

Federal Constitutional Court  
PO Box 1771  
76006 Karlsruhe

In advance by fax: 0721 / 91 01 - 3 82

Heidelberg, 27.09.2012  
My ref.: 00318-12

**Constitutional complaint  
- and preventive legal protection by urgent proceedings -**

of Mr. Simon G. Jakob, Bergheimer Str. 49, 69115 Heidelberg

- Complainant -

Legal representatives.: Lawyers Jakob & Kollegen, Bergheimer Str. 49, 69115 Heidelberg  
against the Federal Government and the Federal Republic of Germany

**Applications**

1. That the Federal Government be obliged to file an action for annulment pursuant to Art. 263 TFEU before the European Court of Justice within the prescribed period up to 06.11.2012, in representation of the Federal Republic of Germany, against the decision of the European Central Bank of 06.09.2012 on the unlimited purchase of government bonds on the secondary market.

Application is made that this obligation be pronounced before 06.11.2012 in the form of a temporary injunction under § 32 BVerfGG.

2. That the Court finds that the decision of the ECB of 06.09.2012 on the unlimited purchase of government bonds is incompatible with the German Constitution.

Application is further made:

That the Court finds that it is unconstitutional if the Federal Government fails to file an action for annulment in accordance with the application under Item 1.

## **Grounds**

### **1. Decision of the ECB**

The Council of the European Central Bank (ECB) decided on 06.09.2012 on the unlimited purchase of government bonds on the secondary market. The exact wording of the decision remained internal and has not been published. The following content can however be taken from the press release of the European Central Bank ([http://www.ecb.int/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html)):

- The purchase of government bonds should only take place if
  - the countries concerned participate in a programme of the European Stabilisation mechanism (ESM) or the European Financing Facility
  - and this programme provides for the possibility of purchasing bonds of the country concerned on the primary market.
- The European Central Bank will decide at its own discretion on the scope, the beginning, the duration and the termination of the bond purchases. It will thereby act within the framework of its monetary policy mandate.
- The purchases should be concentrated on government bonds with maturities between 1 and 3 years.
- The European Central Bank sets no limit in advance on the bond purchases.

### **2. Infringed right**

The complainant alleges the infringement of his right under Art. 38 GG.

According to the jurisdiction of the Federal Constitutional Court, the voting right under Art. 38 I GG extends not only to a merely formal guarantee. Art. 38 GG rather protects voting citizens also against a loss of substance of their constitutionally endowed authority.

The decision on spending, borrowing and liabilities of the Federal Republic of Germany – the budgetary sovereignty of the Parliament – lies at the heart of the democratic structure (Federal Constitutional Court of 30.06.2009 - 2 BvE 2/08, Rn. 249), which is also constitutionally protected under Art. 38 I GG.

By the decision of the ECB of 06.09.2012, the Federal Republic of Germany will be forced to enter into unlimited liability, without any involvement on the part of the Bundestag (or any other popular representation such as the European Parliament). The undermining of budgetary sovereignty threatens a loss of substance of the voting right – central budgetary

decisions will be made without the involvement of the Parliament, without the “voting citizen” being able to exert any influence on the matter.

In addition to other liability circumstances (in particular the European Stabilisation Mechanism), the decision of the ECB will establish an overall volume of liability which is no longer compatible with the principle of democracy – future parliaments will thereby be effectively deprived of their budgetary sovereignty by the exorbitant burden of liability.

I will go into the individual infringements in detail under Item 6.

### **3. Subject of the complaint and legal protection objective**

#### **a. Obligation to file for annulment (Application No. 1)**

By the present constitutional complaint, the complainant primarily requests a commitment of the Federal Government to file action for annulment before the ECJ.

