

ANNEX I.1: ESM DECISION SV 2/12-18, of the Austrian Constitutional Court,
March 16, 2013

1. NAME OF THE COURT

Verfassungsgerichtshof (VfGH) Österreich

2. APPLICANT

Government of Carinthia (*Kärntner Landesregierung*) represented by Dr. Edmund Primosch, Head of the Constitutional Service of the Province of Carinthia

3. TYPE OF ACTION/PROCEDURE

Application to establish the (“in eventu” partial) illegality or unconstitutionality of the TESM and of the declaration of the representatives of the treaty parties from September 27, 2012 (hereinafter “the declaration”), based on Art. 140a B-VG in connection with Art. 139 (1) and Art. 140 (1) B-VG

Art. 140a B-VG establishes that for political, law-modifying or law-completing treaties, the Constitutional Court has the competence to review their constitutionality as if they were laws and therefore apply the procedure for constitutional review of laws (Art. 140 B-VG) correspondingly. For all *other* treaties, the provisions for constitutional review of regulations (Art. 139 B-VG) are applicable. In the case of regulations (Art. 139 B-VG) and laws (Art. 140 B-VG), the court has the competence to 1) establish that they are illegal or unconstitutional and 2) to reverse them. In the case of treaties (Art. 140a B-VG), the court can 1) establish that they are illegal or unconstitutional but 2) *cannot* reverse them. The establishment of the illegality or unconstitutionality of a treaty has the effect that it must not be applied by the organs competent for its application from the day following the publication of the constitutional court’s decision (unless specified differently in the decision)¹. Art. 140 B-VG further specifies who can bring an application for a constitutional review in front of the court and in which cases the court may initiate a proceeding without a concrete application. The government of Carinthia brought the case here because at that time, Carinthia was the only one of the nine Austrian provinces (*Länder*) that had an FPK² majority in its regional parliament and that had a governor (*Landeshauptmann*) from the FPK– and, as explained in question VIII.1, the FPÖ and the BZÖ were the only parties opposing the TESM in the National Council.

¹ Öhlinger, *Verfassungsrecht*, 2009, p. 480.

² The difference between FPÖ, FPK and BZÖ is explained in question I.1 (political context). Basically, all three parties are far-right and have many similarities. FPÖ is the original party, BZÖ is its off-spin, and FPK is the BZÖ’s regional off-spin in Carinthia.

4. ADMISSIBILITY ISSUES

According to Art. 140a B-VG, the TESM can be reviewed following the review procedure for laws of Art. 140 B-VG. The court holds that the declaration is not part of the treaty approved by the National Council according to Art. 50 (1) 1 B-VG, but that it is still a text agreed by subjects of international law that has some normative content, which means that it can be reviewed by the court according to the review procedures for regulations (Art. 140a B-VG in connection with Art. 139 B-VG). Despite the two different procedures applicable, in some cases the reversal of the treaty would also extend to the declaration.

The application is overall substantiated enough and brought after the publication of the treaty and the declaration in the Federal Law Gazette. The single applications, even those brought in the event of the court not declaring the entire treaty as illegal or unconstitutional, are therefore all admissible.

5. LEGAL RELEVANT FACTUAL SITUATION

The treaty TESM was published in the Federal Law Gazette no. III 138/2012.³ The publication from the Federal Law Gazette stating when the treaty was signed, approved and ratified as well as the Declaration from September 27, 2012 and the full text of the treaty are reprinted in the decision. It further reprints Art. 50a to 50d of the B-VG as introduced in Federal Law Gazette no. I 65/2012 and the amendments of the federal parliamentary law published in Federal Law Gazette no. I 66/2012 (see question VIII.2 for the ratification and question VIII.6 the amendments).

6. LEGAL QUESTIONS

According to Art. 140 B-VG and Art. 139 B-VG, court reviews the illegality and/or unconstitutionality of (parts of) the TESM and the declaration only based on the arguments brought in the application.⁴ For details, see below under *Arguments of the parties*.

