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The making of a new treaty: Six rounds of political bargaining

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Introduction

The Heads of State and Government of 25 EU member states (the United Kingdom and the Czech Republic on the sidelines) reached a political agreement on the **"Treaty on stability, coordination and governance in the economic and monetary union" (TSCG)** at the informal European Council on 30 January 2012. The new treaty should be signed at the next regular summit on 1 March 2012. While about 100 national officials (the Euro Group Working Group of the Council of Ministers), several legal experts from Council and Commission, plus three MEPs were negotiating the document at a couple of meetings, five drafts circulated and were eventually leaked to the public[1] before a final version was published.[2]

This unusual transparency provides for the unique opportunity to contrast six versions of the same treaty that represent different stages of the negotiation process from December 2011 to February 2012 and allows to show the **evolution of key provisions** and to examine **which negotiating positions could and could not assert themselves**.

From time to time the principal actors publicly expressed their positions during the negotiations: Poland, for example, insisted on broad participation in Euro summits whereas France preferred exclusive summits of Euro area members only. But the different positions are not always communicated in this clear way and sometimes changes from one draft to another are difficult to explain. At the end, the Contracting Parties agreed on the deal engineered by Herman Van Rompuy, the President of the European Council.

This Policy Brief tries to **analyse significant changes from the first draft of the treaty** (16 December 2011) **to the final version** (30 January 2012), a detailed table is available on *Notre Europe*'s website.[3] It is based on the overall dynamic of these negotiations which focused on three main issues or "pillars" that constitute the new treaty: firstly, **the objectives of the treaty itself and its institutional environment** around the treaty (Titles I, II, V, VI), secondly, the **"Fiscal Compact"** (Title III) and, thirdly, the **coordination of the economic policies** (Title IV).

I. The objectives of the treaty and its institutional environment

Any first glance at the drafts reveals a striking difference: the title of the document changed from "International agreement on reinforced economic union" (1st draft) to "Treaty on stability, coordination and governance in the economic and monetary union" (final version). The evolution of the drafts reveals a balancing act between substance and marketing: while the overarching concept of a "reinforced economic union" was reflected in early declarations, EU authorities have finally branded the document (with its long title) simply as "the new fiscal compact treaty".

While the 2nd draft stated "to foster [...] deeper integration in the internal market" (Article 1.1) as a purpose of the treaty, this provision had disappeared in later drafts – a development seen by the **United Kingdom** as "progress".[4]

Two Articles in Title VI ("General and Final Provisions") are noteworthy: For the first time in the case of a treaty at a European level, an entry-into-force provision with a number of Contracting Parties having ratified it that is inferior to all contracting parties is found across all drafts (between nine and fifteen – finally twelve – Contracting Parties whose currency is the euro, Article 14.2).

In addition, from the 2nd draft onwards the intention to incorporate the new treaty into EU law was explicitly included – with a timeframe in later drafts (Article 16). This can be interpreted as a victory for the community method, defended by **Commission** and **European Parliament**.[5]

Table 1.1: Main changes in the name and scope of the new treaty

(The numeration of the articles refers to the final version.)	**1st draft** (16/12/2011)	**2nd draft** (06/01/2012)	**3rd/4th/5th draft, final version**
		NAME OF THE DOCUMENT	
Name of the document	International **agreement** on reinforced economic union	International **treaty** on reinforced economic union	Treaty **on stability, co-ordination and governance** in the economic and **monetary** union
		Title I: PURPOSE AND SCOPE	
***Article 1.1**: Purpose*	"agree to strengthen their budgetary discipline and to reinforce their economic policy coordination and governance."	"agree on **a 'fiscal compact' and on a stronger coordination of economic policies, involving an enhanced governance to foster fiscal discipline and deeper integration in the internal market [...].**"	"agree [...] to strengthen the **economic pillar of the Economic and Monetary Union [...].**"
		Title VI: GENERAL AND FINAL PROVISIONS	
***Article 14.2**: Treaty will enter into force...*	once **9** Contracting Parties whose currency is the euro have ratified it.	once **15** Contracting Parties whose currency is the euro have ratified it.	on **1 January 2013**, if ratified by **12** Contracting Parties whose currency is the euro.
***Article 16**: To be incorporated into EU treaties...*	(No such provision)	"steps shall be taken [...] with the aim of incorporating the substance of this Treaty into the legal framework of the European Union."	**"[w]ithin five years at most following the entry into force** [...]"

