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THE LIMITS OF LEGAL MECHANISMS DESIGNED FOR ADDRESSING THE FINANCIAL CRISIS OF THE STATES – EXPERIENCES FROM THE CEE COUNTRIES

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SUMMARY: 1. Introduction – 2. Fiscal rules – 2.1 Evolution in CEE states prior to joining the EU – 2.2 Impact of the financial crisis on debt and deficit in the CEE states – 3. Review and monitoring of compliance with fiscal rules – 3.1 Judicial review – 3.2 Independent Monitoring Institutions – 4. Concluding remarks

1. Introduction

The various legal solutions enacted at the EU level during the euro-crisis were intended to be equally effective in the different national legal systems of the member states, albeit a certain effort was required for harmonising some of them with the national specific settings. Amongst the EU countries, the 11 Central and Eastern European countries (Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia) offer a diversity that may be a valuable reference against which the efficiency of such legal solutions may be assessed[1].

Although all countries considered for this study are EU members, only 5 of them are part of the Euro area (Estonia, Latvia, Lithuania, Slovakia, Slovenia), with the other 6 being non-euro states. Even if they were all part of the area beyond the Berlin wall left under the communist rule until 1989, their evolution after the political revolutions of that miraculous year was not at all uniform. Such diversity is still in place after all of them have joined the EU[2].

This paper analyses the efficacy and the legal limits of the most important legal instruments used for tackling the budgetary crisis in these Member States, namely (i) the fiscal rules, both

[1] An early version of this paper was presented at the conference organised by the Faculty of Law of the University of Siena in September 2019 as a broader comparison between the legal solutions for managing the crisis of the State available in the EU and in South America. I am grateful to the organizers, especially to Professor Andrea Pisaneschi, for inviting me to join a panel of the conference.

[2] A group of 8 CEE states (Estonia, Latvia, Lithuania, Czech Republic, Slovakia, Slovenia, Hungary and Poland) joined the EU in 2004, Romania and Bulgaria followed in 2007 and Croatia in 2013.

numeric and procedural, (ii) the judicial review of fiscal rules and (iii) the independent fiscal monitoring institutions, created with the aim of independently assessing compliance with the budgetary discipline rules[3]. Considering that during their transition from a centralised economy to one that is compatible with the EU Treaties and also during the euro crisis some of the CEE countries have been recipients of financial assistance granted by either the International Monetary Fund and/or by the European Union, the impact of the conditionality attached to such financial assistance packages shall be also discussed.

Once included and applied in the different settings of the national legal systems, the fiscal rules developed specific national components, in addition to the common elements provided at the EU level. The effectiveness of such rules, both uniform and specific, as well as of the mechanisms available for their enforcement, i.e. judicial review and the independent fiscal monitoring institutions, proved to be to a significant extent dependent upon the political will[4].

2. Fiscal rules

2.1 Evolution in CEE states prior to joining the EU

During the euro crisis, whilst EU member states were forced to face serious financing difficulties, the older concerns about sustainability of public finances proved their actuality in parallel with the acknowledgement of the weaknesses of the mechanism included in the Maastricht Treaty for the purpose of achieving such sustainability. Within the new framework for the economic governance of the European Union provided in the Maastricht Treaty in 1992, fiscal discipline was essential for allowing the European Central Bank to maintain price stability, as its primary objective[5]. Failure of the fiscal discipline mechanism developed prior to the crisis by the Stability and Growth Pact on a coordination basis provided by the Maastricht

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[3] National fiscal rules were also divided into three interrelated categories, to include procedural, numeric and institutional rules, with the rules pertaining to the functioning of the independent fiscal institutions as the main part of the institutional rules. For an analysis of these three categories of fiscal rules, M. Antoš, *Fiscal Stability Rules in Central European Constitutions*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, pp. 209-210.

[4] R. Streinz, *The Limits of Legal Regulation: Will the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Have a Real Legal Effect?*, in W.-G. Ringe, P. Huber (eds.), *Legal Challenges in the Global Financial Crisis*, Hart Publishing, 2014, p. 243.

[5] See for further explanations for the role of fiscal rules in the Maastricht architecture, the European Fiscal Board *Assessment of EU Fiscal Rules*, August 2019, pp. 9-10, available at https://ec.europa.eu/info/sites/info/files/2019-09-10-assessment-of-eu-fiscal-rules_en.pdf

Treaty, as part of an asymmetric Economic and Monetary Union[6], to prevent the financing difficulties of the member states, including of those part of the euro-area, reopened the discussions on the effectiveness of such fiscal rules that led to a new structure of the economic governance in the EU.

The normative limitations of the various elements of the use of public funds, such as public expenditure, public deficit, public debt or public revenues[7], generally referred to as „fiscal rules", although generally accepted as legal instruments for preventing the accrual of high public debt as well as of unsustainable public deficits, are not a constant in national legal systems. Moreover, strong criticism is concentrated on their opportunity, namely on their deemed effect of reducing economic growth[8].

Prior to the crisis, during the relatively brief period of almost 20 years since the fall of the communist regimes in the CEE countries, their budgetary positions have evolved on various paths. However, a common feature may be identified in the efforts each of them made for adjusting the sustainability of their public finances prior to joining the European Union. Whilst the budgetary discipline rules as part of the Economic and Monetary Union were being set by the Treaty of Maastricht starting 1994 and further developed by the Stability and Growth Pact from 1997 onwards, the CEE countries were still outside the European Union and striving for accession.

The starting point for the path toward EU accession was uneven. Although all countries in the Central and Eastern European area were sharing a communist past, the history of their public debt and deficits is rather different. Some of these states, such as the three Baltic states (Estonia, Latvia and Lithuania)[9], Slovenia, the Czech Republic, Romania and Slovakia inherited a quite small debt in the wake of the regime change at the end of the 80ies, which were maintained in the first years of the next decade, when the debt to GDP ratio ranged between

[6] A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, 2015, pp. 3-10.
[7] For an overview of the evolution in time and geographic spread of the various fiscal rules, V. Lledó, S.Yoon, X. Fang, S. Mbaye, and Y. Kim, *Fiscal Rules at a Glance*, International Monetary Fund, 2017, available at https://www.imf.org/external/datamapper/FiscalRules/Fiscal%20Rules%20at%20a%20Glance%20-%20Background%20Paper.pdf
[8] V. Ruiz Almendral, *The European Fiscal Consolidation Legal Framework: Its Impact on National Fiscal Constitutions and Parliamentary Democracy*, in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, pp. 28-29.
[9] I. Benczes, V. Takacs, *The Domestic Politics of Public Debt: A Central and Eastern European Perspective*, Transylvanian Revue of Administrative Sciences, nr. 41E/2014, pp. 8-9.