7. ARGUMENTS OF THE PARTIES

1. The Carinthian Government

- a. The main application of the Carinthian government regards the legal status of the declaration (see also question VIII.3). The issue is that it has not been approved by the parliament together with the TESM and not signed by the Federal President, but simply added to the publication of the TESM in the

³ BGBl III 138/2012, at

http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_III_138/BGBLA_2012_III_138.pdf

⁴ The Austrian Constitutional Court reviews the legality and constitutionality of the Treaties and the laws authorizing their ratification ex post with the possibility of declaring them (partially) inapplicable, if held unconstitutional/illegal. There is no constitutional review prior to ratification like in Germany.

Federal Law Gazette⁵ (see also question VIII.2). The applicants essentially argue that the declaration has relevance under public international law, that it has been made ‘inseparable’ from the TESM by its signatories and that this sort of ‘interpretative declarations’ and also reservations are equally subject to Art. 50 B-VG. This means that they also have to go through the approval of the National Council and the Federal Council just as the treaty text itself. It further leads to the fact that since the declaration was the major reason why the signatory states approved of the treaty, establishing that the declaration was illegal would have the illegality of both, the treaty and the declaration, as a consequence.

- b. Constitutionality concerns regarding the content of the treaty are the following:
- The Federal President should have done a more in-depth constitutional review before ratifying the treaty even though the applicant acknowledges that the Austrian president’s competences do not go as far as the German president’s.
 - The applicant claims that Art. 125 TFEU does not allow exceptions and that the TESM, as well as Art. 136 (3) TFEU, do modify the Art. 125 TFEU. Therefore, the TESM should have been treated as a treaty that amends the foundations of the European Union (Art. 50 (1) 2 B-VG) and treated accordingly (Art. 50 (4) B-VG).
 - The TESM should be further considered as contradicting the principle of thrift, efficiency and expediency of the public administration (Art. 126b (5) B-VG) and to the state objective of having an overall balance and balanced budgets in economic affairs (Art. 13 (2) B-VG). The applicants elaborate briefly on the underlying economic foundations of the ESM in order to prove that it is contrary to the above-invoked principle and state objective.
 - Art. 9 (2) B-VG only allows the transfer of single sovereign rights. The applicant lists all the rights transferred through the TESM and concludes that the provision of “single” rights has been exceeded.
- c. In the event of the court rejecting to establish the illegality or unconstitutionality of the treaty on the basis of a.) and b.), the applicants want single provisions of the treaty to be declared unconstitutional (“in eventu applications”) These provisions are the following:
- Art. 5 (6) lit b: The newly introduced Art. 50a B-VG (see question VIII.6)

⁵ See section VIII, footnote 14.

sets out participation rights of the National Council in several decision-making processes of the ESM, while Art. 50b B-VG it does not foresee the participation of the National Council in the decision making process of Art. 5 (6) lit b. Therefore, a contradiction between Art. 50a and 50b B-VG is created. In the same context, the applicants contest the sequence “unless the Board of Governors decides to issue them in special circumstances on other terms” in Art. 8 (2) last sentence TESM as not specific enough.

- Art. 9 (2) and (3) TESM and Art. 25 (1) lit c, (2) and (3) can also lead to the depletion of the National Council’s participation rights established in Art. 50a and 50b B-VG because a country can be effectively forced to pay in capital with the threat of losing voting rights.
- The sequence “and decide to make changes to it” in Art. 19 TESM is not specific enough. It is not clear for what reason, under which conditions the financial assistance instruments of Art. 14 to 18 can be changed or extended.
- Art. 25 (2) and (3) TESM are also problematic in the context of a possible excess of the upper limit.
- The sequence “the Chairperson of the Board of Governors, Governors” in Art. 35 (1) TESM and the sequence “Chairperson of the Board of Governors, a Governor” in Art. 35 (2) TESM regarding the immunity of the Austrian member of the Board of Governors, namely the Austrian Minister of Finance: Art. 76 (1) B-VG codifies legal responsibility of members of the Federal Government. Art. 35 (1) would therefore create an exception from Art. 76 (1) B-VG.
- The sequence “and all documents belonging to the ESM or held by it, shall be inviolable” in Art. 32 (5) and “Members or” in Art. Art. 34. These provisions lack an exception for the national parliaments and are therefore contrary to Art. 50a B-VG and the stipulated participation rights of the National Council.
- The declaration from September 27, 2012 is illegal with reference to the reasoning summarized here under 7.1.a.

