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Why further integration of Eurozone Members via intergovernmental Treaties –such as the fiscal compact- is not desirable

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The signing of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called "fiscal compact") on March 2012 is the most recent initiative taken to remedy the European sovereign debt crisis. There seems to be quite a consensus on that the crisis has been a result of the weak implementation of the clear-cut rules concerning public deficits included in the Stability and Growth Pact, the inadequacy of enforcement measures taken to discourage deficit infringements, and mostly, the failure of national governors to conduct sound public finances.

Therefore, it is all the more reasonable that when dealing with a sovereign debt crisis, Eurozone leaders would target primarily on fiscal discipline. But how would such discipline be ensured, bearing in mind that several rules existed already within the Stability and Growth Pact and yet, have been repeatedly violated by most of the Eurozone states? The crisis severely questioned the efficiency of soft law rules and it seemed that the only way for fiscal discipline rules to be fully respected, would be to acquire the status of hard law.

The fiscal compact precisely aimed to restrict Member States' fiscal discretion - marking the end of the laxity that characterized the Eurozone for more than a decade-setting forth that Member States should introduce a fiscal rule requiring the general position of government budges to be balanced or in surplus. This rule has been defined concretely to ensure a uniform application in all Member States: in particular, annual structural deficit should not exceed 0.5 of the nominal GDP, while the ratio of government debt to GDP should not be higher than 60%. The compact is innovative in that it requires for this "debt break" to be introduced into national legal systems through provisions of binding force and permanent character, preferably constitutional.

The problem is that not all Member States agreed with these provisions, and as a result, the fiscal compact could not be signed as an EU Treaty, being part of the EU law structure and binding all Member States. Treaty amendments require unanimity, and unanimity was not achieved in the case of the fiscal compact, since the United Kingdom opted to veto the treaty change. This forced the rest 26 Member States, which became 25 after the Czech Republic decided not to participate in the new treaty either, to come up with a different solution, and eventually sign the fiscal compact as an intergovernmental treaty outside the EU framework.

We believe that the fiscal compact has been a significant step towards fiscal discipline. While we fully respect the right of the UK and Czech Republic to disagree and not wish to participate in such treaty, we understand that the crisis has mainly affected the Eurozone. It was the Eurozone states which were in immediate need to take action, and they were more than justified to wish to find other means to proceed with the signing of the fiscal compact. However, through this report, we would like to express our concerns on the fact that the signing of the Treaty on the

Stability, Coordination and Governance in the Economic and Monetary Union as a separate, intergovernmental agreement might cause significant problems. We would like to submit that the trend towards more intergovernmental decision-making and the put aside of the "Community" method should not become a common practice, for it might end the EU as we know it.

In accordance with Public International Law, EU Member States are not barred from establishing separate agreements between certain Member States only. Since the EU has only been given limited powers, nothing prevents Member States to freely conclude agreements in their areas of competence: the Schengen Agreement is a leading example of such arrangements.

The fiscal compact is quite different though, in that despite being an intergovernmental agreement, it prescribes roles for the EU institutions. In particular, the Commission is entitled to draft reports on the compliance –or not- of the Contracting Parties with the debt break rule, while disobedient states could be brought to the Court of the EU by one or more of the Contracting Parties. The involvement of both the European Commission and the Union's Court in the framework of the fiscal compact constitutes a significant problem: establishing a new Treaty between 25 Member States and borrowing the institutions designed to serve the EU as a whole does not seem entirely proper.

The reason is that the EU Treaties provide clear decisional rules about how they can be changed and the basic rule has always been unanimity. After the Lisbon reforms, Member States have been given the option to choose between the ordinary and the simplified revision procedure, but unanimity is still the rule for both options. If a Member State, or a group of Member States, wish to change something in the Treaties, then everybody needs to agree. Where unanimity cannot be achieved, there are also rules allowing a less than unanimous number of Member States to embark on further integration through the mechanism of enhanced cooperation. It has been correctly argued that the signing of the fiscal compact is in contrast with the long-established unanimity rule. The fiscal compact has practically demonstrated that despite not being possible to obtain unanimity, and without any attempt for the use of enhanced cooperation to be made, it is legitimate to attain the desired change by a different route, while still being allowed to use the EU institutions as part of the route to attaining the desired change. The signing of the fiscal compact implies that it is now on legitimate for a majority of Member States to attain goals that were not attainable via unanimity, using the EU institutions on this effort. Doesn't this in practice mark the substitution of the decisional rule of unanimity by the decisional rule of majority? And isn't there a precedent established for Member States to have a recourse to treaties outside the existing EU ones whenever they would be blocked from achieving their goals through the normal methods of treaty revision?

The creation of such a precedent is not desirable and recourse to intergovernmental treaties should not become the general practice. The reason is that the negotiation of such treaties bypasses the procedure foreseen under the EU Treaties: a procedure designed to respect rules on transparency and democracy, to include social and civil dialogue and to guarantee the involvement of the European Parliament. We do not argue that the existing EU framework is flawless, but one needs to recognize that at least it secures parliamentary control, judicial scrutiny by the Union's independent Court, the respect for fundamental rights and the compliance with legal procedures. The practical consequence of acting outside the Union legal framework is that the fiscal compact, and any subsequent intergovernmental treaty, will not be subject to the normal constraints of the EU law such as subsidiarity control, decision-making procedures and judicial review. Even though the fiscal compact includes provisions enabling Member States to resolve their differences to the Court of the European Union, this is very unlikely to happen. Diplomacy makes it difficult to imagine that a Member State will ever decide to sue another Contracting Party for breaching the debt break rule. Moreover, there seems to be a significant gap on the judicial protection of individual claimants, since there is not precise answer yet on where they would be able to resort to in case they want to challenge a provision of the compact.

