excessive structural budget deficit, and on the basis of this assessment, propose 'country-specific recommendations' for economic reform in the UK. Six such 'CSRs' for the UK were adopted by the Council of the European Union, by way of a Council Recommendation, in 2012, and progress towards these objectives is monitored by the Commission, but cannot be compelled; *see* European Commission, COM(2013) 378 final, <ec.europa.eu/europe2020/pdf/nd/csr2013_uk_en.pdf> and SWD(2013) 378 final, <ec.europa.eu/europe2020/pdf/nd/swd2013_uk_en.pdf>, both visited 17 Feb. 2014. For the UK's most recent 'convergence programme', setting out the government's medium term fiscal policies, as required under the Stability and Growth Pact, *see* HM Treasury, *2012-12 Convergence Programme for the United Kingdom: submitted in line with the Stability and Growth Pact*, April 2013, <www.gov.uk/government/uploads/system/uploads/attachment_data/file/197171/convergence_programme_201213.pdf>, visited 17 Feb. 2014.

[19] Art. 15 TSCG.

[20] Art. 16 TSCG (emphasis added).

substantive provisions of the Fiscal Compact contained in Articles 3 and 8 is of course not clear, but the prospect of this means that it is appropriate to assess the relevant legal obstacles which might obtain.

Thirdly, the UK also provides an interesting case study as to the meaning and effect of Article 3 of the Fiscal Compact. What is required to satisfy the obligation under Article 3(2) to incorporate the balanced budget rule into national law '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' is less than obvious. As a state with an uncodified constitution, grounded instead on the doctrine of the legislative sovereignty of Parliament, in one sense it would perhaps be as difficult for the UK as any EU Member State to satisfy this requirement, if it must bind its legislature to do so.[21] This becomes an important issue in two ways. In one sense, it is worth exploring simply to determine whether it is even conceptually possible for the UK to submit to the substantive content of the Fiscal Compact, if it ever opted to do so. Or, in contrast, if the language of Article 3(2) serves ultimately to make UK compliance with its terms unachievable. In a second sense, the issue is important because, in seeking to establish whether the UK could comply with the requirement that the balanced budget rule be incorporated into national law, we may be able to further clarify the meaning of Article 3(2) in general. And when uncertainty about the action this provision actually requires of states which are parties to the Fiscal Compact persists beyond the deadline for incorporation (which was 1 January 2014 – one year after the entry into force of the treaty), this could be of broader benefit.

With these reasons for consideration of the Fiscal Compact from a UK perspective in mind, the remainder of this article will deal with three main issues. First, we look back, to the circumstances in which the UK veto was exercised in December 2011. In particular, a key consideration to be assessed is whether there were domestic legal obstacles which prompted David Cameron to exercise this veto; legal obstacles that stem from the (then relatively recently enacted) European Union Act 2011. This discussion will provide a basis for the second key issue to be explored: whether the UK could in future ratify, or become bound by, the substantive terms of the Fiscal Compact, and how the European Union Act 2011 might affect the prospect of this. Thirdly, we will consider what particular action the UK would need to take to satisfy the requirements contained at present in Article 3 of the treaty, if it opted to do so. In this way, we will look back, to then look forwards, for the UK's *past* relationship with the Fiscal Compact is likely to have crucial implications for our understanding of the possibility of any *future* relationship with the Fiscal Compact.

[21] This difficulty is identified in LB and JHR, *supra* n. 11, p. 3.

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The United Kingdom and the Fiscal Compact: The past

The veto exercised by the Prime Minister on behalf of the UK at the December 2011 Brussels summit was an important part of the genesis of the Fiscal Compact. Its circumstances and implications have also been much reflected upon in the UK. In its aftermath, the House of Commons Foreign Affairs Committee in particular launched an inquiry into *The Future of the EU: UK Government Policy*.[22] A key issue considered by the Committee was whether the 2011 veto served as a 'watershed' moment in UK–EU relations. This is, however, a question which permits of no definitive answer.[23] The exercise and consequences of the veto were of course significant, yet its implications can be construed in (at least) two ways.

First, the 2011 veto could be understood 'narrowly', as an exercise in the protection of specific UK national interests which has had a minimal impact on its broader position in the EU. Indeed, this would seem to reflect the view of the Prime Minister, who in a subsequent statement to the House of Commons on 12 December 2011 maintained that the veto was necessary in the absence of 'relatively modest' safeguards 'on the single market and on financial services'.[24] Disagreement about the Fiscal Compact might thus be seen as effectively severable from other EU policy issues, and not necessarily inhibiting constructive engagement by the UK with fellow Member States. Such an interpretation could be supported by the fact, discussed above, that the UK, as a non-contracting party to the Fiscal Compact, actually remains in substantially the same position as a non-eurozone contracting party which has not declared an intention to be bound by the substantive provisions of the treaty. The UK may not then in practice be isolated on the margins of the EU simply because it has declined to participate in a compact designed principally to regulate fiscal policy among euro-members.

Secondly, however, the Brussels veto might in contrast be viewed more 'broadly', as expressive of a more fundamental shift in UK government policy towards the EU. The UK government's attempts to obtain concessions in exchange for consenting to an amendment of the existing EU treaties could be seen as evidence of a lack of solidarity with fellow Member States during the ongoing financial crisis, especially since the most controversial provisions contained in the Fiscal Compact would not have been automatically applicable to the UK. As the exercise

[22] House of Commons Foreign Affairs Committee, *The Future of the EU: UK Government Policy* (1st Report of Session 2013-14, HC 87-I, 11 June 2013).

[23] As the findings of the Foreign Affairs Committee's inquiry indicated: 'We have not found that that, by itself, the Prime Minister's veto of EU Treaty change at the December 2011 European Council has so far had a decisive overall effect, either way, on the UK's ability to exercise influence in day-to-day policy-making in the EU'; House of Commons Foreign Affairs Committee, *supra* n. 22, para. [52].