2. The Federal Government

The federal government first presents an overview of the legal factual situation – the signature of and ratification of the TESM and the agreement and approval of amending Art. 136 (6), the accompanying laws to the TESM and the declaration from September 27, 2012. Interestingly, it also summarizes the decisions of the Estonian and the German Constitutional Courts (p. 27-28).

Regarding the admissibility, the government specifies that according to Art. 62 (1) second sentence in connection with Art. 66 of the Statute of the Constitutional Court (Verfassungsgerichtshofsgesetz, VfGG), an application to establish the illegality of a treaty needs to be founded in detail, concerns about the illegality of contested provisions all have to be listed. In the opinion of the government, the applicant failed to do so here. The federal government therefore presupposes that the applications are inadmissible.

Regarding the content of the application, the federal government has the following concerns:

- Regarding the legal status of the declaration the government clearly distinguishes between a reservation and an interpretative declaration. The intent of the latter is *not* to modify the treaty obligations, but to lie out one's understanding of the treaty. In the specific case, the government specifies that the declaration was made based on the decision of the German Constitutional Court (see question VIII.3). The declaration only says what is in the treaty anyways, it neither modifies nor completes it. Since the declaration is not a treaty, Art. 50 (1) B-VG is not applicable to it. It also does not need to be published in that way. Instead, it is to be published together with the treaty it belongs to.
- Regarding argument of the applicant regarding the Federal president's signature (see above 7.1.b.) and lacking constitutional review, the government holds that the applicant failed to show how this would lead to the illegality of the treaty and therefore does not elaborate on the argument.
- Regarding the applicants argument that the treaty should have been treated as one that amends the foundations of the European Union (Art. 50 (4) B-VG), the government points to the CJEU ruling from November 27, 2012, C-370/12, Pringle, in which the court establishes that the TESM is compatible with EU law, and especially also with Art. 125 TFEU. Therefore, the TESM does not change the foundations of EU law.
- Regarding the applicant's point about the TESM's economic rationality and its compatibility with the principle of thrifty, efficient and expedient conduct of the administration (Art. 126b (5) B-VG) and to the state objective determination of having an overall balance and balanced budget (Art. 13 (2) B-VG), the government lays out the that concluding the TESM in its current setting is legally and economically reasonable and rational and the stability of the Eurozone is in the interest of Austria even if itself, it is not going to apply for the ESM's funds.
- Regarding the 'transfer of sovereignty' concerns, the government points to Art. 9 (2) B-VG that stipulates that single sovereign competences can be transferred through law or through a treaty that has been approved according to Art. 50 (1) B-

VG to other states or inter-state institutions. The government is of the opinion that only single competences are transferred through the TESM and that it is therefore in conformity with the constitution.

- Regarding the applicant's arguments brought in the event of the court rejecting the previous arguments (summarized above under 7.1.c. "in eventu applications"), the government makes the following points:
 - Regarding the concerns about Art. 19 TESM, the government points out that the 'determination requirement' of Art. 18 (1) B-VG does not apply because the Board of Governors of the ESM is not part of (Austrian) public administration. But even if Art. 19 TESM had to meet the requirements of Art. 18 (1) B-VG, it would do so, because a possibility of the Board of Governors changing and completing the list of available instrument is vital for the ESM's proper functioning.
 - Regarding Art. 25 (2) TESM, the Carinthian government had been concerned that it might be a back door for exceeding the upper limit of the financial commitment stipulated in Art. 8 (5) TESM. The government said that Art. 25 (2) could not be any clearer about the fact that Art. 8 (5) TESM will not be exceeded. It refers to the German Constitutional Court's decision. Although the German court assumed that the upper limit of Art. 8 (5) TESM applied also to Art. 25 (2) TESM, it had, however, some concerns about the provision. In any case, a measure under Art. 25 (2) TESM would be only temporary and the National Council did not seem to have a problem with it.
 - Regarding the immunity provisions of Art. 35 (1) and (2) TESM, the governments makes clear that decisions of the ESM cannot be attributed to the Republic of Austria which is why Art. 76 and 142 B-VG does not apply to them. It further points out that other founding treaties of international financial organizations out of which several provisions needed to be authorized as constitution amending, the immunity provisions were never considered as such. Immunity foreseen through public international law is not incompatible with Art. 142 B-VG. The same applies to Art. 35 (1) TESM – legal responsibility of the Minister of Finance (because it violated information duties or the participation rights of the parliament (Art. 50a B-VG) would not affect the proper functioning of the ESM.
 - Regarding Art. 32 (5) and 34 TESM, the government holds that they are not incompatible with the parliament information rights. It also refers to the decision of the German Constitutional Court and the declaration from September 27, 2012 in this regard.