##### **aa. Inactivity of the Federal Government**

The Federal Government was called on, amongst others, by the Bundestag member Peter Gauweiler and the Hessen Justice Minister Jörg-Uwe Hahn to file an action for annulment against the decision of the ECB of 06.09.2012 before the ECJ. The Federal Government revealed in its explanations through the government spokesman Steffen Seibert and the Finance Minister Wolfgang Schäuble, that it endorsed the decision of the ECB of 06.09.2012. The ECB was with this decision acting independently and within the framework of its monetary policy mandate. It was a matter of monetary and not the financing of debt. An action for annulment had not previously been filed by the Federal Government, nor could such a move be expected by way of a self-initiative on the basis of the statements made. The complainant opposes this inactivity of the Federal Government.

Although the desired protection objective is not expressly provided for in § 95BVerfGG, its admissibility results from following considerations:

##### **bb. Protection obligations of the Federal Government**

Whether and under what conditions the Federal Government may be required to file an action for annulment by means of a constitutional complaint before the ECJ, has so far not been decided by the officiating Senate. In the context of the fight against terrorism however, the Federal Constitutional Court has already addressed the question of whether and under what conditions governmental omission may be made the subject of constitutional review

(Verdict of 16.10.1977 – 1 BvQ 5/77). From this decision, the following guidelines may be derived for a concrete obligation to act on the part of the Government, to be pronounced by the Federal Constitutional Court:

- (1) There must be a protection obligation of the Government for constitutionally guaranteed rights of the citizen concerned.
- (2) The Government is basically free to decide how it complies with its protection obligations, and what specific measures it will take. A concrete obligation to act can therefore only be determined if such discretion is reduced to zero.

Re. (1):

The fundamental rights serve not only for the defence against government intervention, but they act objectively as a protection obligation for the goods specified in Art. 1 ff. GG. The State must “protect and promote such fundamental rights”.

This also applies to the fundamental “right to democracy” enshrined in Art. 38 GG with regard to the European Union and the action of its organs. Under Art. 23 I 1 GG, the Federal Republic of Germany must ensure in the design and structure of the European Union that democratic, constitutional, social, and federal principles are observed. In the event of undemocratic excesses by institutions of the European Union, the Federal Republic of Germany must therefore stand protectively before the citizens concerned.

Re. (2):

The decision of the ECB of 06.09.2012 injures the complainant, as already described above, in his constitutional right under Art. 38 GG, so that corresponding protection obligations of the Federal Government towards the complainant and against the ECB are activated.

In the present case there is only one possibility as to how the Federal Government can meet these protection obligations: an action for annulment before the ECJ. The discretion of the Federal Government is reduced to zero, so that the Federal Constitutional Court can pronounce a corresponding obligation on the part of the Federal Government.

Other, sufficiently effective possibilities of influence by the Federal Government do not exist: the decision-making on the Council of the ECB takes place by a majority. A German veto is not possible. Due to the clear majority circumstances— according to the President of the ECB there was only a vote against the decision of the ECB – a reversal of the decision situation by a new decision after appropriate political and argumentative influence is out of the question.

### **bb. Guarantee of effective legal protection**

In addition, the granting of effective legal protection requires that the complainant may pursue his legal protection objective as requested. No other legal remedies are available to the complainant.

As an organ of the European Union, the ECB is not subject to the jurisdiction of the Federal Constitutional Court. If the Federal Constitutional Court finds the measures of the ECB to be unconstitutional, the ECB is not bound by this under European law. It therefore requires the opinion and verdict of the ECJ.

Due to the lack of immediate effect however, the citizen concerned cannot bring a complaint before the ECJ (Art. 263 IV TFEU). The constitutional right of Art. 38 GG forming the basis of the constitutional complaint cannot therefore be submitted as grounds before the ECJ.

This legal omission can only be rectified in that the Federal Republic, which as the plaintiff is privileged under Art. 263 I TFEU, and must therefore specify no direct concern, represented by the Federal Government, files an action for annulment, i.e. is obliged by the Federal Constitutional Court to file a corresponding action.

### **cc. Ancillary application**

In the event that the Federal Constitutional Court should consider the tenor of an obligation, such as for legislative inaction, as inadmissible, an application for declaration is made under Application 1.