10 and 15% in the Baltic states, and was 6.6% in Romania[10], 13% in Czech Republic, 18% in Slovenia and 21% in Slovakia. In contrast, Bulgaria, Hungary and Poland had comparably higher debts in the 90ies, as by 1997 the Bulgarian debt to GDP ratio was over 100% and that of Hungary was above 80%[11]. As for Croatia, it economy was significantly affected by the war.

Among the CEE states Bulgaria stands out with its experience of engaging a severe consolidation programme built on the advice of the International Monetary Fund, which comprised putting a place a currency board. This programme proved to be successful, at least in nominal terms, as the debt to GDP ratio declined sharply from 105% in 1997 to below 20% in ten years time, prior to Bulgaria's accession to the EU in 2007[12].

Another specific case if that of Romania, which despite having a debt as low as 10.6% of GDP in 1996, in two years reached a more than double debt to GDP ratio – 22% in 1998 – and also accumulated by the end of 1998 a public deficit of 5.7% of GDP. Combined with an unfavourable economic situation, in 1999 Romania sought financial assistance from the International Monetary Fund[13].

The CEE states also undertook different paces in the process of joining the European Union, yet upon their accession date the EU legal framework for sustainability of public finances, namely the TFEU provisions as well as the Stability and Growth Pact were already in place and had to be complied with by the new Member States, including by including the required adjustments in their national legislations and budgetary policies.

For some of the countries in this eclectic group the perspective of joining the EU acted as major incentive for reforming their national legal framework applicable to budgetary matters and public finances[14]. Some of them, such as the members of the Visegrad group (Czech Republic, Hungary, Poland and Slovakia), coordinated their efforts in this respect, yet despite

[10] This ratio was reached in 1995. Starting 1980 Romania engaged in an external debt repayment programme which lead to redirecting most available resources to such aim, including by reducing beyond reasonable limits internal both current and capital expenditure. This programme resulted in a significant reduction of external public debt up to the 0.9% GDP ratio that was prevailing upon the change of the political regime in December 1989.

[11] Data for all countries from I. Benczes, V. Takacs, *The Domestic Politics of Public Debt: A Central and Eastern European Perspective*, Transylvanian Revue of Administrative Sciences, nr. 41E/2014, p. 13-16.

[12] *Idem*, p. 13.

[13] *Idem*, p. 12-13.

[14] *Idem*, p. 10. Valuable data is also provided in the respective national reports included in the EUI research project *Constitutional Change Through Euro-crisis Law*, available at https://eurocrisislaw.eui.eu/

such coordination the constitutionalization of the budgetary limits followed different models[15]. Whilst Poland included a debt brake in its constitution as early as 1997, set at 60% of GDP as inspired by the limit provided in Protocol no. 12 to the Maastricht Treaty, Hungary adopted a constitutional debt limit of 50% of GDP in 2011, whilst Czech Republic and Slovakia never adopted such limit at the constitutional level. Although both Poland and Hungary had in the 1990s significant public debts as compared to other countries in the region, the paths followed for stabilizing their public finances were different. Nevertheless, once joining the EU in 2004, all these countries were bound by the provisions in the Treaty concerning the limitation of deficit and debt, as detailed in the Stability and Growth Pact.

Moreover, further their EU membership, besides the differentiation amongst CEE states in respect of their budgetary positions, another one resulted from the fact that some of them also became part of the Eurozone[16], whilst others did not join the euro area.

2.2 Impact of the financial crisis on debt and deficit in the CEE states

More than a decade ago, the economic and financial crisis erupted and in all cases affected the CEE countries, albeit at different intensities. Generally, at the EU level, the responses to the crisis were mainly twofold, i.e. (i) the strengthening of the preventive safeguards against the fiscal and macroeconomic imbalances, by adopting regulations that will be further comprised in what was called „euro crisis law"[17] as well as (ii) the creation of common instruments of financial assistance aimed at helping those EU countries that had come under severe pressure in the financial markets.

[15] M. Antoš, *Fiscal Stability Rules in Central European Constitutions*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, p. 206.

[16] Slovenia (2007), Slovakia (2009), Estonia (2011), Latvia (2014), Lithuania (2015).

[17] T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017.

