
Applications for the issue of temporary injunctions to prevent the ratification of the ESM Treaty and the Fiscal Compact unsuccessful for the most part

Today, the Federal Constitutional Court pronounced its judgment regarding several applications for the issue of temporary injunctions. The main objective of the applications is to prohibit the Federal President from signing the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 until the decision in the principal proceedings; by signing the statutes, the Federal President would create the precondition for the ratification of the international agreements - the Treaty establishing the European Stability Mechanism (ESM Treaty) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (known as the Fiscal Compact) - which are approved therein.

Press Release no. [47/2012 of 2 July 2012](#) provides information (in German) on the facts of the proceedings. It can be retrieved on the Federal Constitutional Court's website. Extracts from the decision are available in English on the Federal Constitutional Court's website as well.

The Second Senate of the Federal Constitutional Court refused the applications for the issue of temporary injunctions with the proviso that the ESM Treaty may only be ratified if at the same time it is ensured under international law that 1. the limitation of liability set out under Article 8 (5) sentence 1 of the ESM Treaty (TESM) limits the amount of all payment obligations arising to the Federal Republic of Germany from this Treaty to its share in the authorised capital stock of the ESM (EUR 190 024 800 000) and that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative, 2. the provisions of the ESM Treaty concerning the inviolability of the documents of the ESM (Article 32 (5), Article 34 and Article 35 (1) TESH) and the professional secrecy of all persons working for the ESM (Article 34 TESH) do not stand in the way of the comprehensive information of the *Bundestag* and of the *Bundesrat*.

The Federal Republic of Germany must express that it does not wish to be bound by the ESM Treaty in its entirety if the reservations made by it should prove to be ineffective.

In essence, the decision is based on the following considerations:

I. Extent of review/Admissibility of the main action

1. Diverging from the usual extent of review in temporary injunction proceedings, the Senate did not restrict its review in the present temporary injunction proceedings to a mere weighing of the consequences of its decision. Instead, it performed a summary review of the challenged Acts of assent and of the accompanying laws under the aspect of whether the violations of their rights which the applicants admissibly assert can indeed be established. A summary review of the legal position was required because with the ratification of the Treaties, the Federal Republic of Germany will enter commitments under international law whose cancellation would not be easily possible in the event that violations of the constitution should be established in the principal proceedings. If a summary review in temporary injunction proceedings were to establish a high probability that there is indeed the alleged violation of the precept of democracy, which Article 79 (3) of the Basic Law (*Grundgesetz* - GG) lays down as the identity of the constitution, a serious detriment to the common good would result in the temporary injunction not being issued. The economic and

political disadvantages which could result from a deferred entry into force of the challenged statutes cannot be weighed against this.

2. The Senate only regarded the principal proceedings as admissible to the extent that the applicants, relying on Article 38 GG, assert a violation of the overall budgetary responsibility of the German *Bundestag*, which is entrenched in constitutional law through the principle of democracy (Article 20 (1) and 2, Article 79 (3) GG).

To the extent that the applicants in proceedings 2 BvR 1421/12 object to euro rescue measures taken by the European Central Bank, in particular to the acquisition of government bonds on the secondary market, arguing that the measures, as what is known as "*ausbrechende Rechtsakte*", transgress the framework of authorisation established by the German Acts of assent to the European Union Treaties, their application for a declaration to this effect is not encompassed by the application for the issue of a temporary injunction and therefore can only be reviewed in the principal proceedings.

II. Standard of review

As the Senate already held in its decision regarding the aid to Greece and the European Financial Stability Facility of 7 September 2011, Article 38 GG in conjunction with the principle of democracy (Article 20 (1) and (2), Article 79 (3) GG) demands that as a fundamental part of the ability of a constitutional state to democratically shape itself, the decision on public revenue and public expenditure must remain in the hand of the German *Bundestag*. As elected representatives of the people, the Members of the German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental governing. In this respect, the German *Bundestag* is prohibited from establishing mechanisms of considerable financial importance which may result in incalculable burdens with budget significance being incurred without the mandatory approval of the *Bundestag*. In this context, the *Bundestag*, as the legislature, is also prohibited from establishing permanent mechanisms based on international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate. The *Bundestag* must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Sufficient parliamentary influence must also be ensured on the manner of dealing with the funds provided.