### **b. Application for declaration (Application Item 2)**

European law is basically subject to legal review by the ECJ. In the case of ultra vires acts of the institutions of the European Union, the Federal Constitutional Court is however entitled to establish their unconstitutionality – as here applied for (Federal Constitutional Court of 12. 10.1993 - 2 BvR 2134, 2159/92). A submission to the ECJ should be considered if necessary.

## **4. Special need for urgency**

The complainant wishes to pursue his legal protection objective due to the special need for urgency, also by means of a temporary injunction (§ 32 BVerfGG).

According to Art. 263 VI TFEU, the action for annulment before the ECJ must be lodged within 2 months. The decision of the ECB is dated 06.09.2012. The limitation date is therefore 06.11.2012. Should the Federal Constitutional Court not decide before this time by means of a temporary injunction, there is no further possibility of legal protection.

The proposed consideration of legal consequences mitigates clearly in favour of the application of the complainant: if a prompt temporary injunction is not granted, the legal protection request lapses irretrievably. If the requested temporary injunction is granted, this does not constitute any definitive in anticipation of the main matter: It determines only that corresponding proceedings must be instituted before the ECJ. If the Federal Constitutional Court comes to the conclusion in the main proceedings that the temporary injunction cannot be upheld, the Federal Government can still withdraw the action for annulment before the ECJ.

## **5. Infringement against European law**

The decision of the ECB of 06.09.2012 infringes applicable European law (see below). Although the infringement of European law does not in itself justify an infringement of the Constitution actionable before the Federal Constitutional Court, it does infringe those regulations of European law which from the point of view of national constitutional law have the function of safeguarding national budget autonomy. The infringement of European law therefore has a corresponding effect on German constitutional law (see below, 6.).

According to Art. 282 II TFEU, a primary objective of the ECB is to ensure price stability. As an organ of the European Union, it is bound in its activities by the stipulation of Section 17 of the TFEU with regard to monetary and economic policy. In this interesting context, this refers in particular to the prohibition of monetary budget financing by the ECB under Art. 123 TFEU:

“(1) Overdraft or other type of credit facilities with the European Central Bank or the central banks of the member states (referred to hereinafter as “national central banks”) for institutions, facilities or other bodies of the Union, central governments, regional or local authorities or other public authorities, other bodies governed by public law, or public enterprises of member states are prohibited, as well as the direct acquisition of debt titles from such bodies by the European Central Bank or the national central banks.”

This provision prohibits only *expressis verbis* “direct acquisition of debt titles”, i.e. direct from the issuer on the primary market. However, an economic approach necessarily forces the extension of the prohibition to the secondary market. The economic effects of direct and indirect acquisition are equivalent (Kerber, Städter, Die EZB in der Krise: Unabhängigkeit und Rechtsbindung als Spannungsverhältnis, in *EuZW* 2011, 536 ff.). In both cases this results inevitably in monetary state financing:

(1) In the case of direct acquisition, funds are made available immediately to the state concerned by the ECB – in exchange for government bonds which may be worth hardly anything.

(2) In the case of indirect acquisition, the final result is exactly the same: the state concerned obtains liquidity, the ECB acquires government bonds of this state. The only difference, which is irrelevant from the economic point of view, is that a private person serves as the intermediary.

The argument *e contrario* is characterized in the legal methodology as a weak form of argument. An *argumentum e contrario*, to the extent that the acquisition on the secondary market must be permissible, because in contrast to acquisition on the primary market, it is not expressly prohibited by the wording of the regulation, totally bypasses the economic reality in favour of lunacy.