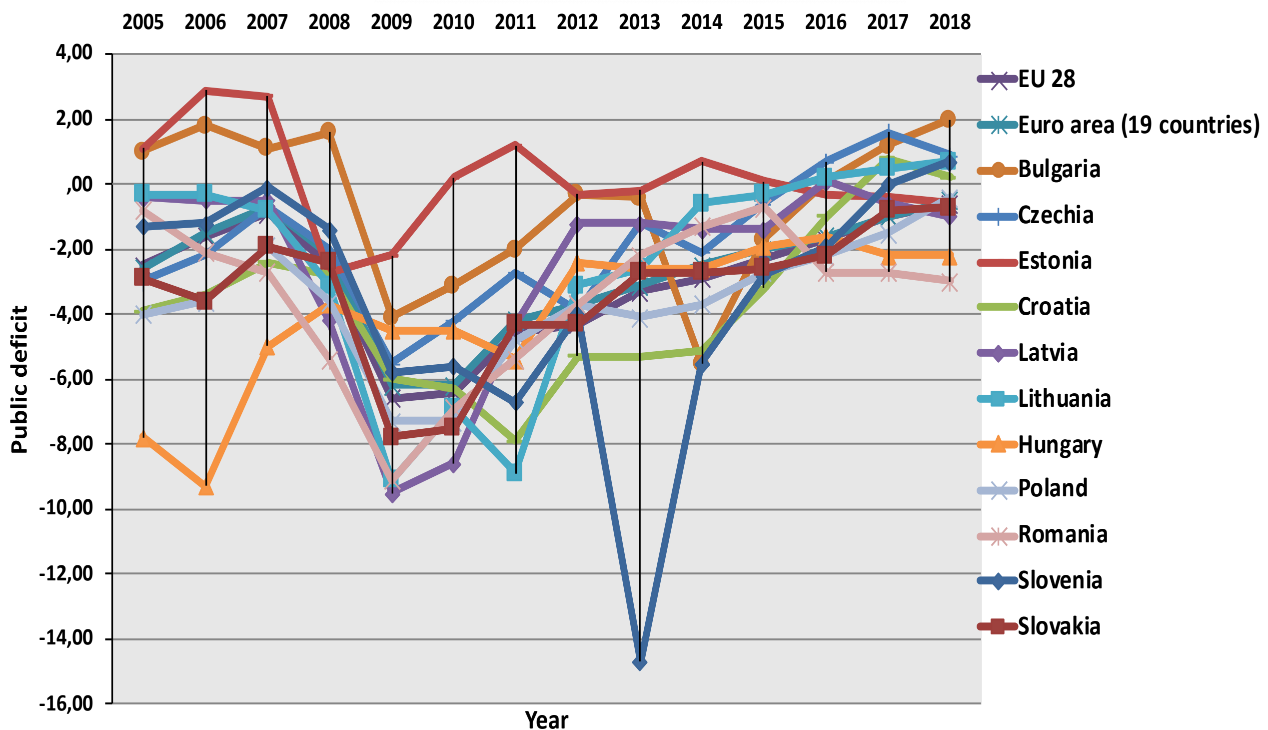

Table 1 Evolution of public deficit in CEE states 2005-2018

Source: Eurostat

For three of the CEE countries – Hungary, Latvia and Romania – an intense onset of the crisis occurred quite early, leaving them with no other alternative than the use of the balance of payments assistance mechanism by the EU law to non-euro countries, as regulated by art. 143 TFEU and further detailed by Regulation 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments[18]. Such emergency financial assistance granted by the International Monetary Fund, the European Union and the World Bank (the International Bank for Reconstruction and Development) was made available subject to strict conditionality. In case of Latvia, the EU financial assistance was accompanied by bilateral loans made by Sweden, Denmark and Estonia.

Consequently, as an essential part of this conditionality, all three states have introduced certain fiscal responsibility rules, such as rules on expenditure ceilings, procedural rules for preparing and amending the draft budget during the approval procedure, etc., in their national legal

[18] Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, Official Journal L 053, 23/02/2002.

systems. Hungary and Romania also created independent fiscal institutions to monitor compliance with such fiscal rules[19].

As the crisis unfold and new regulations were adopted at the EU level, either as part of EU law (Six Pack[20], Two Pack[21]), or as inter-governmental treaties (the ESM treaty[22], the Treaty on Stability, Cooperation and Governance in the Economic and Monetary Union[23]) as well as soft-law instruments (such as the Euro Plus Pact in 2011), the CEE countries had different approaches to such major changes in the economic governance of the Economic and Monetary Union. The main objective of the Six Pack and Two Pack regulations as well as of the Fiscal Compact[24] was to enhance sustainability of public finances and fiscal responsibility, including by ensuring that the balanced budget rule is accepted in the national regulations. In this process, a significant role was reserved for the national ownership of such fiscal rules[25]. This was deemed to be able to give a signal to the financial markets holding a symbolic power similar to the initially envisaged amendment of the TFEU to include the same fiscal rules, but which failed to obtain acceptance by all member states[26].

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[19] The Hungarian Fiscal Council was created in 2008 and became operational in 2009, the Romanian Fiscal Council was organised in 2010 and started operation in the same year.

[20] A package including six Regulations and a Directive, adopted in 2011 - Directive 2011/85 on requirements for budgetary frameworks of the Member States, Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation 1174/2011 on the prevention and correction of macroeconomic imbalances; Regulation 1175/2011 amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary policies and the surveillance and co-ordination of economic policies, Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances, Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the Excessive Deficit Procedure (OJ 2011 L 301).

[21] A package including two Regulations applicable to Euro area states, adopted in 2013 - Regulation (EU) no. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability and Regulation (EU) no. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ 2013 L 140).

[22] Treaty establishing the European Stability Mechanism, signed on 2 February 2012.

[23] Also named the Fiscal Compact Treaty. Signed on 2 March 2012 by the 17 euro area states at that time and eight non euro area states, it entered into force on 1 January 2013.

[24] Fiscal Compact refers to the provisions in Title III of the Treaty on Stability, Cooperation and Governance in the Economic and Monetary Union, concerning the balanced budget rule and its ancillary monitoring mechanisms. Whilst all member states except for UK and the Czech Republic have ratified TSCG, only the eurozone states, Bulgaria, Denmark and Romania have ratified its Title III – the Fiscal Compact.

[25] A. de Streel, *EU Fiscal Governance and the Effectiveness of its Reform*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, p. 97.

[26] V. Ruiz Almendral, *The European Fiscal Consolidation Legal Framework: Its Impact on National Fiscal Constitutions and Parliamentary Democracy*, in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, pp. 39-47. Communication from the Commission *The Fiscal Compact: Taking Stock*, C (2017) 1200 final, p. 4.