The overall budgetary responsibility of the German *Bundestag* is also safeguarded by the design as a stability union that the monetary union has to date been given under the Treaties, in particular by the provisions of the Treaty establishing the European Union and of the Treaty on the Functioning of the European Union (TFEU). However, a democratically legitimised change of the stability requirements under European Union law is not from the outset incompatible with Article 79 (3) of the Basic Law. The Basic Law does not guarantee the unchanged further existence of the law in force but those structures and procedures which, also in the context of a continuous further development of the monetary union with the objective to comply with the stability mandate, keep the democratic process open and at the same time safeguard parliament's overall budgetary responsibility. In this context, obliging the budget legislature to pursue a specific budget and fiscal policy is not from the outset contrary to democracy; such an obligation can also take place on the basis of European Union law or international law.

III. Subsumption

Measured against these standards, the applications prove to be unfounded for the most part.

1. The Act of assent to the insertion of Article 136 (3) TFEU does not impair the precept of democracy. Article 136 (3) TFEU, which was provided for by the European Council decision of 25 March 2011, contains the authorisation to establish a permanent mechanism for mutual aid between the Member States of the

euro currency area. Admittedly, this changes the present design of the economic and monetary union in such a way that it moves away from the principle of the independence of the national budgets which has characterised the monetary union so far. This, however, does not relinquish the stability-oriented character of the monetary union because the essential elements of the stability architecture, in particular the independence of the European Central Bank, the commitment of the Member States to observe budget discipline and the autonomous responsibility of the national budgets remain intact. The possibility of establishing a permanent stability mechanism, which is opened up under European Union Law by Article 136 (3) TFEU, does not result in a loss of national budget autonomy because through the challenged Act of assent, the German *Bundestag* does not yet transfer budget competences to bodies of the European Union or to institutions created in connection with the European Union. Article 136 (3) TFEU itself does not establish a stabilisation mechanism but merely opens up to the Member States the possibility of installing such a mechanism on the basis of an international agreement. The requirement of ratification for the establishment of a stability mechanism makes a participation of the legislative bodies a precondition before the stability mechanism enters into force.

2. The challenged Act of assent to the ESM Treaty essentially takes account of the requirements set out under constitutional law with regard to the safeguarding of the overall budgetary responsibility of the German *Bundestag*.

a) However, it is required to ensure in the framework of the ratification procedure under international law that the provisions of the ESM Treaty may only be interpreted or applied in such a way that the liability of the Federal Republic of Germany cannot be increased beyond its share in the authorised capital stock of the ESM without the approval of the *Bundestag* and that the information of the *Bundestag* and the *Bundesrat* according to the constitutional requirements is ensured.

Admittedly, it can be assumed that the express limitation of the liability of the ESM Members to their respective portions of the authorised capital stock, which is provided for in Article 8 (5) sentence 1 TESM, bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the activities of the ESM to EUR 190 024 800 000; this ceiling can also be assumed to apply to all capital calls made according to Article 9 TESM, including the "revised increased" capital calls according to Article 25 (2) TESM, which in the case of the payment shortfall of an ESM Member may be made to the remaining Members that are able to pay, and which will correspondingly increase the burden on them. However, it cannot be ruled out that the ESM Treaty is interpreted in the sense that in the case of a revised increased capital call, the ESM Members cannot rely on the liability ceiling because the wording of Article 25 (2) TESM does not contain a limitation of the amount and because the provision is intended to secure the creditworthiness of the ESM, and to maintain its ability to act, even in unexpected emergency situations. To meet the constitutional requirement of determining the burdens on the budget in a clear and definitive manner, the Federal Republic of Germany must ensure the required clarification in the ratification procedure, and it must ensure that it is only bound by the Treaty in its entirety if no payment obligations that go beyond the liability ceiling can be established for it without the consent of the *Bundestag*.