[24] *Hansard,* HC Deb, 12 Dec. 2011, Vol. 537, col. 519.

of the 2011 veto thus bears multiple interpretations, it is important to understand the circumstances in which it was employed. For if the use of the veto was unavoidable, this would need to inform our understanding of its implications. The most significant domestic legal issue which could have affected the UK government decision to veto change to the existing EU treaties arose as a result of the enactment of the European Union Act 2011.

The EU Act 2011 was, from a UK perspective, an unprecedented constitutional experiment, the implications of which are still being grappled with.[25] In addition to enacting a 'sovereignty clause' designed to reinforce the fact that EU law takes effect in the UK only because authorised to do so in a domestic statute,[26] the EU Act introduced a range of legal mechanisms seeking to control the making of various decisions relating to the EU, including the requirement that certain categories of decision could only be made if affirmed by Act of Parliament,[27] or if Parliamentary Approval has been received.[28] Of direct relevance to the present discussion, however, are the EU Act's 'referendum locks', the most demanding form of control created by the Act, and, again from a UK perspective, the most novel innovation. The relevance of these referendum locks – which make specified transfers of power or competence from the UK to the EU subject to approval at a national referendum, as will be explained in the next section – stems from the fact that it has been suggested that their existence could have affected the decision to exercise the veto in 2011.[29] The legal basis for such a claim must, however, be evaluated: would the control mechanisms introduced in the EU Act have been engaged had the UK government indicated a willingness to ratify an amending treaty?

This is important, because the prospect of having to hold such a referendum would have been deeply unappealing to the coalition government led by David Cameron. The government had pledged on its formation not to take any action which would trigger a referendum lock during its initial term in office,[30] and re-

[25] For the early attempts to understand this statute *see* M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"', 37 *ELRev* (2012) p. 3; P. Craig, 'The European Union Act 2011: Locks, Limits and Legality', 48 *CMLRev* (2011) p. 1915; S. Peers, 'European Integration and the European Union Act 2011: An Irresistible Force Meets an Immovable Object?', *Public Law* [2013] p. 119; J.E.K. Murkens, 'The European Union Act 2011: A Failed Statute', 4 *Tijdschrift voor Constitutioneel Recht* (2012) p. 396.

[26] European Union Act 2011, s.18.

[27] European Union Act 2011, s.7.

[28] European Union Act 2011, s.10.

[29] *See*, e.g., P. Yowell, 'EU Act 2011: Law and Politics', *U.K. Const. L. Blog*, 19 Jan. 2012 <www.ukconstitutionallaw.org/2012/01/19/paul-yowell-eu-act-2011-law-and-politics>, visited 17 Feb. 2014.

[30] The Coalition, *Our Programme for Government* (2010) p. 19, <www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf>, visited 17 Feb. 2014.

coiling from this commitment could have generated political problems within the coalition, with it being difficult to see a basis on which Conservative and Liberal Democrat ministers could together campaign for a 'Yes' vote give their disparate attitudes towards Europe. Indeed, it is not obvious whether the Conservative members of the government could, or would, have even campaigned in favour of approval of the provisions of the Fiscal Compact at such a referendum. Perhaps most significantly, had a referendum been held and the vote lost, the result could have been interpreted as a rejection of EU membership in itself, with uncertain consequences. At the very least, such a result would have had the potential to accelerate the Prime Minister's plans to renegotiate the terms of UK membership of the EU, which, if re-elected, he intends to put to a referendum in the next, rather than the present, Parliament. And this is to say nothing of the tense atmosphere in which such renegotiation would then have had to occur. So had a referendum been legally required in the UK on the provisions that became the Fiscal Compact, a clearer rationale for the exercise of the 2011 veto would perhaps emerge. But the question of whether a referendum would have been required by the terms of the EU Act 2011 will also have critical implications for any potential future relationship between the UK and the Fiscal Compact. For it will provide us with a starting point to explore whether these same control mechanisms would be triggered in the future, if the UK were eventually to agree to become bound by the substantive provisions contained in Articles 3 and 8 of the treaty.

The European Union Act 2011 and the Fiscal Compact

With respect to the legal position, the scope and applicability of the EU Act's referendum locks to provisions of the kind which were ultimately enacted in the Fiscal Compact must be established. The referendum locks contained in sections 2, 3 and 6 of the EU Act are intended to ensure that, in the circumstances specified in the legislation, power or competence cannot be transferred from the UK to the EU by Act of Parliament unless approved of by a majority of the electorate voting in a referendum. Sections 2 and 3 of the Act are of particular relevance for present purposes. By section 2, a treaty to amend or replace the existing EU treaties must be approved at a referendum if it fulfils the criteria set out in section 4 of the EU Act. Similarly, by section 3, a revision of the existing EU treaties under the Article 48(6) TEU simplified revision procedure will attract a referendum if it falls within section 4. In principle, therefore, had the Prime Minister withheld his veto in Brussels, and had an agreement been reached to attempt to incorporate provisions of the sort now contained in the Fiscal Compact into EU law via an amendment of the existing EU treaties, whether through a new treaty or the simplified revision procedure, the EU Act's referendum locks might have been engaged.

Yet upon examination of the criteria set out in section 4, which determine whether a purported amendment of the existing EU treaties would attract a referendum under the Act, it becomes clear that provisions of the sort contained in the Fiscal Compact would not have required approval at a national plebiscite. To determine whether a provision falls within section 4 of the EU Act, a two stage process is to be followed. First, it must be established whether a proposed provision satisfies any one of the criteria set out in section 4(1) of the Act, which, in broad terms, is designed to catch an increase in the competence or power of the EU. Second, if a provision does satisfy the criteria set out in section 4(1), it must be considered whether that provision is nevertheless exempt from the requirement that a referendum be held in accordance with section 4(4). If the proposed amendment is to be carried out using the simplified revision procedure, by section 3(4) a further stage is added: if a provision falls within section 4 only because it is caught by subsection (1)(i) or (j), a referendum will not be required if the effect of that provision in relation to the UK is not significant. In all other instances, a 'significance test' is not engaged.