- Overall, the government argues that the TESM is not illegal. In the event of the court declaring the TESM illegal, the government asks the court to set a two-year-timeframe (according to Art. 140a (1) B-VG) during which the TESM remains in force.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The court holds that the applicant's main argument, that of establishing that the TESM and the Declaration is illegal and/or unconstitutional, is unfounded.

- Regarding the first argument (see above 7.1.a.), that of the treaty being illegal because of the Declaration being illegal: As laid out by the court in the section of admissibility, the illegality of the Declaration would not automatically lead to the illegality of the treaty. The Declaration is much more a separate subject of contestation and to be reviewed based in a procedure based on Art. 139 B-VG.
- Regarding the argument about no proper constitutional review by the president, the court agrees with the government on the fact that applicant failed to show how this leads to the unconstitutionality of the TESM. It does not bring any argument the federal president should not have signed the treaty according to Art. 65 (1) first sentence B-VG.
- Regarding the argument that the TESM should have been approved according to Art. 50 (1) 2 B-VG (and not Art. 50 (1) 1 B-VG) because it modifies Art. 125 (1) TFEU in substance, the court points to the Pringle case⁶ in which the ECJ has established that Art. 125 to 127 TFEU do not bar Member States from signing the TESM. As far as the applicant alleges that (then) future Art. 136 (3) TFEU collides with Art. 125 TFEU, the court holds that it is not within its competence to decide on that.
- Regarding the argument that the TESM should be considered as contradicting the principle of thrifty, efficient and expedient conduct of the administration (Art. 126b (5) B-VG) and the state objective determination overall balance and sustainable balanced budgets (Art. 13 (2) B-VG), the court quotes excerpts of the accompanying explanations of the government's proposition to the National Council.⁷ It says that the government and the National Council have decided to participate in the TESM based on complex questions about finance, currency and political economy. If they have decided to take up certain obligations in order to avoid unforeseeable economic damage, they shall not be hindered by Art. 126b (5) B-VG or Art. 13 (2) B-VG. The concerns of the government of Carinthia end up in the argument that there would have been a different political action possible

⁶ C-370/12 – Pringle, November 27, 2012.

⁷ Government's explanation for the proposed legislation regarding the TESM to the National Council at: http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01731/fname_247805.pdf

than that of the government and the National Council. It concludes that it is not the constitutional court's role to judge this question of legal policy.

- Regarding the question whether only “single” sovereign rights were transferred (Art. 9 (2) B-VG), the court says that as the federal government has already pointed out, not all of the rights listed by Carinthia's government are sovereign rights, but also if they were, the conclusion of the TESM would still not violate Art. 9 (2) B-VG, also because according to standard doctrine, the “single” in the cited provision should not be viewed too narrowly. Because the objective of the ESM is limited, the transferred rights remain within the necessary framework.
- As a conclusion, the principal application of the Carinthian government (see above 7.1.a. and 7.1.b.) is to be dismissed.
- The court further rules on the single “in eventum” applications (see above 7.1.c.)
 - Regarding the alleged contradiction between Art. 50a and 50b B-VG that could be created in Art. 5 (6) lit. b TESM, the court states Art. 50a B-VG foresees only as much participation of the National Council in the decision-making process of the ESM as is stipulated by the subsequent articles Art. 50b and 50c. The court further holds that Art. 8 (2) TESM is specific enough because of the determined scopes and objectives of the ESM.
 - Regarding the arguments about capital calls under Art. 9 (2) and (3) TESM, the court repeats that Art. 50a B-VG does not go further than Art. 50b B-VG, these newly added provisions stand in context, and that the National Council is meant to participate in certain decisions of the ESM, not in any action of its organs.
 - Regarding argument that Art. 19 TESM is not specific enough; the court says that treaty provisions need to be insofar determined as they form the basis for national implementation acts. This is not the case with Art. 19 TESM. However, this requirement also needs to be distinguished from the determination requirement of Art. 18 B-VG that Art. 19 TESM does not need to meet. In the light of Art. 9 (2) B-VG (singling out the competences that are transferred to an international organization) the court deems Art. 19 TESM to be specific enough.
 - Regarding the concern that Art. 25 (2) and (3) TESM could lead to an excess of the upper limit for capital drawings, the court holds that these doubts are unfounded since the Declaration from September 27, 2012.
 - Regarding the concerns about the immunity provisions of Art. 35 (1) and (2) TESM, the court says that such provisions are common state practice