Such a reservation in the ratification procedure is also required with regard to the provisions of the ESM Treaty on the inviolability of the documents (Article 32 (5), Article 35 (1) TESM) and on the professional secrecy of the legal representatives of the ESM and of all persons working for the ESM (Article 34 TESM). Admittedly, a good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorised third parties, for instance to actors on the capital market, but not to the parliaments of the Member States, which must bear political responsibility for the commitments based on the ESM Treaty vis-à-vis their citizens also during further treaty implementation. However, the provisions do not explicitly address the

information of the national parliaments by the ESM; with a view to the fact that the situation under constitutional law as regards the parliament's rights of participation and its rights to be informed is different in the Member States, an interpretation is therefore conceivable which would stand in the way of sufficient parliamentary monitoring of the ESM by the German *Bundestag*. A ratification of the ESM Treaty is therefore only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, *Bundestag* and *Bundesrat* will receive the comprehensive information which they need to be able to develop an informed opinion.

b) In other respects, the other provisions of the ESM Treaty are unobjectionable according to the summary review. Admittedly, the provision under Article 4 (8) TESM, according to which all voting rights of an ESM Member are suspended if it fails to fully meet its obligations to make payment vis-à-vis the ESM, is not unproblematic with a view to its potentially far-reaching consequences under the aspect of overall budgetary responsibility because for so long as the default continues, the Member concerned can no longer influence the decisions of the ESM. Consequently, the participation of the German *Bundestag* in the decisions of the German representative in the bodies of the ESM, which is provided for at national level, would fail, and the context of legitimation between parliament and the ESM would be interrupted during this period. However, the provision does not violate the overall budgetary responsibility of the *Bundestag* because the latter can, and must, see to it that the German voting rights are not suspended. It must make the budgetary arrangements necessary in this context to ensure that it will be possible at any time to completely pay in Germany's shares in the authorised capital stock of the ESM.

Furthermore, it cannot be established that the amount of the payment obligations entered into through the participation in the ESM of a total nominal value of EUR 190 024 800 000 exceeds the limit of the burden on the budget to such an extent that the budget autonomy effectively fails. This also applies taking into account Germany's overall commitment undertaken with regard to the stabilisation of the European monetary union. When examining whether the amount of payment obligations and commitments to accept liability will result in the *Bundestag* relinquishing its budget autonomy, the legislature has broad latitude of assessment, which also applies to the assessment of the future soundness of the Federal budget and the economic performance capacity of the Federal Republic of Germany, including the consideration of the consequences of alternative options of action. The legislature's assessment that the risks involved with making available the German shares in the European Stability Mechanism are manageable, while without the granting of financial assistance by the ESM the entire economic and social system would be under the threat of unforeseeable, serious consequences, does not transgress its latitude of assessment and must therefore be accepted by the Federal Constitutional Court.

The objection that the ESM can become the vehicle of unconstitutional state financing by the European Central Bank cannot be raised against the ESM itself. As borrowing by the ESM from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with the prohibition of monetary financing entrenched in Article 123 TFEU, the Treaty can only be taken to mean that it does not permit such borrowing operations. The European Stability Mechanism is one of the institutions specified in Article 123 (1) TFEU to which no loans may be granted by the European Central Bank. A depositing of government bonds by the ESM with the European Central Bank as a security for loans would also infringe the ban on the direct acquisition of debt instruments of public entities. Here, it can remain open whether this would constitute a direct acquisition of debt instruments of state issuers on the primary market or whether after their intermediate acquisition by the ESM it would be tantamount to an acquisition on the secondary market. For an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is prohibited as well, as it would circumvent the prohibition of

monetary financing. To what extent the decision taken by the Governing Council of the European Central Bank on 6 September 2012 on a programme concerning the purchase of government bonds of financially weak Member States whose currency is the euro complies with these legal requirements was not a matter for decision in the present proceedings for the issue of temporary injunctions, proceedings which exclusively relate to the Acts of assent to the ESM Treaty and the Fiscal Compact and to the respective accompanying laws.