Applying this process to the provisions contained in the Fiscal Compact it is evident that the EU Act's referendum locks would not be engaged. Article 3, which imposes the balanced budget rule discussed above, comes closest to being caught by the criteria set out in section 4(1) of the Act. In particular, it seems to be covered by section 4(1)(f)(i), which provides that 'the extension of the competence of the EU in relation to the co-ordination of economic and employment policies' will attract a referendum. Nevertheless, when we look to section 4(4), it is apparent that Article 3 would be exempt from the requirement that a referendum be held in accordance with subsection (b). Article 3 would not engage the EU Act's referendum locks because it is a provision 'that applies only to member States other than the United Kingdom'. Since the provisions of the treaty would not apply automatically to non-eurozone states like the UK, Article 3 would have been exempt from the EU Act's referendum requirements.

Indeed, the exemption provided under section 4(4)(b) would also be applicable to all of the other substantive provisions contained in the Fiscal Compact; as with Article 3, each one would also be exempt from the requirement that a referendum be held because it 'applies only to member States other than the United Kingdom'. Yet this is not the only reason that the other provisions of the Fiscal Compact do not engage the EU Act's referendum locks, as will be discussed below. There is, however, one further potential exception. Article 8, at least as outlined in the second draft of the Fiscal Compact, might also have had to rely exclusively on the section 4(4)(b) exemption to avoid triggering a referendum, though even this would ultimately depend on how that draft version of Article 8 was interpreted. This is due to the fact that the version of Article 8 contained in the second draft

could be understood as extending the jurisdiction of the Court of Justice to cover enforcement of the provisions of Title III of the Fiscal Compact in general, rather than the obligation to implement the balanced budget rule in national law in particular. Article 8, in this form, could be argued to effect a partial elimination of Article 126(10) TFEU, which otherwise operates to limit the judicial enforcement of the excessive deficit procedure as a matter of EU law. Yet as obligations generated under the excessive deficit procedure are also referred to in Title III to the Fiscal Compact, this might have been understood to provide an alternative basis for their judicial enforcement. If such an interpretation of this draft version of Article 8 had been accepted, it is possible that this provision could have satisfied the EU Act's section 4(1) criteria. In particular, Article 8 of the second draft could potentially have been caught by section 4(1)(i) if it were to be seen as a provision which removes a limitation on the power of an EU institution or body 'to impose a requirement or obligation on the United Kingdom'. Of course, even in such circumstances, the exemption under section 4(4)(b) would still operate to negate the referendum requirement that would otherwise take effect if, as with Article 3 discussed above, Article 8 of the second draft was not to be applicable to the UK. Nevertheless, Article 8 as finally drafted avoided such problems, as the amended text of this provision limited the jurisdiction of the Court of Justice to matters related to Article 3(2) of the draft treaty alone, and cited Article 273 TFEU as the existing legal basis for this special jurisdiction.[31] The version of Article 8 contained in the final treaty thus does not further extend the Court's jurisdiction, with the consequence that section 4(1)(i) is not engaged, and the 'not applicable to the UK' exemption provided by section 4(4)(b) is not required, because a referendum lock is not triggered.

Looking beyond Article 3, and the ultimately hypothetical complications of the second draft of Article 8, while (in principle) all of the other substantive provisions contained in the treaty would also seem to be exempt under section 4(4)(b), they would also fail to attract a referendum under the EU Act for a number of other reasons which can be briefly recounted. Article 4, concerning the operation of the excessive deficit procedure, would also be exempt in accordance with section 4(4)(a) of the Act as it involves (at most) 'the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence'. Articles 5, 6 and 11 of the treaty (which deal with budgetary and economic partnership programmes, public debt issuance planning, and coordination of major economic policy reform respectively) appear to be outside the scope of section 4(1), in so far as they do not confer any new competences on the EU. In addition, as the Preamble to the treaty states that the Commission intends to bring forward

[31] Art. 8(3) TSCG.

proposals for legislation within the framework of the EU treaties in the areas covered by these Articles, in the future these provisions may also be exempt as a 'codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence' in accordance with section 4(4)(a) of the Act. Article 9, on enhancing economic convergence and competitiveness among the contracting parties, also appears to be outside the scope of section 4(1), as it does not confer any new competence on the EU. Finally, Articles 7, 10, 12 and 13 (concerning the reversible obligation to support sanctions, readiness to engage in enhanced cooperation, Euro Summit meetings, and cooperation between the European and national Parliaments respectively) seem to be outside the scope of the EU Act entirely, as they are not provisions the ratification or approval of which the Act seeks to control.

The overall position is therefore that nothing in the Fiscal Compact, had it been conceived as an instrument to amend the EU treaties themselves, would have engaged the referendum locks contained in the EU Act. As a result, it seems clear that the UK Government could have lawfully agreed to ratify a treaty containing these provisions by way of amendment to the existing EU treaties without having to seek the approval of the electorate at a national referendum. On this basis, it seems difficult to imagine that concerns that a referendum might be *legally* required under the EU Act – and the complications which would be likely to ensue from such a referendum – made a significant contribution to the Prime Minister's decision to veto a change to the existing EU treaties at the negotiations in Brussels.