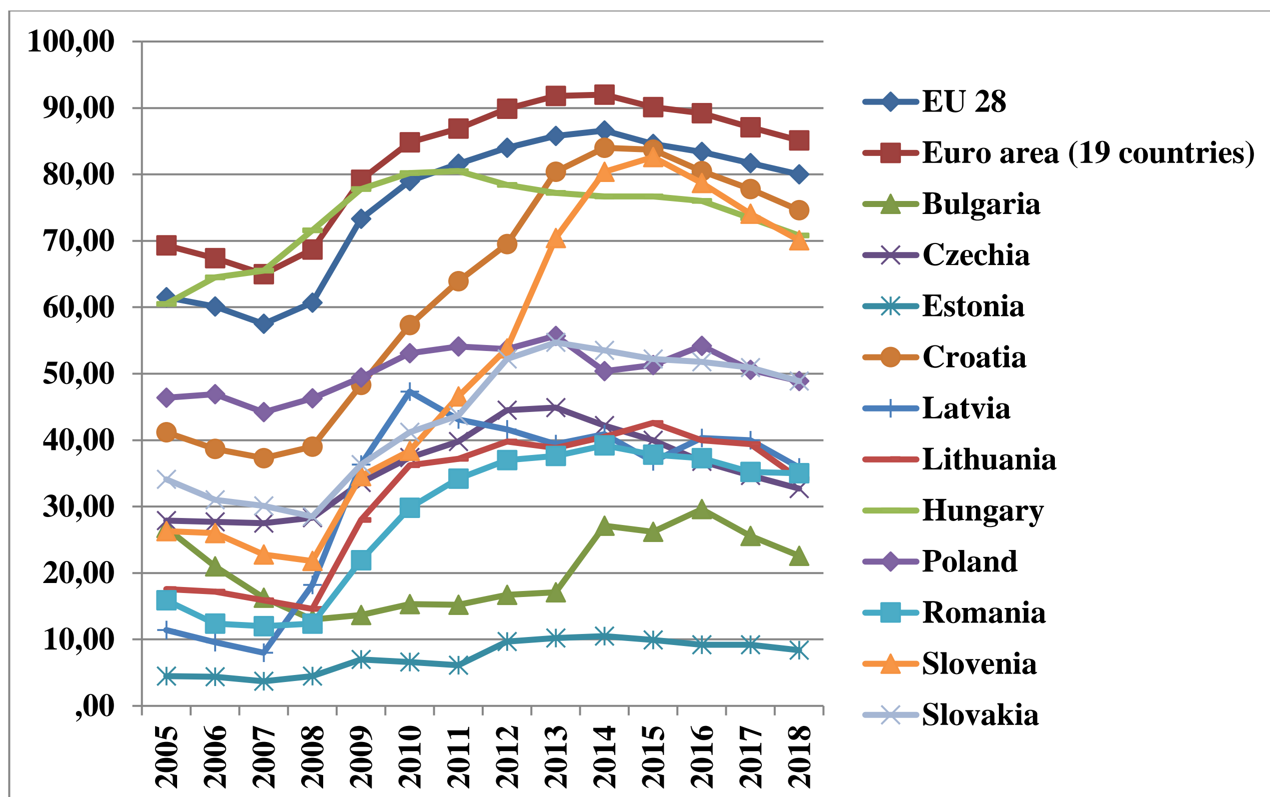

Table 2 Evolution of public debt in CEE states 2005-2018

Source: Eurostat

Whilst Six Pack was applicable to all member states and the Two Pack only to the Euro area member states, thus generating precise compliance obligations, as concerns the Fiscal Compact the CEE countries adopted different stances. Amongst them, only Bulgaria and Romania ratified it together with the euro zone member states, which means that 4 of the CEE states are still not bound by the Fiscal Compact, namely Croatia, Czech Republic, Hungary and Poland. However, the Polish constitution includes budgetary limitations since its adoption in 1997, such as a debt brake of 3/5 of GDP, as well as an interdiction for the Parliament to amend the draft budget submitted by the Government in a manner that would lead to an increase of the proposed deficit included in the draft. Compliance by the annual budgetary law with such constitutional rules is subject to judicial review by the Constitutional Tribunal[27].

[27] M. Antoš, *Fiscal Stability Rules in Central European Constitutions*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, p. 213-214. K. Granat, Poland Country Report, *Constitutional Change Through Euro-crisis Law*, available at https://eurocrisislaw.eui.eu/wp-content/uploads/sites/44/2019/05/Poland.pdf

Also, prior to the Fiscal Compact, the Hungarian Constitution was amended in 2011 in a significant manner, to include a debt ceiling of 50% of GDP, although its entry into force was postponed until 2014. Upon adopting such limit at a constitutional level, the prevailing debt to GDP ratio in Hungary was 80.5%, which triggered the application of another constitutional provision that prompted for adoption and application of debt reduction measures[28]. No similar constitutional limitations concerning public debt or deficit are in place in Croatia and in the Czech Republic, such rules being included in ordinary laws[29].

Even for the CEE states that have adopted the Fiscal Compact, the transposition of the balanced budget rule in their national legal systems followed different paths, reflecting the diversity of the national budgetary settings, thus taking advantage of the margin given by the Fiscal Compact to customize national provisions to the specific institutional and budgetary framework of each state. The emphasis on the acceptance of the balanced budget rules at the national level and the subsequent design of the legal mechanisms aimed at ensuring its application (such as the automatic correction mechanism and the opinions of the national independent fiscal institutions) led to various national implementation solutions[30].

Some states, such as Estonia, Lithuania, Slovenia, included the balanced budget rule at a constitutional level, whilst Latvia and Slovakia have relied on the constitutionally recognised pre-eminence of international treaties, such as TSCG, over national regulations, such as budgetary laws, for ensuring the limitation of the power to depart from the numerical balanced budget rules when adopting or rectifying the annual budgets. Bulgaria and Romania have included such rules in ordinary laws, with the Commission assessing that such transposition of the balanced budget rules and automatic correction mechanism into the domestic legal order is compliant with the requirements in the Fiscal Compact. Although an ordinary law cannot by itself act as an effective limit for the national budgetary process, despite its *binding* and *permanent*

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[28] Z. Szente, *Breaking and Making Constitutional Rules: The Constitutional Effects of the Financial Crisis in Hungary*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate, 2013, pp. 250-251. D. Dojcsák, Hungary Country Report, *Constitutional Change Through Euro-crisis Law*, available at https://eurocrisislaw.eui.eu/wp-content/uploads/sites/44/2019/05/Hungary.pdf.

[29] M. Djurovic, Croatia Country Report, *Constitutional Change Through Euro-crisis Law*, available at https://eurocrisislaw.eui.eu/wp-content/uploads/sites/44/2019/05/Croatia.pdf, T. Dumbrovsky, Czech Republic Country Report, *Constitutional Change Through Euro-crisis Law*, available at https://eurocrisislaw.eui.eu/wp-content/uploads/sites/44/2019/05/Czech-Republic.pdf.

[30] An outline of these national solutions is provided in the *Report from the Commission presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, C(2017) 1201 final.

character[31], the Commission deemed the Romanian regulation of both the balanced budget numerical rules and the correction mechanism by ordinary laws to be compliant based on quite „non-legal" arguments, such as „*formal and public commitments given by Contracting Parties that the national legal framework will be applied in line with the requirements of the TSCG*"[32]. As for Bulgaria, the same assessment considered certain procedural constraints applicable to the adoption of annual budgetary laws, which were deemed to rule out the possibility to depart from the balanced budget rule requirements[33].

However tolerant and optimistic the Commission might have been when accepting that all member states which ratified the Fiscal Compact have included both the numerical and the procedural rules (correction mechanism and monitoring by an independent fiscal institution) in the national legal systems in a manner generally precluding deviations by budget laws, the foundations of such assumption are ill-based at least in those cases when it considers political commitments. For obvious reasons, such commitments cannot be effective in legal terms, and the possibility to deviate from the rules upon adoption or rectification of annual budget laws will be open at all times. On the other hand, at least as the Romanian legal system is concerned, the insertion of the balanced budget rules into an ordinary law was the only option available in the absence of a constitutional revision. As the limited domain of organic laws, determined by article 73 of the Romanian Constitution, does not include fiscal or financial (budgetary) rules, an organic law providing such rules could not be passed[34].