With respect to the "Governance of the Euro Area" (Title V), the Prime Minister of **Poland** took a firm stance on the **participation of Contracting Parties whose currency is *not* the euro** in the so-called "Euro Summits". Poland made this demand public only after the 3rd draft was leaked. The country obtained a first concession in the 4th draft where these heads of state or government will be invited "when appropriate and at least once a year" (Article 12.3). But Donald Tusk continued to rally for his demand and threatened not to sign the fiscal treaty.[6] In the circle of Euro area member states, **France**[7] has always wanted to establish regular exclusive meetings of the 17 as an "economic government". At the informal European Council summit on 30 January 2012 a compromise was found that Contracting Parties whose currency is not the euro should participate:

- "in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future" (Article 12.3)
- "as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of this Treaty" (Article 12.3)

As a consequence, the Preamble now recalls that "at least two Euro Summit meetings per year [are held], to be convened, unless justified by exceptional circumstances, immediately after meetings of the European Council or meetings with the participation of all Contracting Parties having ratified this Treaty".

Table 1.2: Main changes on the Euro summit

Title V: GOVERNANCE OF THE EURO AREA			
(The numeration of the articles refers to the final version.)	**1st/2nd/3rd draft**	**4th/5th draft**	**final version** (30/01/2012)
***Article 12.1**: Participants in the Euro summit*	"The **Heads of State or Government of the Contracting Parties whose currency is the euro**, together with the **President of the European Commission** shall meet informally in Euro Summit meetings. The **President of the European Central Bank** shall be invited to take part in such meetings."		
***Article 12.3** (former Article 12.6): Contracting Parties whose currency is not the euro who have ratified this Treaty*	*(No such provision)*	"the President of the Euro Summit will invite [them], when appropriate and at least once a year [...] to a meeting of the Euro Summit."	"The Heads of State or Government of the Contracting Parties, other than those whose currency is the euro, who have ratified this Treaty **shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future**, as well as, when appropriate and at least once a year, **in discussions on specific issues of implementation of this Treaty** on Stability, Coordination and Governance in the Economic and Monetary Union."
***Article 12.4** (former Article 12.3):*	*(Preparation and follow up of Euro summits)*	"[...] **The Euro Group shall contribute to the preparation and follow up of the Euro Summit meetings and its president may be invited to attend the Euro Summit meetings for that purpose.**"	

The discussions concerning institutional design seem to show the extent to which "**variable geometry**" provokes fears across a number fo EU member states. What could be the magic number capable of asserting itself against the EU-27? The number of 17 Eurozone member states as preferred by France, the number of 25 Contracting Parties as preferred by Poland, or another number if not every signing country were to ratify the new treaty? Even after the compromise of 30 January 2012, this largely remains an open question.

II. What level of autonomy is left to the Contracting Parties of the "Fiscal Compact"?

The level of autonomy for the Contracting Parties in the core part of the document, the "Fiscal Compact" (Title III), was the **main issue during the negotiations**. Whilst all Contracting Parties saw the objective of the Fiscal Compact to commit to more budgetary discipline, the precise provisions confronted the **European Central Bank and Germany** pushed for more precise and hard line provisions, in contrast to a **mixed coalition of other negotiating parties** that wanted softer provisions. Four provisions have undergone significant changes:

- The **transposition of the "Golden Rule" that limits the annual structural deficit to 0.5 percent** will happen "through provisions of binding force and permanent character, preferably constitutional" (Article 3.2) instead of "provisions of a constitutional or equivalent nature" (1st and 2nd drafts), mainly because **Ireland and Denmark** would be obliged to hold a referendum on constitutional amendments.[8]
- An additional provision appeared in the 4th draft: for cases of "significant observed deviations from the medium-term objejctive or the adjustement path towards it" (Article 3.1e) the Commission will be authorised to table proposals for an **automatic correction mechanism** (at the national level) that determines "the nature, the size and the time-frame of the corrective action to be undertaken and the role and independence of the institutions responsible at national level for monitoring the observance of the rules" (Article 3.2).
- While **voting by reversed qualified majority** (Article 7) was never questioned, **Italy** insisted on limiting its scope to national deficits and not to include national debt. The country was reportedly "satisfied"[9] when "debt" was deleted from the 3rd draft.
- Article 8 contains the provisions on the **roles of the Commission and the Court of Justice (ECJ)**. The scope of jurisdiction for the ECJ was limited

to Article 3.2 in the 3rd draft, and the Commission acting "on behalf of the Contracting Parties" (2nd draft) to bring non-compliance before the ECJ, was downgraded to a reporting role with some kind of peer review between the Contracting Parties where the Court of Justice acts as the referee on the question whether Article 3.2, the Golden Rule, is transposed correctly. In the 1st and 2nd draft the responsibility of the ECJ covered the entire Title III of the treaty.