The state-financing character of the bond purchase decided by the ECB becomes perfectly clear when one establishes the context in relation to further European measures (of the ESM and the ECB itself):

The ECB bond purchase should be closely coordinated with the measures of the ESM. As already referred to in Para. 1, the purchase of government bonds should only take place if the states concerned participate in a programme of the ESM, and this programme allows for the possibility of purchasing bonds of the state concerned on the primary market. The ECB therefore wants a “concerted action”: Purchase of government bonds on the primary market through the ESM + purchase of government bonds by the ECB on the secondary market. The state-financing character of primary purchases must however be beyond dispute – in this case the state concerned is furnished directly with the financial means which it urgently requires (and can no longer obtain on the general financial market). The secondary purchase now acts in concert in addition to the state-financing primary purchase, and in this combination brings about the most effective possible state financing. For the purpose of this effectiveness, the purchase by the ECB must *ex-ante* be unlimited – i.e. the ECB wants to continue with secondary purchasing until the financing gap of the state concerned is closed. According to the current status, the purchasing of bonds by the ECB has already reached a level of € 219 billion (see Liability level of the ifo Institute, <http://www.cesifo-group.de/de/ifoHome/policy/Haftungspegel.html>, overview graphic). Because there is still no end to the crisis in sight, a comprehensive and long-term expansion of bond purchasing must be expected following the decision of the ECB.

Added to this is the massive lending of the ECB under the target system, and the reduction or complete suspension of the credit thresholds, which is also aimed at state financing (see Hans-Werner Sinn, Special edition of the “ifo-Schnelldienst” of 21.03.2012 – Die Target-Kredite der Deutschen Bundesbank). In brief form, Prof Dr. Schünemann explains the target system as follows:

“Under the TARGET system, cross-border transactions within the Euro zone are handled in such a way that (using a Greek-German example), a Greek citizen who wants to buy a motor vehicle, an industrial plant or a plot of land in Germany, obtains a loan from his bank, which then commissions the Greek Central Bank to arrange with the Bundesbank, in return for a security, to make a corresponding payment to the bank of the German seller. The Bundesbank initially receives coverage in the form of a claim against the Greek Central Bank, but at the end of a day the millions of transactions within the Euro zone are balanced and reconciled, and the claim against the relevant foreign central bank is replaced by a claim corresponding to the total balance against the ECB, while at the same time the ECB acquires a claim against those central banks whose balance is negative.” (Die Target 2-Salden der Deutschen Bundesbank in der Perspektive des Untreuetatbestandes, [www.zis-online.com/dat/artikel\\_/2012\\_4\\_654.pdf](http://www.zis-online.com/dat/artikel_/2012_4_654.pdf))

This target system has got into difficulties, because the ECB has reduced or completely suspended the requirements for the collateral to be given by the national central banks – the so-called credit thresholds. As early as 24.10.2008, the credit threshold was downgraded from “A” to “BBB” (according to the international rating levels). This means that the national banks of the Euro zone are allowed to operate with securities of lower quality. Finally the credit thresholds with regard to Greece, Portugal and Ireland were suspended entirely. The national banks of these countries can accordingly assume loans within the European Central Bank system without providing securities of equivalent value. The target system has thereby been converted into a credit machine and a rescue package. The target claims of the Bundesbank against the ECB have exploded since the debt crisis, and by 31.08.2012 amount to € 751.45 billion (see Liability level of the ifo Institute, <http://www.cesifo-group.de/de/ifo-Home/policy/Haftungspegel.html>, a link to the relevant target requirements is provided under the overview graphic.).

Finally, the ECB is pumping masses of money through corresponding loans into the (ailing) banking sector. According to press reports, the Spanish banks currently, have a credit volume with the ECB of € 375.5 billion. This leads to further default risks, for which the member states must ultimately be liable according to the participation allocation of the ECB. In December of last year, the ECB had already provided the banking sector with long-term credits in the amount of approx. € 490 billion, while in February of this year, a further credit programme was set up in the amount of approx. € 530 billion, and further programmes can be expected. Here too there are at least indirect state financing effects: (1) The country concerned does not need to come to the rescue of banks with its own funds, because the ECB does its job for it. (2) With the (low-interest) loans granted, the bank can purchase (high-interest) government bonds, and if necessary sell them on to the ECB.