Currently, the national legal systems of all member states in the CEE region comprise some type of balanced budget rule, aimed at limiting both public deficits and debt by means of relatively uniform numerical and procedural rules. Considering the options pursued for

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[31] According to article 3(2) in Title III of TSCG, „The rules set out in paragraph 1 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. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments."

[32] *Report from the Commission presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, C(2017) 1201 final, par. 3.1, p. 4. Alongside Romania, Cyprus, Denmark, France and Netherlands also made such commitments.

[33] *Report from the Commission presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, C(2017) 1201 final, par. 3.1, p. 4.

[34] E.S. Tănăsescu, S. Gherghina, *Limitations on Government Debt and Deficits in Romania*, in F. L. Morrison (ed.), *Fiscal Rules – Limits on Governmental Deficits and Debt*, Springer, 2016, pp. 247-248.

including such rules in the domestic legislation, the diverse settings of the balanced budget rule may be hardly grouped due to their heterogeneity, yet several categories may be identified:

(a) states which included the balanced budget rule in the constitution at their own initiative, such as Hungary and Poland, although they are not parties to the Fiscal Compact[35];

(b) states which included the balanced budget rule in their constitutions following transposition of the Fiscal Compact, such as Lithuania, Estonia, Slovenia;

(c) states which recognise the balanced budget rule due to constitutionally set prevalence of the Fiscal Compact as an international treaty over national law – Latvia, Slovakia;

(d) states which included the balanced budget rule into national law by ordinary laws, without being parties to the Fiscal Compact –Croatia, Czech Republic;

(e) states which included the balanced budget rule into national law by ordinary laws, transposing the Fiscal Compact – Bulgaria, Romania.

In addition, for some countries, namely Hungary, Latvia and Romania, a certain role in the creation of a national system of expenditure control as a step towards the monitoring and limitation of public deficit and debt required by art. 126 TFEU as detailed by the Stability and Growth Pact, belonged in the early stage following their EU accession to the activation of financial assistance mechanisms prior or upon the onset of the sovereign crisis. Hungary in 2008, Latvia from 2008 to 2012 and Romania from 2008 to 2015 had access to the balance of payments EU financial assistance under Regulation no. 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. Such assistance was complemented by loans granted by the International Monetary Fund for the same purpose of restoring the balance of payments. As part of the conditionality attached to such financial assistance, all three countries undertook fiscal stabilisation programmes, which also included the adoption of certain fiscal rules[36]. Amongst them, the creation of independent fiscal institutions, entrusted with a specific mandate for monitoring the application of such fiscal rules.

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[35] Hungary and Poland have signed and ratified solely Title V of the Treaty on Stability, Cooperation and Governance in the Economic and Monetary Union.

[36] For Hungary, see Z. Szente, *Breaking and Making Constitutional Rules: The Constitutional Effects of the Financial Crisis in Hungary*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate, 2013, pp. 245-261, for Latvia, see R. Balodis, J. Pleps, *Financial Crisis and the Constitutions in Latvia*, in X. Contiades (ed.), *op.cit.*, pp. 117-140, and for Romania, see E.S. Tănăsescu, S. Gherghina, *Limitations on Government Debt and Deficits in Romania*, in F. L. Morrison (ed.), *Fiscal Rules – Limits on Governmental Deficits and Debt*, Springer, 2016, pp. 247-248.

The negative effects of the financial crisis on the budgetary position of these countries had been thus tackled by specifically designed fiscal rules, addressing the challenges faced by their respective public budgets. Of course, such fiscal rules were not new, but they were not considered explicitly in the budgetary practice nor implicitly derived from the general deficit and debt limits in the TFEU and the Stability and Growth Pact. They included both specific measures, aimed at reducing determined expenditure (e.g. the interdiction to cumulate pensions above a certain threshold and salaries in the public sector, the reduction of personnel expenditure, cuts in public sector salaries and pensions, reorganization of public institutions and public pensions or public sector salaries schemes) and more general rules, addressing certain budgetary operations, such as the interdiction to transfer expenditure allowed in the public budgets for investment to current expenditure allowances, the interdiction to increase personnel expenditure with a six month period prior to general parliamentary elections, the interdiction to rectify the state budgets more than twice a year, in the second semester, except for an exceptional worsening of the macro-economic conditions during the first semester[37] etc.

Some of the fiscal rules thus included in the national regulations as part of the conditionality attached to the financial assistance programmes were not entirely mirroring those existing at the EU level, and therefore raised the issue of their compliance with the EU law, especially as concerns their impact on social rights[38]. The decisions of the constitutional courts in those states, establishing a certain protection for the social rights, are now providing an extensive area for research as concerns the relation between the fiscal rules and budgetary measures adopted as part of the sovereign debt programmes and the national constitutional settings and further envisaged constitutional reforms.

Yet, in the aftermath of the euro-crisis, it is to be assessed whether the detailed framework of fiscal rules developed in the national legal systems from complementary sources, combining the general rules comprised in the EU law with the specific rules, addressing the particular situation

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[37] Such rules were included in Romania in the Law no. 69/2010 on fiscal-budgetary responsibility, adopted as part of the fiscal consolidation programme that was a condition for the disbursements under the 2009 loan package granted by the EU under the balance of payments regulation, the International Monetary Fund, the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development. S. Gherghina, E.S. Tănăsescu, *Roumanie. La Cour constitutionnelle et l'équilibre des finances publiques*, Economica, Presses Universitaires d'Aix-Marseille, 2013, pp. 409-430.

[38] C. Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, pp. 279-326.

of the states that were part to financial assistance programmes, will be maintained as such or will be further amended, to become a constant part of the fiscal discipline rules applicable outside the crisis. It worth emphasising that most of the rules adopted during the financial and sovereign crisis and which are still in place passed one or more judicial tests before the national courts[39], including constitutional courts[40], as well as before the European Court of Justice[41].

3. Review and monitoring of compliance with fiscal rules

The national budgetary frameworks resulting after the transposition of the fiscal rules established at the EU level or agreed as part of assistance programmes may be further scrutinised in consideration of two tenets: (i) their legal effectiveness, as measured by the availability of judicial review of the compliance with such fiscal rules, and (ii) the existence and adequate function of an independent monitoring of compliance with the fiscal rules, namely of an independent fiscal institution.