This is, however, to assume that the UK would not have been bound by the substantive provisions contained in the Fiscal Compact, had these provisions been enacted in the form of an amendment to the EU treaties. As has been outlined above, while almost all of the provisions contained in the Fiscal Compact would simply not have engaged the EU Act's referendum locks (including Article 8, in the final form in which it was enacted), Article 3 would have triggered a referendum lock in accordance with section 4(1)(f)(i)[32] had it been applicable to the UK. It may be a safe assumption that had David Cameron withheld his veto, and had the provisions now contained in the Fiscal Compact been implemented by an amendment to the existing EU treaties, that his government would not have been willing to be bound by the balanced budget rule set out in Article 3. But it is nevertheless important to bear this in mind when we consider below what legal obstacles might prevent any future UK government from becoming bound by this central element of the Fiscal Compact.

[32] Which provides that 'the extension of the competence of the EU in relation to the co-ordination of economic and employment policies' will attract a referendum.

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The United Kingdom and the Fiscal Compact: The future

The UK, while at present not party to the Fiscal Compact, could in future change its position in relation to the treaty and / or its substantive provisions in a number of ways. The UK could accede to the Fiscal Compact, and either remain unbound by its terms (excluding Title V), or declare an intention to be bound by some aspects of the agreement.[33] Alternatively, the UK could agree to the incorporation of the substantive terms of the Fiscal Compact into the existing EU treaties, and again, as a non-eurozone Member State, determine whether to become bound by its provisions.[34]

Of course, what a UK government may or may not choose to do in the future is a matter for speculation, and predictions as to the likelihood of any particular course of action largely futile. Yet it may be worth further reflection upon the distinction drawn above between a 'narrow' understanding of the 2011 veto (as having been employed merely to protect specific national interests), and a 'broad' understanding of the 2011 veto (as indicative of an underlying antagonism towards the EU itself), to assist in sketching the parameters of possible future action. Adopting a narrow interpretation, if the use of the veto was not legally required or unavoidable, as concluded above, but optional, it might be difficult to view its deployment as being effective in a meaningful sense. For the Prime Minister's negotiating strategy failed to secure any of the safeguards sought, while many, albeit not all, of the provisions objected to by the UK government at the Brussels summit were still enacted by alternative means in the form of the Fiscal Compact. Nevertheless, if the veto was employed for the 'narrow' reasons recounted above, it may be less likely to preclude future accession to the treaty, or incorporation of the terms of the Fiscal Compact into the existing EU treaties. It is likely that this would need to be part of some broader revision of the EU treaties, with the UK potentially adopting a quid pro quo approach in order to achieve some of the reforms to EU law which it desires.[35] It is not clear, however, that this would fit with the timescale that the current Prime Minister envisages for renegotiation of the UK's relationship with the EU, to be put to a national referendum in 2017.[36] Nor is it clear that the UK position is sensitive to the existing legal scope for the

[33] Art. 15 TSCG.

[34] Art. 16 TSCG.

[35] The prospect of this is discussed, for, e.g., in Dashwood, *supra* n. 12, p. 755-756.

[36] *See* 'EU Speech at Bloomberg', 23 Jan. 2013, <www.gov.uk/government/speeches/eu-speech-at-bloomberg>, visited 17 Feb. 2014. What precisely will be the subject of renegotiation is not yet clear; a Balance of Competences review is currently being undertaken by the government, in an attempt to audit the activity of the EU and its effects on the UK, and with a view to informing the debate about reform of this relationship; *see* <www.gov.uk/review-of-the-balance-of-competences>, visited 17 Feb. 2014.

'flexibility' it desires in relation to the EU, or the challenges that such developments might present.[37]

What if, in contrast, a broader interpretation of the veto is adopted, and it is treated as being emblematic of a shift in government policy towards the EU, rather than a statement of dissatisfaction with the notion or terms of the Fiscal Compact itself? If the 2011 veto ultimately comes to be seen as a defining moment of some kind – the diplomatic manifestation of the UK's retrenchment from Europe – it might become more difficult to foresee either accession to the Fiscal Compact, or incorporation into the existing EU treaties. Instead, an attempt to engineer UK withdrawal from the EU might be thought to become more likely, although what the domestic constitutional mechanism for this would be is uncertain. The European Union Act 2011 contains no standing provision for a withdrawal referendum to be held,[38] and while the Conservatives have stated that a pledge to hold an 'in-out' referendum will be included in their 2015 general election manifesto, this would only be likely to occur in the event that they are able to form a majority government after that election. The Liberal Democrat element of the current coalition government has blocked the Prime Minister from introducing a government bill to give effect to his promise to hold a withdrawal referendum by the end of 2017, with the Conservatives having to resort to using a private member's bill, proposed by James Wharton MP, to legislate to this effect in the present Parliament. This private member's bill has recently been defeated in the House of Lords, and the government is now considering use of the Parliament Acts 1911 and 1949 (by which legislation can be enacted without the consent of the Lords, provided it has been passed by the House of Commons in two successive sessions of Parliament, after a delay of one year)[39] in an attempt to ensure that the EU (Referendum) Bill becomes law.[40]

Whatever the range of possibilities may be in terms of future UK action regarding the Fiscal Compact and its position within the EU more broadly – and this is only framed, rather than exhausted, by the discussion immediately above – accession to the treaty or supporting its incorporation into the EU treaties would only be a first step. The question of whether the UK would opt to become bound by the substantive provisions contained at present in the Fiscal Compact – and in particular the Article 3 obligation to introduce the balanced budget rule into national law – would be even more contentious. And with respect to this issue, the question of whether the original 2011 veto should be interpreted narrowly or

[37] *See* Editorial Comments, *supra* n. 10, p. 673-682.

[38] *See* Gordon and Dougan, *supra* n. 25, p. 18-21.

[39] Parliament Act 1911, s.2(1).

[40] *See* 'Cameron says Tories will bring back failed EU Bill', *BBC website*, 31 Jan. 2014, <www.bbc.co.uk/news/uk-politics-25977258>, visited 17 Feb. 2014.

broadly seems essentially irrelevant. For as a non-eurozone state in which the prospect of participating in monetary union seems to be entirely off the political agenda for the long term, and which, as discussed above, is exempt from the more demanding, obligatory elements of EU fiscal governance, the prospect of the UK deciding to subject itself to the substantive provisions of the Fiscal Compact seems remote.