Table 2: Main changes in the level of autonomy for Contracting Parties on budgetary policies

Title III: FISCAL COMPACT				
(The numeration of the articles refers to the final version.)	**1st draft** (16/12/2011)	**2nd draft** (06/01/2012)	**3rd draft** (10/01/2012)	**4th/5th draft, final version**
***Article 3.2**: Transposition of the "Golden Rule" at the national level*	"The rules mentioned […] shall be introduced in **national binding provisions of a constitutional or equivalent nature.**"		"[…] shall **take effect** […] **within one year of the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, that are guaranteed to be respected throughout the national budgetary processes."**	*Only one additional provision:* **"The Contracting Parties shall put in place at national level the correction mechanism […] on the basis of common principles to be proposed by the European Commission, […]. This mechanism shall fully respect the prerogatives of national Parliaments."**
***Article 8.1**: Member states which consider that another member state has failed to comply…* *New in fourth draft:* ***Article 8.2**: Non-compliance*	**"with Title III** may bring the matter before the Court of Justice"	**"with Title III** may bring the matter before the Court of Justice. **The Commission may, on behalf of the Contracting Parties, bring an action for an alleged infringement […] before the Court of Justice"**	**"with Article 3(2)** may bring the matter before the Court of Justice […] **or invite the European Commission to issue a report into the matter."** *Additional provision:* **"if the Commission confirms non-compliance in its report, the matter will be brought to the Court of Justice by the Contracting Parties".**	*(New wording, but same meaning)* *New provision:* "the Court […] may impose […] a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1% of its gross domestic product […] payable to the European Stability Mechanism."[10]

The overall picture of Title III shows that at times **some provisions were watered down while others were tightened**. The ECB reportedly criticised the 2nd draft for "substantial watering down" that "clearly run[s] against the spirit of the initial general agreement on an ambitious fiscal compact."[11] Interestingly, "exceptional circumstances" (heavily criticised by proponents of a tough line) have always featured in the drafts, either in Article 3.3 or in the preamble. But the treaty definition seems ambiguous just like the "annual structural balance of the general government" that according to Article 3.3 "refers to the annual cyclically-adjusted balance net of one-off and temporary measures".

New provisions were added to clarify in the 4th draft, like a reference to Article 273 TFEU in Article 8.3 on the role of the ECJ.[12] The 5th draft became more precise with respect to "[…] the imposition of financial sanctions following criteria established by the Commission in the framework of Article 260 [TFEU]" and the final version added that "[t]he existence of an excessive deficit due to the breach of the debt criterion will be decided according to the procedure set forth in Article 126 [TFEU]", without changes.

In addition, **real conditionality** emerged in the preamble of the 4th draft: "[T]he 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." Earlier a press release of **Germany**'s Foreign Office had demanded a "link between the treaty and solidarity efforts in the Euro area […]. Solidarity and fiscal solidity are two sides to a coin."[13]

III. The evolution of the provisions on "economic policy coordination and convergence"

If the new treaty has the objective to strengthen the economic part of the economic and monetary union, the provisions of Title III seem necessary, but not sufficient. **Fiscal and budgetary measures alone do not stand for economic union.** Indeed, Title IV promises "economic policy coordination and convergence".

Throughout the negotiations the provisions of Title IV changed the least; their content is rather weak and the wording rather general. Two alternative interpretations are possible: this either means that economic policy coordination and convergence can be achieved at the EU-27 level, potentially also in the framework of the "Euro Plus Pact" that was signed by 23 member states (all Contracting Parties of the new treaty except Sweden and Hungary) in March 2011, or alternatively this can be interpreted as a lack of political will to proceed towards real economic policy coordination and convergence.

Three small, technical changes are noteworthy:

- in Article 11 the 3rd draft expressed "a view to [...] working towards a common economic policy" (this integrationist moment was replaced by "a more closely coordinated economic policy" in all later drafts),
- since the 4th draft the **Euro Plus Pact** is **not explicitly mentioned any longer** (Article 9),
- and in Article 10 of the final version the Contracting Parties "stand ready to make active use" of Article 136 TFEU (which contains provisions specific to Member states whose currency is the euro) and of "enhanced cooperation".

The Contracting Parties show their willingness to pursue **closer cooperation**, to use all provisions of the EU treaties that allow for the Euro Group or other formations that do not comprise all 27 member states to advance, but at the same time they **soften their commitment** and renounce a "common economic policy" and avoid a reference to the Euro Plus Pact. These elements seem to confirm the difficulty of effectively promoting the coordination of national economic policies, in addition to the level of the 27.