3.1 Judicial review

The extent of the judicial review available for assessing compliance of annual budgetary laws or budget rectification laws with the fiscal and budgetary rules mostly depends on the national settings. Where the balanced budget rule and, in certain cases, other fiscal rules are placed at a constitutional level, the judicial review before the constitutional courts may ensure compliance with such rules. Also, where the procedure of budget drafting and adoption is provided in the Constitution, judicial review may be available for any breach of such procedural rules.

[39] J.-H. Reestman, *Legitimacy through Adjudication: The ESM Treaty and the Fiscal Compact before the National Courts*, in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, pp. 243-278.
[40] For an overview of consistent case law of constitutional courts in Latvia and Romania in relation to the expenditure cut measures during the crisis, R. Balodis, J. Pleps, *Financial Crisis and the Constitutions in Latvia*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate, 2013, pp. 121-128, and respectively, S. Gherghina, E.S. Tănăsescu, *Roumanie. La Cour constitutionnelle et l'équilibre des finances publiques*, Economica, Presses Universitaires d'Aix-Marseille, 2013, pp. 415-424.
[41] A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, 2015, pp. 121-154, F. Fabbrini, *Economic Governance in Europe. Comparative Paradoxes and Constitutional Challenges*, Oxford University Press, 2016, pp. 63-114.

Despite the heterogeneity of the solutions adopted by the CEE member states for placing the fiscal rules within their national legal systems, the availability of judicial review by constitutional courts seems to be the prevailing rule, since in five states (Estonia, Hungary, Lithuania, Poland, Slovenia) the rules are included at a constitutional level whilst in other two (Latvia, Slovakia) the rules are subject to judicial review based on the constitutional provisions requiring compliance of national laws with the international treaties. This means that in four states (Bulgaria, Croatia, Czech Republic and Romania) no judicial review may be available for ordinary budgetary laws, except for the case when the procedural constitutional rules concerning the drafting of the budget by the Government and its vote by the Parliament, are breached[42].

For most CEE states, judicial review by constitutional courts is thus available for laws adopting or rectifying the public budgets as well as for other laws adopting new expenditure to be further included in the public budgets. The only exceptions, where judicial review of budgetary laws may be in place solely for failure to comply with the competences and procedures provided in the constitution for drafting and approving the public budgets, are Bulgaria, Croatia and the Czech Republic.

Amongst the constitutions providing for debt brakes or other numerical and/or procedural fiscal rules and the constitutions that remain silent in this respect, a somehow intermediary constitutional rule, existing in Croatia, Estonia, Latvia, Lithuania[43] and Romania, is that requesting prior identification of financing sources for any additional expenditure to be included in the public budgets.

The Romanian Constitutional Court developed over the last 25 years an extensive jurisprudence concerning this constitutional request to identify financing sources for additional expenditure, dwelling on the link it established between this constitutional rule and the constitutional obligation of the Parliament to require information from the Government before adopting legislation leading to a modification of the state budget. Based on the relation between the two constitutional provisions, the Court stated that no legislation affecting the state budget by adding new expenditure may be adopted unless information concerning this financial effect

[42] H. Marková, M. Kopecky, R. Suchánek, *The Process of Budgeting and Issues of Indebtedness in the Czech Republic*, in F. L. Morrison (ed.), *Fiscal Rules – Limits on Governmental Deficits and Debt*, Springer, 2016, p. 88.

[43] Ş. Deaconu, I. Muraru, E.S. Tănăsescu, S. Barbu, *Codex constituţional*, vol. I and II, Monitorul Official Publishing House, 2015, comprising the constitutions of the states herein mentioned.

and the revenues considered for its financing is requested from the Government, except for the case when such information is described in the law or in the explanations accompanying the draft law[44].

The analysis made by the Court started from the distinction it established and further strived to maintain between the (i) identification of the financing source as such, and (ii) the question of its sufficiency. Although such distinction is not at all clear-cut in most cases, the Court stated that its judicial review competence is limited solely to assessing the first element, *i.e.* whether a proper financing source was identified prior to adopting a law approving additional expenditure to be further included in state budgets. The Court constantly held that it couldn't undertake any review of the issue whether the financing source identified is sufficient in quantitative terms, yet accepted to extend the analysis of the existence of a financing source by assessing the aptitude of such source to actually generate the revenues required to cover the intended expenditure[45].

Due to its generic ambit, the actual application of this rule depends on its interpretation by the Constitutional Court, therefore it cannot be an effective fiscal rule other than in procedural terms. This means that its obvious effect will be the diligence of the promoters of any law supplementing certain expenditure in the prevailing budget towards completion of the procedures organising the information flow from the Government to the Parliament in the process of adopting such law. As the identification of the financing source is deemed to be a part of this transfer of information, the completion of its procedural steps shall suffice for ensuring compliance with the constitutional rule, provided the financing source thus indicated by the executive is generally able to cover the intended expenditure. The procedure-oriented approach developed by the Romanian Constitutional Court jurisprudence most probably ensures a much more comfortable assessment of any judicial review based on reference to the constitutional rule that requires prior identification of the financing source for any supplementary expenditure, yet it may not lead in all cases to a proper review of compliance with such rule.

The assessment implied by this rule is thus deemed to be two-fold, to refer both to the identification of a financing source, which may be made in procedural terms, and to the quantitative assessment of such source, which is qualified by the Romanian Constitutional

[44] S. Gherghina, *Commentary to article 138 of the Romanian Constitution*, in I. Muraru, E.S. Tănăsescu, *Constituția României comentată*, C.H. Beck 2019, pp. 1231-1241.
[45] Decisions of the Romanian Constitutional Court no. 22/2016, no. 581/2016, no. 620/2016.

Court to be a rather economic than legal task. Nevertheless, the mere identification of a financing source is irrelevant for assessing the compliance with the constitutional rule of a law adopting a new expenditure, in the absence of the assessment of the ability of the source to cover the expenditure. By rejecting in principle this second (quantitative) assessment, due to its apparent economic character, the Court reaches the limits of its competence, which are perceived to always include a legal dimension. Absent the legal dimension of the case, the Court deems it has no ability to further its assessment into the economic domain. Yet, the numeric or generally quantitative constitutional fiscal rules – debt brakes, balanced budget rules including a limited deficit, etc. – are always economic in content.