and necessary for the proper functioning of the institution. However, this does not mean (as the federal government has already pointed out) that they are an obstacle to responsibility under Art. 142 (2) lit. b B-VG when information duties of Art. 50c B-VG (in connection with the corresponding federal parliamentary law) or non-compliance with an authorization under Art. 50b B-VG or any other constitutional or national legal provision is violated. The contested provisions therefore do not violate Art. 76 (1) B-VG.

- Regarding the application concerning Art. 32 (5) TЕСM and Art. 35 TЕСM, the court points to the fact that the TЕСM was approved by the National Council together with the accompanying laws, in particular Art. 50a to 50d B-VG. One cannot assume that the legislator adopted laws of constitutional rank the fulfillment of which would be in contradiction to Art. 32 (5) and 34 TЕСM. It further points to the declaration, that makes clear that the contested articles are not an obstacle for proper information of national parliaments.
- Regarding the government of Carinthia's last "in eventu" application, that of declaring the declaration as illegal the court repeats the declaration is from a national point a legal act under public international law that ensures the meaning of provisions of a nationally authorized (Art. 50 (1) 1 B-VG) treaty. Regarding the argument that the declaration would have had to be authorized like the treaty itself by the National Council, the court specifies that it in no way exceeds the limits set by the treaty, it only stresses

9. LEGAL EFFECTS OF THE JUDGMENT/DECISION

All applications of the Carinthian government are to be dismissed. The treaty and its accompanying laws remain in force.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT/DECISION AND ITS BROADER POLITICAL IMPLICATIONS

The case had been brought by the then far-right-wing Carinthian government (see question I.1 for details) that was by then involved in many affairs including a banking scandal (Hypo Alpe Adria) and had lost most of its credibility. The case had been decided two weeks after the Carinthian regional elections from March 3, 2012. The far-right-party (Freiheitliche Partei Kärntnes (FPK), basically an off spin of the federal-level parties FPÖ and the BZÖ, see again question I.1 for details) that had been at power in Carinthia in different constellations but continuously since 1999, lost the elections to the social democrats.⁸ The to-be constituted

⁸ Die Presse, Machtwechsel in Kärnten – die SPÖ stürzt die FPK vom Thron, March 2, 2013, http://diepresse.com/home/politik/kaerntenwahl/1351274/Machtwechsel-in-Kaernten_SPOe-stuerzt-FPK-vom-Thron

new government under a social-democrat governor was even considering of withdrawing the application in the time between the constitutive meeting of the new Carinthian government and the decision of the court. In the end, the court was faster.⁹

However, even though the court had held an oral hearing and many issues did seem critical during that hearing, the decision in the end was very clear.

The president of the constitutional court, Gerhart Holzinger, however said that the proceeding had been complicated and that the legislator should think about changing the procedure of constitutional review for treaties. Treaties should be reviewed before ratification¹⁰ (like in Germany).

⁹ Der Standard (*main left-wing newspaper*), Verfassungsrichter prüfen ESM-Beteiligung, March 6, 2013, at <http://derstandard.at/1362107546736/Verfassungsrichter-pruefen-ESM-Beteiligung>.

¹⁰ Die Presse, ESM Vertrag nicht verfassungswidrig, April 3, 2013, at http://diepresse.com/home/politik/eu/1383770/Urteil_ESMVertrag-nicht-verfassungswidrig.

