

For our files

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2 BvR 1296/12
Constitutional Complaint
Urgent legal protection against the ESM and Fiscal Pact

A constitutional complaint has already been submitted as an urgent application under file ref. 2 BvR 1296/12 prior to the adoption of the corresponding draft laws by the Bundestag and Bundesrat.

On 29.06.2012, the German Bundestag adopted the following laws:

- Law on the Agreement of 2nd February 2012 on the Establishment of a European Stability Mechanism (ESMG), see Bundestag Records 17/9045 in the version amended by the Budget Committee (17/10126, 17/10172)
- Law on the Financial Participation in the European Stability Mechanism (ESMFinG), see Bundestag Records 17/9048, 9371 in the version amended by the Budget Committee (17/10126, 17/10172)
- Law on the Decision of the European Council of 25th March 2011 on the amendment of Art. 136 TFEU, see Bundestag Records 17/17/9047 and 9373
- Law on the Agreement on the Stability, Coordination and Control of the Economic and Currency Union (in short: FiskalVG), see Bundestag Records 17/9046 and 9667 in the version amended by the Budget Committee (17/10125, 17/1071)

The Bundesrat has also agreed to these laws, although they have not yet been signed by the Federal President.

The above mentioned constitutional complaint is now to be continued against the adopted laws. Should the Constitutional Court consider it necessary in procedural terms, this application should be considered as a new constitutional complaint. With regard to grounds,

attention is drawn to the constitutional complaint already submitted. This is attached as an Appendix.

The complaint refers to the violation of the voting right (Art. 38 GG) in conjunction with the principle of democracy (Art. 20 I GG). Application is made that:

- the above laws be declared as unconstitutional.
- the countersignature of these laws by the Federal President be temporarily prohibited until a decision is reached on the main matter

In addition to the correspondence already submitted of 12.06.2012, we would like to state as follows:

I. Need for urgency

If the Federal President countersigns the disputed laws, they become legally binding under national law. Should the Federal Constitutional Court then subsequently declare the disputed laws to be unconstitutional, the Federal Republic would come into an irresolvable conflict between international/European law and national constitutional law. The responsible bodies would then be faced with the choice of acting either against international/European law or national constitutional law. Ratification would de facto create irreversible circumstances – internationally binding agreements and the provision funds that can never be recovered. For this reason, it is essential that the Federal Constitutional Court clarifies in advance the constitutionality or unconstitutionality of the contested laws, and that countersignature only takes place, or is definitively prohibited, after appropriate clarification.

II. Material legal situation

The disputed laws were adopted essentially in the version of the drafts as in the form subject to the constitutional complaint already submitted on 12.06.2012. The following changes must however be examined:

1.

The volume of the financial aid under the ESM / EFSF is to be increased. § 1 ESMFinG is to be supplemented by the following Para. 3:

“The Federal Government is authorised, by its representative on the Governing Council, to agree to a decision in accordance with Art. 10 (1) of the Agreement on the Establishment of the European Stability Mechanism on the amendment of the consolidated loan volume of the European Stability Mechanism and European Financial Stabilisation Facility, in the sense of Art. 39 of the Agreement on the Establishment of the European Stability Mechanism, to the extent that the funds required for the emergency measures agreed for the implementation of the European Financial Stabilisation Facility up to 30th March 2012, up to the level of € 200 billion, may not be deducted in the calculation of the consolidated loan volume within the meaning of Art. 39 of the Agreement on the Establishment of the European Stability Mechanism” (17/1026, p. 8)

According to the ESMV, the maximum credit volume is € 500 billion (Art. 39). By this authorisation, the credit volume is to be increased to € 700 billion. This confirms that the ESM is not limited in terms of its structure, but is designed for a continuous increase of lending (and if necessary, also of the capital). Clear limits are lacking, although due to the relevance to the basic law (Art. 38 GG), they should indeed be imperative.

In the report of the Budget Committee (17/10172, p. 12) it states on this point (deprecatingly):

“The Euro group on 30th March 2012 agreed on a temporary adjustment of the consolidated loan volume of the EFSF and ESM to € 700 billion. This amount results from the fact that the funds agreed at this time for the implementation of the emergency measures of the EFSF in the amount of € 200 billion will no longer be taken into account in the consolidation. Following repayment of the funds provided by the EFSF, there will remain in the long term a maximum, consolidated loan volume of € 500 billion, whereby the temporarily increased, consolidated loan volume of € 700 billion will be reduced by the relevant amount following individual repayments of the funds agreed by the EFSF to the EFSF.”

Under any reasonable economic considerations, no repayment (or only very little) of the EFSF funds can be expected, because the supported countries and their economies suffer from structural debt problems. This will result de facto in a “tacit” increase in the ESM.

The budget sovereignty of the Bundestag will therefore be further restricted:

- The liability volume continues to increase. The ESM is being topped up. The ECB is still buying government bonds on the secondary market. Irrespective of the questionability of this procedure under European law (which is beyond the purview of the Federal Constitutional Court), this leads to further national liability risks which under economic considerations must affect the budget.
- On the other hand, the freedom of the Bundestag to comply with its obligations by borrowing is also restricted. The Fiscal Pact lays down strict regulations on this point.
- The assumption of liability and other restrictions of budget freedom (e.g. through the so-called debt brake of the Basic Law) are not unknown in budget law. They are however subject to the disposition of the Bundestag, and can be revised by corresponding majorities. Through the ESM and Fiscal Pact, the Deutsche Bundestag would surrender this basic democratic freedom.