Another significant problem of the fiscal compact and any intergovernmental treaty setting forth a closer economic policy coordination and integration between some Member States, is that such a coordination could ultimately intrude on matter related to the internal market, which is a domain that must be the province of the full European Union. Closer integration will most probably include areas such as the functioning of labour markets, a revision of the pension and social security systems, convergence or a harmonization of the corporate tax base. Discussing about the European economy, Contracting Parties will unavoidably talk about the single market. Even though they would not be legally allowed to decide or even discuss anything relating to the internal market, this is not very likely to work in practice. Despite not being permitted to take decisions about it, they might informally caucus on it. Sooner or later, Contracting Members might begin to act like a bloc, and this could violate the rights of Member States such as the United Kingdom and the Czech Republic, which while they decided not to sign the fiscal compact, they must continue to enjoy the full rights stemming from EU membership and the integrity of the internal market. Bearing in mind that decision-making in the EU and especially in matters related to the internal market, does not require unanimity, the fear that Contracting Parties may act as a bloc, silencing the voices of Member States which opted to stay out of the fiscal compact, is quite reasonable.

We believe that further integration of the Eurozone states by means of intergovernmental decision-making might lead to the creation of a two-speed Europe. It is comprehensible that the crisis pushes Eurozone countries into deeper integration. It is encouraging that the fiscal compact is open to non-Eurozone states also. However, it has been supported that the non-Eurozone states which eventually joined the fiscal compact, have done so motivated by the fear of 'being stuck on the lower tier of a two-tier Europe'. This is certainly not a good motive! Non-Eurozone Member States have been somehow disregarded during the crisis, and this is not surprising. Yet, it is of tremendous importance for the integration process of the Eurozone states to be handled with care. If we reach a point where non-Eurozone states will hastily sign treaties, worrying that otherwise they will be left aside and become mere observers of the progress and integration of Eurozone states, how could we still be talking about the success of the European project and the full freedom of Member States?

What is the alternative?

We would like to submit that instead of intergovernmental decision-making and treaties which stand outside the EU law and its constraints, Eurozone member could make use of the instrument of enhanced cooperation. Enhanced cooperation is after all, a Community method, and we believe that the interests of smaller Member States, as well as of the Union as a whole, are better ensured under the Community system. The involvement of the EU institutions under the Union system seems to somehow ensure that changes will not be prescribed by one or two powerful Member States and be loyally followed by smaller, frightened Member States whose voices cannot be easily heard in such circumstances.

If the EU Treaties provide for a differentiation mechanism allowing a number of Member States to cooperate more closely and establish advanced integration in an area within EU structures without all 27 Member States necessarily participating, why could such mechanism not be exploited and used? It is true that for enhanced cooperation to be performed, the Treaties establish a set of procedural and substantive requirements that need to be respected by Member States. The procedural requirements dictating that authorization to proceed to is only granted following a decision of the Council, on a proposal from the Commission and with the consent of the European Parliament are surely not insurmountable. As far as the substantive requirements are concerned, the reasons why EU Treaties state that enhanced cooperation should only be used as a means of last resort and could not undermine the internal market, economic, social or territorial cohesion, neither distort competition between Member States, is precisely to safeguard that further

integration would not divide EU into ins and outs. It is therefore for the interest of the Union for these requirements to be respected.

The only problem with the use of enhanced cooperation is that it needs to comply with the Treaties and Union law and any attempted deviation from them would automatically be illegal. Through the use of enhanced cooperation, it is only possible to move towards a deeper integration that is already provided for in the EU law. Measures requiring a revision of the Treaties cannot be adopted, while the EU institutions cannot be granted any powers other than those which the Treaties already provide them with. On the other hand, it is well possible for the Eurozone states to negotiate new treaties regarding the area of economic governance, which is not within the EU's exclusive competences, as long as they do not breach EU law. It is true that the intergovernmental decision-making has been proved more prompt that Community decision-making during the crisis. The adoption of the six-pack serves as a great example of such delays, since it took nearly two years of discussions and amendments through an endless procedure involving the Commission, the Council and the Parliament for these laws to come into effect and they cannot be regarded as an immediate and swift response to the crisis.

Could the changes envisaged in the fiscal compact be attained through the use of enhanced cooperation? This is a difficult question that we will not attempt to answer. At first sight, the fiscal compact does not seem to undermine the internal market, economic or social cohesion, neither to distort competition. Nevertheless, it requires Contracting Members to implement the debt break rule into national legislation, through binding and permanent provisions of a preferably constitutional character, and one could well argue that this is a far reaching change to be made through the use of enhanced cooperation and instead requires a solid, uncontested legal basis, such as a new Treaty.

Unfortunately, as it is more likely that the EU sovereign debt crisis will not end any soon, Eurozone Members will probably need to undertake more action and measures to further deal with it. Instead of immediately resorting to intergovernmental treaties when unanimity cannot be achieved, we would argue that Eurozone states should give a try to the instrument of enhanced cooperation. Of course, they will not be able to drastically change the existing EU framework and proceed with such a deepening of integration as they might wish to establish. However, small and steady steps ensuring a stable and smooth relationship among all EU Member States, based on mutual trust and the belief that they all share the same goals could be better than great strides which, seeking to deepen integration, they could end up deepening the gap of a two-speed Europe.