Nevertheless, as I have argued above, there is something to be gained from exploring the potential legal obstacles to such developments in the abstract, in terms of our broader understanding of the meaning and effects of the Fiscal Compact itself, and because the prospect of a change in the UK position in relation to it cannot be entirely discounted. Indeed, this may particularly be the case if a new government felt it necessary to legislate to enact fiscal rules in an attempted guarantee of its economic credibility. Such a commitment has recently been made by Ed Balls MP, the Shadow Chancellor, on behalf of a future Labour government. Announcing a 'binding fiscal commitment', Balls has promised that '[t]he next Labour government will balance the books and deliver a surplus on the current budget and falling national debt in the next Parliament', and 'legislate for our tough fiscal rules within 12 months of the general election'.[41] Of course, whether such fiscal rules would cohere, either directly or indirectly, with the balanced budget rule set out in the Fiscal Compact remains to be seen. But the potential for some form of binding fiscal legislation to be introduced in the UK, whether domestic or European in substance, is real. In the following section, we will thus consider the legal obstacles to UK accession to the Fiscal Compact, or incorporation of its terms into the EU treaties, before subsequently considering how, if this were to become necessary, the balanced budget rule could be implemented in the UK.

Legal obstacles to accession or incorporation

The key legal obstacle to a future UK change in position in relation to the provisions contained in the Fiscal Compact remains the European Union Act 2011. Whether the control mechanisms contained in the EU Act could still be triggered depends on how precisely the UK changes its present position. As discussed above, this could involve simply acceding to the new treaty while its provisions remained outside the architecture of the EU treaties.[42] A change of position might also entail the UK declaring its intention to be directly bound by all or some of the

[41] Ed Balls MP, 'Speech to the Fabian Society New Year Conference', 25 Jan. 2014, <labourlist.org/2014/01/full-text-ed-balls-commits-labour-to-budget-surplus-and-announces-50p-tax-rate-plan>, visited 17 Feb. 2014.

[42] Art. 15 TSCG.

provisions contained within the new treaty, again while outside the architecture of the EU legal order; a declaration which would be necessary for the treaty's provisions to be applicable to the UK.[43] Or the UK might also change its position by agreeing to the incorporation of the new treaty into the EU treaties, thus making the provisions of the Fiscal Compact a part of EU primary law.[44] The effect of the EU Act on such potential future developments will now be considered. In so doing, a number of inconsistencies in the scheme of the Act can be identified, which may undermine its ability to control the transfer to the EU of competence related to the provisions of the Fiscal Compact.

First, consider if the UK agreed to the incorporation of the Fiscal Compact into the existing EU treaties, when it had either not acceded to the treaty at all, or had acceded but not declared its intention to be bound by its provisions. In such circumstances, at the point of the incorporation of the Fiscal Compact provisions into the EU treaties, the EU Act's referendum locks would straightforwardly not be engaged. For, as discussed above, if the provisions were applicable only to Member States other than the UK, the section 4(4)(b) exemption would operate to ensure that a referendum was not required. Yet, if we consider an alternative change of position, a gap in the EU Act's system of control becomes apparent. For if a UK government *subsequently* agreed to be bound by the provisions contained at present in Title III of the Fiscal Compact – which would, in our hypothetical scenario, now be incorporated into the EU treaties – new competence would have been conferred on the EU through the UK's acceptance of the rules contained in what is currently Article 3, for the reasons explained above. And this could occur without a referendum being held to approve the changes, for these provisions would already have become part of EU law, and thus – even in relation to provisions which would otherwise fall within section 4 – the referendum locks contained in sections 2 and 3 of the EU Act would not bite.

The potential gap described above arises because the EU Act is not *as such* structured to catch future hypothetical increases in EU competence; if an increase in competence is not applicable to the UK at the time of the treaty change, the Act's referendum locks will not be engaged. Only in certain explicitly listed situations does the Act make provision for referendums to be held if a future UK government were to seek to opt-in to existing areas of competence within the EU treaties: for example, by joining the euro[45] or accepting the Schengen Protocol.[46] If this potential loophole, whereby EU competence could be increased without a referendum being held, were to be closed, section 6 of the EU Act would need to

[43] Art. 14 TSCG.
[44] Art. 16 TSCG.
[45] European Union Act 2011, s.6(5)(e).
[46] European Union Act 2011, s.6(5)(k).

be amended: for example, to require a decision for the UK to subscribe to the Fiscal Compact to be approved at a referendum. But the present existence of this gap in the coverage of the EU Act could be understood to undermine the overall coherence of the system of control which has been introduced. For, given the potential impact of the rules contained in the Fiscal Compact on the macro-economic autonomy of Member States, an acceptance to be bound by these provisions would appear to be a 'trigger event' of at least equivalent significance to many others specifically covered by section 6 of the Act. Yet while the inconsistency created by this gap in the EU Act's scheme of referendum locks, when judged on its own terms, is difficult to justify, its existence also demonstrates that the Act may not offer an absolute obstacle to a UK change of position in relation to the Fiscal Compact, at least in these circumstances.