Annex I.2: TSCG Decision SV 1/2013-15, Austrian Constitutional Court,
October 3, 2013

1. NAME OF THE COURT

Verfassungsgerichtshof (VfGH) Österreich

2. APPLICANT

70 (=1 third) members of the National Council (generally members of the Greens, the FPÖ and the BZÖ)

3. TYPE OF ACTION/PROCEDURE

Application based on Art. 140a B-VG (see above discussion of ESM judgment, Annex 4, Point 3) to declare “illegal” Art 2 Para 2, Art 3 Para 1 lit b, Art 5, Art 7, and Art 8 of the TSCG; and in the case in which (“in eventu”) the court comes to the conclusion that the TSCG would have had to be authorized based on Art. 50 Para 1 No 2 in connection with Art 50 Para 4 [therefore by qualified majorities in both chambers of parliament], to declare the illegality of the entire TSCG and to declare the end of its applicability for Austrian authorities.

The constitutional court has the possibility (among others) to decide about the unconstitutionality of federal laws based on Art 140 Para 1 2nd sentence B-VG upon an application filed by a more than third of the members of the National Council. The 70 members of the National Council represented more than a third in the 24th legislative period, the constitutional requirement for an application was therefore fulfilled.

4. ADMISSIBILITY ISSUES

The court held that the application to declare Art 3 Para 1 lit b TSCG illegal was inadmissible because of it being too narrow with regard to the objections raised in connection with it, namely the limitation of the National Council’s budgetary sovereignty: If Art 3 Para 1 lit b TSCG was declared inapplicable, but Art 1 lit a remained in force, the budgetary sovereignty of the National Council would be limited more than with the contested provision remaining applicable – with its lit b specifying lit a, namely that “balanced budget” does not mean “budget without deficit”. The court explains in detail why Art 3 Para 1 lit a TSCG remaining in force ‘alone’ would mean that the Austrian authorities needed to aim at a budget without deficit (Para 19-32 of the Decision). (The federal government had argued, in its opinion, the inadmissibility of reviewing Art Para 1 lit b TSCG for these reasons as well.)

As far as the “in eventu” application is concerned the court holds that such application is also inadmissible because it would need to contain a specific demand connected to a “main demand” which is not the case. (Para 35)

The review for legality and constitutionality of the remaining application is, however, admissible.

(Nota bene: In the following, the discussion of this case is limited to the discussion of that are first particularly relevant (without getting too deep into the details of the Austrian federal system also discussed in the decision) and second only to issues held admissible by the court. It will not engage with the issues raised by the parties with regard to the not admissible issues).

5. LEGAL RELEVANT FACTUAL SITUATION

The treaty published in the federal official Gazette no. III 17/2012 after having been approved by a simple majority in the National Council and ratified by the Federal president. The Federal President signed the treaty on July 17, 2012 and therewith ratified it.¹¹ For the significance of the president's signature see question VIII.2. It was counter-signed by the Federal Chancellor and deposited at the European Council on July 30 2012. It was published in the official gazette on January 22, 2013.¹²

6. LEGAL QUESTIONS

The court reviews the constitutionality (Austrian) and legality of Art. 7, Art. 2 (2), Art. 8 and Art. 5 TSCG – with the possibility of declaring them inapplicable.

7. ARGUMENTS OF THE PARTIES

1. The Applicants

The applicants largely rely on Prof. Stefan Griller's article (see question IX.3). They first lay out the overall constitutional framework for the transfer of powers to the European level. They invoke issues of constitutional law and also legal questions of European law. In particular, they argue that the TSCG goes beyond of what is allowed as transfer of competences (as simple law) under Art 9 (2) B-VG and that therefore, the treaty would have had to be ratified as a treaty amending the foundations of the EU (Art. 50 (4) B-VG) with qualified majorities.

With view to the single contested provisions, they argue (focusing on Austrian constitutional law) the following:

Regarding Art. 7 TSCG (reversed majority voting) they contest the submission of the Austrian member of the Council – that is not supposed to be subject to any “authority to direct” (Weisungsrecht) since a minister is the highest member of the public administration (Art. 69 (1) B-VG). In their view, there is also no foundation for such a proceeding in the EU accession statutes. Art. 9 (2) B-VG would also not be sufficient

¹¹ Federal President's communication (see section VIII, footnote 12).