Table 3: Main changes in the coordination of national economic policies

Title IV: ECONOMIC POLICY COORDINATION AND CONVERGENCE			
	1st draft (16/12/2011)	**2nd/3rd/4th/5th draft**	**final version (30/01/2012)**
Article 9	"[...] the Contracting Parties undertake to work jointly towards an economic policy fostering growth through enhanced convergence and competitiveness and improving the functioning of the Economic and Monetary Union. To this aim, they will take all necessary action, including through the **Euro Plus Pact**."	*(Minor changes)*	"[...] the Contracting Parties shall take the necessary actions and measures in all the domains which are essential to the good functioning of the euro area **in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability**."
Article 10	"[...] the Contracting Parties undertake to make recourse, whenever appropriate and necessary, to the enhanced cooperation on matters that are essential for the smooth functioning of the euro area, without undermining the internal market."	*(Minor changes)*	**"[...] the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro** as provided for in Article 136 of the Treaty on the Functioning of the European Union and of enhanced cooperation as provided for in Article 20 [TEU] and in Articles 326 to 334 [TFEU] on matters that are essential for the smooth functioning of the euro area, without undermining the internal market.**"**
Article 11	[...]	*(Minor changes)*	"[...] working towards a **more closely coordinated** economic policy [...];"

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At the informal European Council of 30 January 2012 all 27 Heads of State and Government (except the Prime Minister of Sweden, for "parliamentary reasons") signed the **Statement "towards growth-friendly consolidation and job-friendly growth"**.[14] This indicates that such action is approved by the United Kingdom and that such action does not need to be included into a treaty that deliberately avoids the necessary approval of each member state. Concrete measures could then be decided via EU legislation and the Open Method of Coordination could be used for achieving convergence between the member states that signed the Euro Plus Pact. More detailed provisions in Title IV would not be necessary.

Conclusion

"Victory for Merkel"[15] said the *Financial Times* when the new treaty was approved. This is true: the German chancellor had the idea to change the European treaties and accepted to have a new treaty as the second-best solution. In the treaty the key provisions on fiscal discipline always **fulfilled the demands of Germany**, but observers also expect that the treaty becomes one element of a more wide-ranging package to respond to the financial and economic crisis where countries with a strong economy would have to accept greater financial transfers to countries hit by the crisis – and growth measures would accompany austerity measures.

Besides "German power" the developments also confirm what Thomas Schelling has called the **"Paradox of Weakness"**[16]: There are victories where one would not have expected them, as in the case of Ireland. The country obtained that the "Golden Rule" could be transposed into extra-constitutional law (and thus it could be able to avoid a referendum), but conditionality of future assistance from the European Stability Mechanism (ESM) on ratification, in return, handcuffs Ireland to the treaty.

The text of the treaty will now be **scrutinised in the relevant committees of the national parliaments** of the Contracting Parties. National MPs will ask their governments whether they have negotiated the best possible result. After the treaty will have been signed at the European Council of 1 March 2012, it must be ratified – alongside the two other ratification processes (the accession of Croatia and the ESM treaty with a new third paragraph in Article 136 TFEU to accommodate it). **The ratification of a new treaty always follows the making of a new treaty**.

1. For the individual drafts, please refer to: http://tinyurl.com/fiscaltreaty1, http://tinyurl.com/fiscaltreaty2, http://tinyurl.com/fiscaltreaty3, http://tinyurl.com/fiscaltreaty4, http://tinyurl.com/fiscaltreaty5.
2. http://www.european-council.europa.eu/media/579087/treaty.pdf
3. "Tracking the changes in the new treaty": This detailed table compares the wording of all articles in the six versions of the new treaty. It can be found on the website of *Notre Europe*.
4. British Prime Minister's office, Afternoon Press Briefing, 11/01/2012.
5. Statement by President Barroso on the International Agreement, 18/01/2012. European Parliament, Resolution on the European Council of 8-9 December 2011, 18/01/2012.
6. EUobserver, 25/01/2012 and 30/01/2012.
7. EurActiv.com, 27/01/2012.
8. European Voice, 12/01/2012; EUobserver, 11/01/2012.
9. Agence Europe, 16/01/2012.
10. The 5th draft clarifies that "[t]he amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union." (Article 8.2).
11. *Financial Times*, 14-15/01/2012, p. 2.
12. Article 273 TFEU: "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."
13. Auswärtiges Amt [German Federal Foreign Office], Press release, 11/01/2012.
14. European Council, *Statement on growth and jobs*, 30/01/2012.
15. *Financial Times*, 31/01/2012, p. 1.
16. Schelling, Thomas C. ([1960] 2005), The strategy of conflict (Cambridge, MA: Harvard University Press). The "paradox of weakness" (pp. 22-28) means that the more the hands of one party are bound during negotiations, the more the other party must give in.

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