A second problematic scenario created by a UK change of position in relation to the Fiscal Compact, which is almost the inverse of the first, can also be identified. Consider now if the UK agreed to the incorporation of the Fiscal Compact into the existing EU treaties, when it had already both acceded to the treaty and declared its intention to be bound by the latter's provisions. Upon declaring its intention to be bound by the new treaty, the UK would be required, in accordance with Article 3(2), to enact national provisions of 'binding force and permanent character, preferably constitutional', to give legal effect to the balanced budget rule set out in Article 3(1). How this might be done will be discussed in the next section. Yet even if the UK was in full compliance with its obligations under Article 3(2), and had made provision in domestic law to give effect to the Fiscal Compact's provisions in advance of their incorporation into the existing EU treaties, at the point of incorporation a referendum could nevertheless still be triggered under the EU Act. For if, in accordance with section 4 of the EU Act, new competence was in principle being transferred to the Union through a revision of the EU treaties, a referendum would need to be held pursuant to section 2 or 3 of the Act. And if a provision of the sort now contained in Article 3 of the Fiscal Compact was incorporated into the existing EU treaties, it would indeed fall within section 4,[47] and would not be exempt for the provision would be applicable to the UK.[48] Nor does it appear that such a change would be exempt under section 4(4)(a), because this would not be a 'codification of practice… in relation to the previous exercise of an existing competence' of the EU, since the previous practice would have occurred outside the EU legal order.

Here then, rather than there being a gap in the EU Act system of control, the problem is one of overprovision. In such circumstances, the Act would require a referendum to be held to approve the granting of new competence to the EU even

[47] As discussed above, at text between n. 30 and n. 31 *supra*, by virtue of s.4(1)(f)(i).
[48] As discussed above, at text between n. 30 and n. 31 *supra*, by virtue of s.4(4)(b).

though the UK would already have agreed to be bound by the rules to be incorporated into the EU treaties, and further, would already have made provision in national law to make such rules enforceable. The peculiarity of having to hold a referendum in such a situation – essentially to approve something already in place – is clear. And the consequences of a 'No' vote would be significant and complex: the legal and political status of the national law implementing the relevant rules would be open to question. Whether this poses an obstacle to accession to the Fiscal Compact is not clear. For, as with the first problematic scenario considered above, the EU Act could be amended, and it is likely that the EU Act would need to be amended, even if on a one-off basis, to avoid such a situation occurring. But it demonstrates further the difficulty of the objective the EU Act sought to achieve – setting out in advance a system of control in relation to future transfers of powers or competence to the EU – and that this legislation adds to the complexity of establishing what obstacles might obtain in relation to UK attempts to change its position in relation to the Fiscal Compact (which, it might be argued, could constitute an obstacle in itself).

Nevertheless, the only circumstances in which the Act can uncontrovertibly be said to constitute a legal obstacle would be where the UK agreed to be bound by the substantive terms of the Fiscal Compact at the moment of incorporation into the existing EU treaties, at which point, a referendum lock would be triggered. Otherwise, the effects of the EU Act would be avoidable, or absurd. From this, it is apparent that the provision of the EU Act's referendum locks in relation to future UK involvement in the Fiscal Compact is erratic and lacking any principled basis. Of course, as we have seen above, the fact that a referendum was not legally required in accordance with the terms of the EU Act did not prevent a veto being exercised in 2011 to keep the UK outside the Fiscal Compact. Whether the recognition of this fact should incline us towards a 'narrower' understanding of the veto, as being based on the protection of specific national interests, or a 'broader' understanding of the veto, as being based on disenchantment with the European project, will remain a matter for debate. We might note, however, that the reasons that the government would have found the holding of a referendum on the provisions of the Fiscal Compact undesirable reflect, to some extent, the considerations underlying a broader explanation of the exercise of the 2011 veto. Yet at the very least, these conclusions largely as to the legal (ir)relevance of the referendum locks in this context, both past and future, suggest that political motivations – whatever they precisely may be – will likely play a greater role in conditioning the UK's future relationship with the Fiscal Compact than any legal obstacles contained in the EU Act.

Legal obstacles to implementation of the balanced budget rule

The final issue to consider is how the UK might implement the provisions of the Fiscal Compact, if opting to become bound by its substantive terms. In particular, the requirement to introduce the balanced budget rule in national provisions of 'binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes', in accordance with Article 3(2), is critical. After detailed consideration of a range of competing interpretations, Reestman argues that the meaning of this provision, and the action required to satisfy it, is 'impossible to detect with any intellectual certainty'.[49] The essential difficulty relates to whether to implement the balanced budget rule in an ordinary act of the legislature would be sufficient to satisfy Article 3(2), or whether non-constitutional implementation would need to be 'supra-legislative'. In states where the legislature is the institution endowed with the authority to approve budgets, would the implementation of the balanced budget rule need to be executed in such a way so as to be permanently binding in relation to it? Looking at the 'text and context' of Article 3(2), Reestman is drawn towards concluding that 'the balanced budget rule needs to be inserted in at the very least a supra-legislative provision'.[50] Yet this, he argues, would be to disregard the genesis of Article 3(2) – with later drafts of the treaty diluting the stringency of the implementation requirement, arguably to avoid the complex amendment processes that might otherwise be triggered in some Member States if constitutional change was obligatory.[51] Ultimately, Reestman concludes, for 'political-institutional and practical reasons' it is unlikely that the Commission, and potentially then the Court of Justice, would, while exercising the enforcement functions allocated to them by Article 8 of the Fiscal Compact, determine that enactment of the balanced budget rule in ordinary legislation did not satisfy Article 3(2).[52] For this would be to condemn the (many) Member States subject to the Fiscal Compact who have sought to implement the balanced budget rule in this way, including the Netherlands, France, Ireland[53] and Finland.[54]

[49] Reestman, *supra* n. 8, p. 498.

[50] Reestman, *supra* n. 8, p. 498.

[51] Reestman, *supra* n. 8, p. 495-497.

[52] Reestman, *supra* n. 8, p. 498.

[53] Fiscal Responsibility Act 2012. The language of the Irish legislation is interesting: by s.2(1) it provides that 'The Government shall endeavour to secure that' the requirements imposed are complied with, which could be seen to raise questions about the extent to which this is a 'binding' obligation.

[54] *See* P. Leino and J. Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?', 9 *EuConst* (2013) p. 451 at p. 472-475.