From this perspective, given that the fiscal rules, irrespective of their placement on a specific normative level, include in most cases at least one economic element, any assessment of compliance with such rules conducted by a court will have to consider both the economic and legal aspects of the matter. This challenge of extending the legal analysis to the economic domain may not necessarily be comfortable for the courts, yet it became usual, albeit not easy, for other areas of intersection between the legal and economic domains, such as state aid or competition law.

3.2 Independent Monitoring Institutions

The legal mechanism of judicial control is accompanied by the economic mechanism of an advisory nature ensured by the independent fiscal institutions[46]. Under both the EU law (Directive 2011/85 for all member states and Regulation 473/2013 for the euro area states) and the Fiscal Compact, the independent fiscal institutions are a core element of the mechanism designed to ensure compliance with the fiscal rules. They are supposed to induce, rather than impose, compliance of budgetary laws as well as of any regulations having an impact on public budgets (such as tax, employment, social or other measures) to a larger extent than the judicial review.

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[46] The existence of independent agencies entrusted with monitoring compliance with fiscal and budgetary rules was part of the conditionality proposed by the International Monetary Fund prior to the crisis, and is currently a constant in several countries. For detailed information, X. Debrun, T. Kinda, „*Strengthening Post-Crisis Fiscal Credibility: Fiscal Councils on the Rise – A New Dataset*", IMF Working Papers, WP/14/58 (April 2014), pp. 13, 58.

To this end, independent fiscal institutions to monitor and assess compliance with fiscal rules are to be organised in all member states, irrespective of the normative level on which such rules are placed, and their functioning is submitted to common principles[47]. In certain states that were recipients of financial assistance upon the outburst of the financial crisis, such as Hungary and Romania, fiscal councils were created in 2008 and, respectively, in 2010, as a precondition for access to funds.

The independent fiscal institutions in the EU member states are regulated unevenly by three different regulations, which do not share a uniform domain of application[48].

First, all CEE countries are bound by Directive 2011/85 on requirements for budgetary frameworks of the Member States which requires, although in a quite general manner, that fiscal rules are to applied under independent monitoring. As of the date of this paper, all member states have transposed the directive, except for the Czech Republic. Despite it has not yet fully transposed Directive 2011/85, although the deadline for such transposition was 2013, the Czech fiscal council became operational early 2018.

Second, as it is the Fiscal Compact that linked the independent fiscal institutions to the automatic correction mechanism, entrusting them with the task to monitor the elements leading to its activation, such rules shall not be applicable to those CEE countries that have not ratified the Fiscal Compact. Accordingly, the requirements in the Fiscal Compact concerning the activity of the independent fiscal institutions shall be applicable to Estonia, Latvia, Lithuania, Slovakia and Slovenia, as euro area states, and to Romania and Bulgaria, who have ratified the Fiscal Compact.

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[47] Commission Communication *Common principles on national fiscal correction mechanisms* - COM(2012) 342. According to principle 7, concerning the role and independence of monitoring institutions, „Independent bodies or bodies with functional autonomy acting as monitoring institutions shall support the credibility and transparency of the correction mechanism. These institutions would provide public assessments over: the occurrence of circumstances warranting the activation of the correction mechanism; of whether the correction is proceeding in accordance with national rules and plans; and over the occurrence of circumstances for triggering, extending and exiting escape clauses. The concerned Member State shall be obliged to comply with, or alternatively explain publicly why they are not following the assessments of these bodies. The design of the above bodies shall take into account the already existing institutional setting and the country-specific administrative structure. National legal provisions ensuring a high degree of functional autonomy shall underpin the above bodies, including: i) a statutory regime grounded in law; ii) freedom from interference, whereby the above bodies shall not take instructions, and shall be in a capacity to communicate publicly in a timely manner; iii) nomination procedures based on experience and competence; iv) adequacy of resources and appropriate access to information to carry out the given mandate."

[48] D. Fromage, *Creation and Reform of Independent Fiscal Institutions in EU Member States: Incomplete and Insufficient Work in Progress?,* in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, p. 117.

Third, the core principles for independent fiscal institutions are anchored in the EU law and detailed by Regulation 473/2013, yet applicable only to Euro area states (for the CEE region, Estonia, Latvia, Lithuania, Slovakia and Slovenia).

The existence and operation of the independent fiscal institutions are among the tenets of the economic governance in the EU that is mostly left to the decision of the member states[49]. To date, all CEE countries have in place an independent fiscal institution, except for Poland, where the Supreme Audit Office allegedly performs the assessment tasks required by Directive 2011/85[50]. Yet, the legal basis for their operation is quite different, as not all states in the region are bound by the regulations applicable to independent fiscal regulations. Only the five CEE states that are members of the Eurozone, namely Estonia, Latvia, Lithuania, Slovakia and Slovenia, are fully bound by all three regulations concerning the independent fiscal institutions, whilst two CEE states, Bulgaria and Romania, are bound by both the Directive 2011/85 and the Fiscal Compact and the other four states of this area, Croatia, the Czech Republic, Hungary and Poland, are only bound by the general rules in Directive 2011/85 concerning the independent review of compliance with fiscal rules.

Given that the opinions of the independent fiscal institutions are in most cases of an advisory, non-binding, nature, their impact depends mostly on their publicity as well as on the prestige of their analyses and nonetheless of their members. An exception in this respect is the Hungarian Fiscal Council, which has a veto over a budget plan that does not meet the numerical rules in the Constitution[51].

Upon its assessment conducted in 2017 as concerns compliance with the requirements of the Fiscal Compact[52], the European Commission looked into the core principles defining the independence of the fiscal institutions and reached the conclusion that all member states under scrutiny are compliant with such principles. The assessment was conducted for the purpose of article 8 of the Treaty on Stability, Coordination and Governance in the European and

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[49] For an overview of several national solutions, P. Magarò, „*Independent Fiscal Institutions: A Comparative Analysis*", Transylvanian Review of Administrative Sciences, 9(39), 2013, pp. 73-79.

[50] D. Fromage, *Creation and Reform of Independent Fiscal Institutions in EU Member States: Incomplete and Insufficient Work in Progress?,* in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, p. 123.

[51] M. Antoš, *Fiscal Stability Rules in Central European Constitutions*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, p. 215.

[52] Report from the Commission presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, C (2017) 1201 final (hereinafter „the EC 2017 Report under Article 8 TSCG").