This produces the overall picture that the ECB, in concert with the ESM, is conducting state financing by means of various measures (bond purchases, suspension of credit thresholds, loans to the banking sector). The ECB is thus not only violating the prohibition of monetary budget financing, but also acting outside its primary mandate, which is to establish price stability. State financing by printing money necessarily brings with it inflationary tendencies, which have been readily accepted, and even welcomed by the ECB, because inflation devalues the horrendous debts of the member states. In addition to the “official” rescue package (ESM), this constitutes a second, unofficial (super-)rescue package, which is unlimited and not subject to any parliamentary control.

Ultimately however, the member states must be liable for the massive purchase of worthless or risky government bonds by the ECB in accordance with their participation allocation at the ECB. As the end result, payment default will mean the liability of Germany for foreign national debts, albeit it via the detour of the ECB.

This is however exactly what the TFEU is supposed to prevent. The so-called “no bail-out clause” of Art. 125 TFEU states:

“(1) The Union is not liable for the liabilities of central governments, regional or local authorities or other public authorities, other bodies governed by public law, or public enterprises of member states, and does not stand surety for such liabilities; this applies irrespective of the mutual financial guarantees for the joint implementation of a certain project. A member state is not liable for the liabilities of central governments, regional or local authorities or other public authorities, other bodies governed by public law, or public enterprises of member states, and does not stand surety for such liabilities; this applies irrespective of the mutual financial guarantees for the joint implementation of a certain project.”

The prohibition of monetary budget financing by the ECB, and the “no bail-out clause” are closely interrelated materially. Monetary budget financing by the ECB ultimately results in liability for foreign national debts. This relationship must be taken into account in the interpretation of Art. 123 I TFEU (Prohibition of monetary budget financing) – Art. 123 I TFEU must effectively be interpreted in the sense that liability for foreign national debts may also not be brought about even “through the back door”, i.e. by the secondary purchase of bonds by the ECB.

State financing by the ECB, i.e. by printing money, inevitably leads to inflationary trends. The ECB is therefore acting contrary to its primary objective of maintaining price stability, and therefore outside its mandate.

The actual budget financing (and inflation-driving) character of the bond purchases is decisive for the legal assessment of the ECB decision of 06.09.2012. The monetary policy state-

ments put forward by the President of the ECB Draghi may lead to any different legal assessment: but budget financing remains budget financing.

In particular the reference of Draghi to the fragmentation of the Euro currency zone, which must be countered by the ECB (see the press release already cited above) does not make sense. In this connection it is appropriate to quote the clear findings of Prof. Dr. Kerber:

“The *No Bail-Out* regulation of Art. 125 TFEU is intended to ensure that every Euro member state is liable for its own debts, and that destabilising fiscal behaviour by the capital markets is penalized – if necessary by the national insolvency of the country concerned. The national bankruptcy of an EMU member state is in itself not an occurrence which should permanently shake the Euro zone or bring about its collapse. The differing treatment of the debts of the individual Euro-zone countries is however not a market disruption, but is intended by the Treaty. This reflects the different creditworthiness of the member states.” (Kerber, op. cit.)

The equalisation of different interest levels through bond purchases cannot be justified from the monetary policy aspect, it runs counter to the basic conclusions of the TFEU: each state must bear responsibility for his own debts, if necessary with appropriate interest.

## **6. Infringement of German constitutional law**

### **a. Union law protection of budgetary autonomy**

The infringement of Union law described above shown is also constitutionally relevant, as indicated above under Point 5 – constitutional law and European law are here closely inter-linked:

“The current integration programme designs the Monetary Union as a community of stability. This is the fundamental basis for the participation of the Federal Republic of Germany in the Monetary Union, as has repeatedly been emphasised by the Federal Constitutional Court (see BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181 f.>). The treaties thereby run parallel with the requirements of Art. 88 Sentence 2 GG, not only with regard to currency stability, but also with Art. 14 Para. 1 GG, which makes observation of the independence of the European Central Bank and the primary objective of price stability the permanently applicable constitutional requirements of German participation in the Monetary Union (see Art. 127 Para. 1, Art. 130 TFEU); the constitution requirements under Union law are also ensured by further central regulations on the design and organisation of the Monetary Union. This applies in particular to the prohibition of monetary budget financing by the European Central Bank, the pro-

hibition of transfer of liability (the No Bail-out Clause) and the stability criteria for sustainable budgetary management (Art. 123 to Art. 126, Art. 136 TFEU; see BVerfGE 129, 124 <181>.”

The German legislature approved the Monetary Union on the assumption of a stability Union with a Central Bank on the German model. Monetary state financing by the Central Bank through the above measures of the ECB was unimaginable from a German perspective on the introduction of the Monetary Union, and is not covered by the contractual principles. The ECB is acting *ultra vires*.

Through the bond purchase and the reduction or suspension of the credit thresholds, the ECB is running the substantial risk for the Federal Republic of Germany that it will have to stand surety for the national debt of other member states, without the German Bundestag having any say or right of control.

It is however the inalienable right of the Bundestag (budget law) to decide freely and on its own responsibility on the liabilities to which Germany commits itself. Although the European Central Bank was founded as an independent institution, which should therefore not be subject to any political control, this can only be justified if it acts within the framework of its mandate (price stability). If the ECB in exceeding its mandate creates liability risks for national budgets, this lacks any democratic legitimacy – the budget law of the German Bundestag is undermined, and the voting citizen is robbed of his right of influence as protected under the Constitution (Art. 38 GG).

#### **b. Lack of limitation of the bond purchase**

The Federal Constitutional Court emphasised the following points in its provisional verdict of 12.09.2012 regarding the ESM: (1) The ESM is (at least provisionally) limited, and a maximum liability limit is specified. (2) Any liability increases can be made only by consensus in the Governing Council, and therefore also require the consent of the German Governor. (3) The rights of the Bundestag are guaranteed by parliamentary reservation and participation rights in accordance with §§ 4 ff. ESMFingG. Taking these points into account, the Federal Constitutional Court concluded after summary examination that the ESM (or the corresponding consent and accompanying laws) is compatible with the German Constitution.

In the case of the bond purchase by the ECB, the situation is fundamentally different: (1) The bond purchase is unlimited. (2) The Council of the ECB makes its decisions by a majority, the vote of the President of the Deutsche Bundesbank, Weidmann, against the decision of the ECB of 06.09.2012 was simply overruled, there is therefore no German right of veto on important decisions. (3) There is no feedback of any sort to the German Bundestag.

All arguments which might (still) justify the constitutionality of the ESM do not apply to the ECB bond purchase. The assumption of unlimited liability risks without the consultation of the Parliament is constitutionally unacceptable.

### **c. Total volume of the liability risks**

The total volume of the German liability risks associated with the various European rescue measures is calculated by the ifo Institute at € 795 billion (see Liability level of the ifo Institute, <http://www.cesifo-group.de/de/ifoHome/policy/Haftungspegel.html>, overview graphic). This is no more than a conservative estimate: the liability risk relates only to the bond purchases already made by the ECB; it is therefore likely that the liability risk will significantly exceed this figure in the future.

This figure exceeds not only any natural power of imagination, but also by far the volume of a normal federal budget. If the risks are realised, the Bundestag has no budgetary leeway, budgetary sovereignty as a precondition of democracy would be virtually non-existent, so that Art. 38 GG is clearly violated. Even the entire national assets of the Federal Republic of Germany would be unlikely to cover the already existing liability risk.

The constitutional complaint of the complainant is supported by the Alliance for Democracy. The Alliance for Democracy is a loose association of politically motivated people who are dedicated to the strengthening of democracy.

Simon G. Jakob  
Lawyer

### **Anlagen**

Press release by the ECB on the decision of 06.09.2012  
Authorisation