How would such considerations be manifested in the UK context? And can this inform our broader understanding of the effect of Article 3(2)? In the UK, unlike states such as Germany, Italy and Spain,[55] a constitutional implementation of the balanced budget rule is not a possibility. While the notion of a 'constitutional statute' is the subject of contemporary domestic debate – focused mainly around whether such statutes, however defined, need to be repealed[56] or interpreted[57] in ways which differ from ordinary statutes – this has mainly been conducted among the judiciary. Parliament and the government have not to this point engaged in any formal differentiation between different categories of statute, and thus the idea of a constitutional statute, which has in any event been criticised as problematic,[58] would not offer a solution. This, coupled with the lack of a codified constitutional instrument in the UK, would mean that a balanced budget rule would inevitably need to be implemented by an Act of Parliament.[59]

But would this satisfy the Article 3(2) requirements that such a law be 'binding' and 'permanent'? If a 'supra-legislative' implementation were to be held as necessary, the legislative sovereignty of the UK Parliament could be thought to be problematic, a difficulty also generated in relation to the Netherlands. As A.V. Dicey famously argued, when explaining the nature of the doctrine of parliamentary sovereignty, the UK Parliament has the power 'to make or unmake any law whatever', and 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[60] A third proposition was understood by Dicey to flow from these two: that Parliament, possessing legally unlimited legislative power, could not pass an Act which binds its successors.[61] And classically, the doctrine of implied repeal – that a later statute repeals by implication an earlier statute on the same subject matter – was treated as provid-

[55] *See* V. Ruiz Almendral, 'The Spanish Legal Framework for Curbing the Public Debt and the Deficit', 9 *EuConst* (2013) p. 189.

[56] *See*, e.g., *Thoburn* v. *Sunderland City Council* [2002] EWHC (Admin) 195; [2003] QB 151, Laws LJ at para. [60]-[70]; *H* v. *Lord Advocate* [2012] UKSC 24; [2013] 1 A.C. 413, Lord Hope at para. [30].

[57] *See*, e.g., *Robinson* v. *Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] N.I. 390, Lord Bingham at paras. [10]-[12]; *Imperial Tobacco* v. *Lord Advocate* [2012] UKSC 61, Lord Hope at paras. [10]-[16].

[58] *See*, e.g., G. Marshall, 'Metric Measures and Martyrdom by Henry VIII Clause', 118 *Law Quarterly Review* (2002) p. 493 at p. 496: 'This seems to inject an unwelcome element of uncertainty into our public law'.

[59] Assuming, that is, as Reestman is surely correct to say, that a non-legislative solution of the kind considered by Craig would not be a viable interpretation of Art. 3(2); *see* Reestman, *supra* n. 8, p. 494; discussing Craig, *supra* n. 6, p. 237.

[60] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn. (Macmillan 1915) p. 37-38.

[61] Dicey, *supra* n. 60, p. 66 fn. 3: 'a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment'.

ing clear evidence that Dicey was right, and that a successor parliament could never be bound by prior legislation.[62] If this is an accurate account of the constitutional position in the UK, it could be argued that when Parliament enacts an annual Finance Act to approve the government's budget,[63] it would not be bound by a balanced budget rule contained in a prior statute, which could thus be violated readily, by mere implication. Indeed, on Dicey's orthodox understanding of the sovereignty of Parliament, any attempt to enact a binding balanced budget rule in legislation would be futile.

This analysis may, however, be called into question. It could be argued that a balanced budget rule implemented in national legislation has 'binding force' as required by Article 3(2) even if it is subject to the prospect of future repeal by a sovereign national legislature. The crucial issue is whether the balanced budget rule would be displaced by a subsequent, contrary Finance Act, or whether the later legislation would be understood to be unlawful. In legal principle, we might think that such a Finance Act would not necessarily displace a statutory balanced budget rule in such circumstances, if we understand the latter legislative provision as prescribing the legal conditions with respect to which a Finance Act must take effect. Such an understanding of legislative sovereignty is provided by the 'manner and form' theory of parliamentary sovereignty, according to which the legally unlimited law-making authority of Parliament can be used to alter the process which must be followed for future legislation to be validly enacted. Derived from the work of Ivor Jennings, this approach is not a rejection of parliamentary sovereignty, but a reconceptualisation of it, with the effect that while Parliament cannot bind its successors absolutely as to the future *subject matter* of legislation, it can enact legislation which alters the future law-making *process* itself.[64] On this basis, it could be possible to implement a balanced budget rule in such a way that it took effect as a procedural condition, rather than a substantive limitation, the latter variety of legislative limit being ineffective and unlawful on any understanding of parliamentary sovereignty. The implementing legislation could, for example, provide that a future Finance Act could only take effect if approved by the kind of independent auditing institution envisaged in Article 3(2) for monitoring compliance with the Fiscal Compact.[65] This procedural condition would need to be

[62] *See Ellen Street Estates* v. *Minister of Health* [1934] 1 KB 590; *Vauxhall Estates* v. *Liverpool Corporation* [1932] 1 KB 733.

[63] On which *see* 'The Budget and the Annual Finance Bill', *House of Commons Library*, SN813, updated 5 Dec. 2013.

[64] W.I. Jennings, *The Law and the Constitution*, 5th edn. (University of London Press 1959) p. 153.