Monetary Union and contributed to the conclusion that the member states that ratified it comply with its requirements. To allow this conclusion, the EC report assessed the independent fiscal institutions alongside the assessment concerning the transposition of the balanced budget rule as provided in the Fiscal Compact into the national legal systems as well as that concerning the efficacy of the automated correction mechanisms inserted in the national legislations. The assessment of the national fiscal councils focused on both their role assigned in the national system and their independence.

The independence of the fiscal monitoring institutions is in all cases provided by the applicable regulations in a complex structure combining the organisational independence[53], both in operational and financial terms, and the independence of its members, to include incompatibilities and specific competence and experience requirements alongside a special nomination procedure. In operational terms, the national regulations include, in some cases, the interdiction to seek or accept instructions from other public authorities or institutions, as well as specific provisions concerning their access to information and the communication channels to be used for dissemination of the monitoring opinions and assessments. As for the financial aspects of the activity of the fiscal councils, despite the various national settings[54], specific separate budgetary allocations are provided in the annual budgetary laws. However, none of the budgeting and financing mechanisms regulated in the national legal systems is likely to amount to a financial independence of the fiscal monitoring institutions, in budgetary terms, aiming instead at ensuring adequate resources for the completion of their tasks. From this perspective, the Commission's Report focuses merely on the adequacy of resources, concentrating the more relevant elements of the fiscal councils' independence on the exercise of their attributions, *i.e.* on their functional autonomy[55].

Besides the elements of their independence, the most important contribution to the effectiveness of the opinions issued on fiscal and budgetary matters by the fiscal institutions,

[53] P. Magarò, „*Independent Fiscal Institutions: A Comparative Analysis*", Transylvanian Review of Administrative Sciences, 9/2013, p. 72.

[54] As described in section 3.4 page 10 of the EC 2017 Report under Article 8 TSCG.

[55] In fact, many independent fiscal institutions are subordinated either to the government or to the parliaments. D. Fromage, *Creation and Reform of Independent Fiscal Institutions in EU Member States: Incomplete and Insufficient Work in Progress?,* in T. Beukers, B. de Witte, C. Kilpatrick (eds.), *Constitutional Change Through Euro-crisis Law,* Cambridge University Press, 2017, pp. 112-113

which may be ensured despite their advisory nature, is the principle „comply or explain"[56]. Most of the member states have explicitly included this principle in their legislation, whilst few of them – Slovakia, amongst the CEE states – have only partially referred to it in respect of certain assessments issued by the national fiscal monitoring institutions. Nevertheless, the Commission assessment considered the formal undertaking of the states that have partially regulated the „comply or explain" principle to further extend its application to all opinions issued by the fiscal council, thus contending that all TSCG signatories are complying with the requirement concerning the existence of an appropriate monitoring mechanism for the balanced budget rule and the related correction mechanism.

Yet, in their annual reports, some independent fiscal institutions are claiming the non-observance of their opinions by the executive and legislative powers as well as the failure of national authorities to apply the „comply or explain principle". The Romanian Fiscal Council transmitted the most acute signals of such non-observance of this principle. Its annual reports are repeatedly underlining the breach of several fiscal rules included in the national regulations[57], as well as the fact that the principle „comply or explain" is ignored completely[58].

In the absence of a legal sanction, which in its turn would amount to recognising a mandatory nature for the assessments and opinions issued by the national fiscal institutions, the „comply or explain" principle, although included in the national legislations as an important element of the mechanism ensuring the sustainability of public finances, proves to be effective only depending on the political will of the national parliaments or governments - the entities which have to either „comply" with the independent opinions of the fiscal councils or „explain" any choice not to do so. Its ineffectiveness, at least in certain if not in all cases, may be seen as a sign of a (partial) failure of a member state to achieve the aim of the method chosen by the Fiscal Compact for ensuring public finance sustainability through the balanced budget rule, namely the internalisation of the rule by transposing it in a manner that is specific for each

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[56] As worded by the EC 2017 Report under Article 8 TSCG, page 8, „Appropriate provisions and arrangements should guarantee that governments comply with the opinions that have been expressed in monitoring institutions' assessments which are themselves produced at key stages of the correction mechanism, or alternatively explain publicly why they are not following those opinions."

[57] Including the absence of a reasonable period allowed to the Fiscal Council for studying the proposed fiscal measures and issuing its reasoned opinion. The annual reports repeatedly indicate that the official documents are submitted for review with very short notice, sometimes even with less than 24 hours prior to the date when the Fiscal Council's opinion is due.

[58] Romanian Fiscal Council, Annual Report 2018, pp. 25, 27-33, available at http://www.fiscalcouncil.ro/RA%202018%20EN%20FINAL.pdf

country. If, despite its attempt to formally ensure compliance with the uniform standard for the balanced budget rule provided by the Fiscal Compact, a member state fails to effectively apply such standard on a regular basis, relying or not on the legal gaps or even of an enforcement mechanism, this signals a failure to fully accept the balanced budget rule within the national legal system.

4. Concluding remarks

After at least seven years of application at national level of the most important fiscal rules designed at the EU level for overcoming the negative effects of the financial crisis and further ensuring public finances sustainability, the national experiences developed in the CEE region member states prove the diversity allowed by the EU minimal standard rules. Based on both the differences among the national legal systems and the political will to fully accept and apply the uniform fiscal rules, such diversity displays various national legal solutions for the fiscal rules as well for the mechanisms aimed at ensuring compliance with them, such as judicial review and independent fiscal institutions.

The main effect of such diversity may be the fact that the fiscal rules have a strong national component, which is to be further balanced with its European component, and any legal limitations for their application shall be more visible at the national level. This EU-national duality of legal mechanisms designed for ensuring the sustainability of public finances allowed for various national attitudes towards such mechanisms. When there is no political will for accepting at the national level the fiscal rules, any legal argument, most often of a procedural type, that may reduce or even block the effectiveness of national mechanisms ensuring the correction of any noncompliance with the fiscal rules shall be used, leaving any such correction to be applied at the EU level. On the contrary, even in those countries were the fiscal rules have been nationalised to a larger extent and no procedural artifices are used for postponing their application, the challenge remains to ensure compliance with such rules via democratic processes, maintaining checks and balances during the budgetary process. Most probably, a more balanced position will be developed in time, mostly considering that the currently existing fiscal rules have already passed the test of judicial review in most countries, which contributed to their consolidation at least at the national level.