¹² Publication of approval of the TSCG Treaty in BGBl III 2012/17, at http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_III_17/BGBLA_2013_III_17.pdf.

as a basis for this sort of “authority” created through Art. 7 TSCG for the Commission.

Regarding Art. 2 (2) TSCG, the applicants contest the new role for any member of the public administration applying the TSCG, namely their task to review the provisions to be applied with view to their conformity with European law. For such a task of *Normenkontrolle* (review) to be introduced, a constitutional amendment would be needed.

Similarly, the applicants argue the unconstitutionality of Art. 8 TSCG: The possibility of initiating a proceeding against a treaty party according to Art. 8 TSCG when the Commission is of the opinion that commitments (Art 8 (1)) were violated gives the Commission the de facto possibility to order such a proceeding. Additionally, the CJEU gets the possibility to evaluate the deficit ceiling’s implementation into national law.

Regarding Art 5 TSCG, they invoke that secondary rules for its application do not exist which makes the provision, and notably its paragraph 1, second sentence inapplicable for not being specific enough and leading to legal uncertainty.

Additionally, the applicants raise several European constitutional law questions, especially that based on Art 4 (3) TEU (loyalty principle) more alternatives to the TSCG would have had to be discussed. Furthermore, Member States have not undertaken any attempt to obtain an authorization of enhanced cooperation based on Art. 20 TEU.

2. The Federal Government

The Federal government also makes a long introduction into the history and the rationale of the TSCG. Its opinion is based on the article of Potacs and Mayer (see question IX.3).

Regarding the applicants’ concerns about Art. 7 TSCG, the government’s main point is that there is no “authority“ created at the Commission, but that treaty party simply “self-bind” themselves through public international law. There are no new competences created at the Commissions besides the competences it already had under Art. 126 TFEU.

Regarding Art. 2 (2) TSCG, the government holds that it only specifies the TSCGs relationship to EU law, that it can only regulate an area of law that is not already regulated by primary or secondary EU law. The obligation to observe EU law obligations as well as its primacy results from EU law itself. For the government, it is unclear how a right to *Normenkontrolle* should result from this and therefore does not see any constitution-amending element in Art. 2 (2) TSCG.

Regarding Art. 8 TSCG, the government also argues that the new “competence” of the commission does not amount to a transfer of powers in the sense of Art. 9 (2) B-VG.

Regarding Art. 5 TSCG, the government discusses it in a broader context of transfer of competences.

It comes to the overall conclusion – similar to the court’s decision in the ruling on the TESM, that the extent of competences being transferred on EU level through the TSCG remains within the framework of what is allowed under Art. 9 (2) B-VG.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

A lot of background on the TSCG, its creation and its rationale, as well as the other pillars of the economic union is given by the court. The court is of the opinion that the TSCG was a treaty under public international law and that therefore, its conclusion did not need a 2/3 majority necessary under Art. 50 (4) B-VG for treaties amending the foundations of EU law. As for the rest, the transfer of competences as foreseen in the TSCG remain within the framework of what is admissible.

In detail:

Regarding Art. 7, the court follows the government’s argument – there is not authority to direct created at the European Commission, Art. 7 is a commitment made by states under public international law to accept a certain procedure. It is not disputed – not even by the applicants – that it is constitutionally admissible to determine voting behavior of a Federal Minister by treaty law. It is beyond the competence of the court to judge whether such a treaty determination of voting behavior is admissible under EU law.

Regarding Art. 2 (2) TSCG, Art. 5 and Art. 8, the court elaborates on transfer of competences to the EU and to international bodies – via public international law – in general and engages into a long discussion of the system of transfer of competences between the three levels of Austrian constitutional law (in particular Art. 50 and Art. 9 (2), EU law and the TSCG (as public international law), concluding that the neither of the articles violated Austrian constitution and that in particular neither Art. 5 nor Art. 8 transferred competences to the Commission and respectively to the CJEU in a not justified way.

9. LEGAL EFFECTS OF THE JUDGMENT/DECISION

The TSCG remains in force as ratified.

AUSTRIA

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT/DECISION AND ITS BROADER POLITICAL IMPLICATIONS

The political resonance was rather mild since the decision came right after the 2013 elections of the National Council and was overshadowed by more general budget discussions and the formation of a new government.