[65] The role and nature of such monitoring institutions has been explained in outline by the European Commission, as required by Art. 3(2) TSCG; *see* COM(2012) 342 final, especially Principle 7. In the UK, the Office for Budget Responsibility, which has since being established in 2010

adhered to for valid budgetary legislation to be enacted, and in that sense would make Parliament 'bound' by the balanced budget rule when enacting an annual Finance Act, but still subject to the clear possibility that it could be explicitly repealed by the sovereign legislature.[66]

There may, nevertheless, be two difficulties with this argument. The first is that the 'manner and form' theory of parliamentary sovereignty has not unequivocally been accepted as the correct explanation of the doctrine in the UK. The arguments each way cannot be rehearsed here,[67] but it is important to note that the enactment of the EU Act 2011, in its creation of a range of procedural conditions with which future legislation is intended to comply to be valid, could be seen as evidence that a manner and form understanding of parliamentary legislative authority has been effectively embraced in the UK.[68] If this is the case, the approach to the implementation of a balanced budget rule outlined above could be seen as viable. A second problem could be that, while 'binding' unless or until repealed, the requirement of permanence contained in Article 3(2) might be deemed not to be satisfied by such a solution. Yet perhaps 'permanent' need not be understood to mean *unrepealable*; rather it could be interpreted to be an instruction to the relevant national authorities that the balanced budget rule *should not be repealed*. On this basis, if a balanced budget rule was enacted in ordinary legislation – even if it remained ultimately subject to the prospect of repeal by the legislature – in the period that it was not repealed, the requirement of permanence, and indeed that of being 'binding in force', would arguably be satisfied. Indeed, to understand the need for the balanced budget rule to be enacted in permanent form in any other way is surely to set a threshold which it is near impossible for national implementation to satisfy, while generating an undesirable level of inflexibility.[69]

provided independent and authoritative analysis of public finance, would be the obvious body to be nominated to execute such a function; *see* <budgetresponsibility.org.uk>, visited 17 Feb. 2014.

[66] This would therefore seem to be compatible with the view of the Commission that the implemented provisions 'cannot be simply altered by the ordinary budgetary law' to satisfy the requirements of Art. 3(2), for such a repealing Act would not be an ordinary budgetary law; *see* European Commission, COM(2012) 342 final, communicating the common principles on which national correction mechanisms must be based, as specified in Art. 3(2) TSCG.

[67] The initial parameters of the debate can be found in M. Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade', *Public Law* [2009] p. 519. For the most influential rejection of the manner and form theory, *see* H.W.R. Wade, 'The Basis of Legal Sovereignty', *Cambridge Law Journal* (1955) p. 172.

[68] For further discussion of this point, *see* Gordon and Dougan, *supra* n. 25, p. 23-30.

[69] Is it, for example, so difficult to imagine a future moment in which the precise economic prescriptions of the Fiscal Compact might require amendment? The experience of the eurozone sovereign debt crisis would seem to indicate that the unexpected should not be discounted, let alone constitutionally proscribed.

Ultimately, Reestman must be right to conclude that for the EU institutions tasked with enforcement of Article 3(2) to determine that implementation of the balanced budget rule in an ordinary act of the legislature was not satisfactory would put 'the constitutional relationship of the Union with [several] members states under high strain', and which would undermine the stabilising effect that the Fiscal Compact is designed to have.[70] But perhaps this need not be understood as a pragmatic compromise, distorting the literal terms in which the obligation in Article 3(2) is expressed. The UK constitution might permit of greater flexibility to achieve a workable solution, were it to become necessary to implement the balanced budget rule at least, than might be assumed from reiteration of the Diceyan orthodoxy that a sovereign Parliament cannot bind its successors. And, in turn, this may allow us to look again at the requirements of binding force and permanency contained in Article 3(2), and reasonably interpret them as being less demanding to satisfy than might be apparent on first reading.

Concluding reflections

This article has considered a number of legal questions raised when the Fiscal Compact is assessed from the perspective of the UK. While the UK's past position with respect to the Fiscal Compact is relatively clear, though not uncontroversial, it must be understood to gain an insight into the much more uncertain matter of the UK's potential future relationship(s) with the treaty. The prospect of any such future relationship would require complex questions concerning the interaction between UK and EU law to be addressed, but the legal obstacles are far from insurmountable. Instead, as with the 2011 veto itself, political considerations are likely to be decisive in conditioning any future relationship.

Such political considerations will doubtlessly be informed by views as to the desirability of further, or even continuing, UK engagement with the EU. Yet such debates should not dominate, for there are also legitimate domestic constitutional questions that would need to be addressed. In particular, the adoption in national legislation of a balanced budget rule could be understood, first, to pose a normative challenge to the UK's 'political constitution'.[71] A parallel might be observed with the 'legalisation of politics' that has arguably been a consequence of the enactment of modern human rights legislation, with the political capacity of public authorities conditioned by fundamental legal norms.[72] Here, similarly,

[70] Reestman, *supra* n. 8, p. 500.

[71] *See* J.A.G. Griffith, 'The Political Constitution', 42 *Modern Law Review* (1979) p. 1.

[72] The notion of the legalisation of politics is discussed in M. Loughlin, *Sword and Scales* (Oxford University Press 2000) p. 232-233. In the UK, this legislation takes the form of the Human Rights Act 1998.

we might then see a legalisation of economics, with the economic capacity of governments being constrained by fiscal rules given form as legal norms. The consequences of such a development would surely need to be fully evaluated, especially from a democratic perspective.[73] Secondly, such a step might pose a structural challenge to the UK's political constitution. The adaptability of this model can arguably be demonstrated by the discussion above, which indicates that it would be possible for a balanced budget rule to be implemented in national legislation in a way which is, in one sense, binding and permanent. Yet this very adaptability could be seen as threatened if it is too readily exploited to create what are in principle procedural conditions, but in practice may become significant obstacles to political (or economic) action. This is not to say that constitutional mechanisms which recondition the manner in which future action can be taken by governmental authorities should not be embraced where appropriate. But the EU Act 2011 has provided us with a good example of the difficulties and inconsistencies that such devices can generate, even when ostensibly democratic in form. And, as such, were the adoption in domestic legislation of a balanced budget rule of the kind contained in the Fiscal Compact ever to be seriously considered in the UK (whether European in origin or not), some fundamental questions about the nature of the constitution would need to be confronted.

[73] *See*, e.g., Leino and Salminen, *supra* n. 54, p. 463.

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