2.

The legislator has now laid down regulations, particularly with regard to the participation of the Bundestag in the ESM and Fiscal Pact, corresponding regulations have been incorporated into §§3 - 7 of the ESMFinG (17/10126, S. 9 ff.) and with regard to the Fiscal Pact, the law on the cooperation of the Federal Government and German Bundestag in matters of the European Union will be supplemented (17/1025, p. 5).

These regulations however are not suitable to ensure a satisfactory, democratic legitimation level, as guaranteed by Art. 38 1 GG.

In its Lisbon verdict, the Federal Constitutional Court found that the democratic legitimation level of the European Union will still sufficient at the integration status of the time. In continuation of the judicial considerations, the standards of democratic legitimation must be set correspondingly higher in the course of continuing integration, i.e. further integration steps must be supported by a strengthening of democratic elements in the European Union.

The opposite is the case: Integration through the ESM and Fiscal Pact on the way to a community of liability and increased coordination and control of national financial and economic policy will be counteracted in terms of democratic policy by the conclusion of agreements and the foundation of institutions which lie beyond the bounds of actual European law. The participation of the European Parliament provided for in European law will be completely excluded.

Nor will adequate democratic legitimation be achieved by a democratic return to national states, in this case the Federal Republic of Germany.

The possibilities of democratic return to national states are already restricted by their very nature – even before the adoption of these contested laws. The voting behaviour of members of the government and other representatives (such as the Governors in the Governors' Council of the ESM) could be bound accordingly to the voting of the Bundestag. Infringements against this bond would then constitute infringements against national constitutional law, but would have no consequences at international or European level: The act in which the Federal Government would have cooperated against instructions would remain in effect. The Bundestag can therefore be displaced from its formative role, and is dependent on information provided by the Federal Government, which is provided only hesitatingly and late (see BVerfG of 19.06.2012 - 2 BvE 4/11). This problem must be accepted to a certain extent in the interests of European integration - in Art. 23 GG, the Basic Law expressly allows for the possibility of European integration. In the matter in question here – budget sovereignty as the “germ cell” of democracy – this problem is extremely virulent and sets constitutional limits on further integration. However, as long as our Parliament can be so easily circumvented in such important matters, it must be concluded that no adequate democratic return can be possible.

Added to this is that the participation rights of the Bundestag are in some cases lacking.

With regard to the ESM, the current version has brought about an “improvement”, in particular due to the fact that the plenum of the Bundestag under § 5 V ESMG has been granted the rights to confer the resolution upon itself at any time.

Now as before however, the increase of the issue rate according to Art. 8 II 2 ESMV, which is an important implement for the extension of the liability volume of the ESM, remains unregulated. In such a sensitive area of basic and constitutional law, such lack of regulation is unacceptable.

The information obligations of § 7 are not effective, because Art. 34 ESMV specifies a professional duty of confidentiality. The ESMV is designed so that decisions are made within a small circle, without information to the public. National regulations cannot remedy this because of the precedence of international law.

While the German legislator is at least showing signs of an effort to ensure the participation of the Bundestag in the ESM, e.g. in the purchase of government bonds by the ESM (Art. 17, 18 ESM), the policy of the ECB to buy up government bonds is removed from all democratic control – either at the European or national level. As a result, a substantial liability volume is being generated, beyond any parliamentary control (which already induced the SPD Chairman

Gabriel to the statement that Euro-bonds had de facto long been in existence). In the assessment of whether the contested laws stand up to the Basic Law, an isolated consideration on the basis of the close material connection between the ESM, the Fiscal Pact and the policy of the ECB cannot lead to proper results. In the context of the overall picture of a lack of democracy which can no longer be tolerated in constitutional terms, the absolutist parliamentary policy of the ECB is a further weighty detail.

With regard to the Fiscal Pact, the legislator has restricted himself to supplementing § 3 of the law on the cooperation of the Federal Government and German Bundestag in matters of the European Union. This in no way remedies the democratic deficits of the Fiscal Pact. Firstly the Commission, which will be granted extensive authorities within the framework of the Fiscal Pact, is in no way democratically involved. Secondly, § 9 IV EUZBBG contains a regulation on parliamentary reservation, which is tailored only for the Council. The relevant decisions regarding Fiscal Pact – such as the introduction of deficit proceedings (Art. 7 FiskalV) – are not made in the Council. The parliamentary reservation means nothing, unless an analogous applicability is advocated. Thirdly, § 9 IV 4 EUZBBG de facto gives the Federal Government broad discretion to ignore any possible statements of position by the Parliament by referring to hardly justifiable foreign or integration policy grounds. This should now also apply in the core area of legislative responsibility – budget sovereignty. This is no longer reconcilable with Art. 38 1 GG.

With kind regards



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Lawyer

Enclosure

Constitutional complaint of 12.06.2012
Legal material