3. The provisions on the involvement of the German *Bundestag* in the decision-making processes of the ESM, which result from the Act of assent to the ESM Treaty and from the ESM Financing Act (*ESM-Finanzierungsgesetz* - ESMFinG), also essentially comply with the requirements placed on the safeguarding of the principle of democracy at national level. This applies to the elaboration of the rights of participation of the German *Bundestag* as well as with regard to its rights to be informed and to the personal legitimation of the German representatives in the bodies of the ESM. They are to take part in the meetings of the bodies of the ESM and to implement the resolutions of the German *Bundestag*. The ESM Financing Act presumes that the German representatives are bound by the resolutions of the *Bundestag* and are accountable to it.

a) Admittedly, it is questionable whether the participation of the *Bundestag* also with regard to the issuing of shares of the ESM's authorised capital stock higher than at par (Article 8 (2) sentence 4 TESM) is sufficiently provided for at national level, or whether in this respect, the possible far-reaching consequences on the Federal budget require express authorisation by a Federal statute, as is the case with an increase of the capital stock of the ESM. If § 4 (1) ESMFinG is interpreted in conformity with the constitution, the approval of an issuing of shares higher than at par is reserved to the plenary session of the *Bundestag*, no temporary injunction is required in this respect.

b) With regard to the allocation of the rights of participation to the plenary session, the budget committee and the special committee, the legislature took the criteria as a guideline which the Federal Constitutional Court detailed in its judgment of 28 February 2012 (2 BvE 8/11; see Press Release no. 14/2012, which is available in English on the Federal Constitutional Court's website) However, it does not appear to be ruled out that the ESM Financing Act assigns powers to the budget committee which due to their implications are to be exercised by the plenary session, for instance decisions on material changes of the procedure and of the conditions of the ESM's capital calls. In this respect, however, a temporary injunction is not required either. For the plenary of the German *Bundestag* can counter objections raised against the constitutionality of the allocation of rights of participation to the budget committee at any time by assuming to itself the powers of the budget committee, thus exercising its right under § 5 (5) ESMFinG.

4. The Act of assent to what is known as the Fiscal Compact (TSCG) does not violate the overall budgetary responsibility of the German *Bundestag*.

a) The regulatory content of the Treaty, whose objective is to strengthen the economic and monetary union by fostering budgetary discipline, is for the most part identical with the existing requirements of the Basic Law's "debt brake" (Article 109, 115 and 143d GG) and with the budgetary obligations arising from the Treaty on the Functioning of the European Union. In particular, the Contracting Parties' obligation under Article 5 (1) TSCG to submit, in the event of an excessive deficit, a budgetary and economic partnership programme that requires approval has been incorporated into the excessive deficit procedure that has already been codified under primary law (Article 126 TFEU). No direct "reach-through" of the bodies of the European Union to national budget legislation is provided for.

b) The Fiscal Compact also does not grant the bodies of the European Union powers which affect the overall budgetary responsibility of the German *Bundestag*. To the extent that a correction mechanism is to be put in place by the Contracting Parties at national level in the event of significant deviations

from the medium-term objective of submitting a balanced budget, on the basis of the principles to be proposed by the European Commission (Article 3 (2) TCSG), this provision only concerns institutional but not specific substantive requirements for the preparation of the budgets. Instead, the provision expressly clarifies that the prerogatives of the national parliaments shall be fully respected and thus precludes from the outset a partial transfer of budgetary responsibility to the European Commission. The competencies of the Court of Justice of the European Union, whose jurisdiction can be invoked according to Article 8 (1) TCSG in case of a failure to comply with the obligations arising from Article 3 (2) TCSG, also do not encroach upon the national legislature's specific budgetary freedom.

c) Finally, by ratifying the Fiscal Compact, the Federal Republic of Germany does not undertake an irreversible commitment to pursue a specific budget policy. It is true that the Treaty does not provide for a right of termination or resignation for the Contracting States. It is, however, recognised under customary international law that the resignation from a treaty by mutual agreement is always possible, and that unilateral resignation is at any rate possible in the event of a fundamental change in the circumstances which were relevant upon the conclusion of the treaty.