



*CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW:  
AUSTRIA*

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<sup>1</sup> The views expressed in this report are solely those of the author in her private capacity. The report provides an overview and makes no claim to completeness.

# I POLITICAL CONTEXT

## POLITICAL CHANGE

### I.1

WHAT IS THE POLITICAL CONTEXT OF THE EUROZONE CRISIS PERIOD IN AUSTRIA? HAVE THERE BEEN CHANGES IN GOVERNMENT, ELECTIONS, REFERENDA OR OTHER MAJOR POLITICAL EVENTS DURING THE PERIOD OF 2008-PRESENT?

All of the crisis measures have been decided by the 2008-2013 government consisting of a coalition of the Social-Democrat Party (SPÖ) and the Austrian People's Party (ÖVP) (conservative center-right party) under a SPÖ chancellor, Werner Faymann (see questions V.1 and VIII.1. Maria Fekter (ÖVP). Maria Fekter (ÖVP) was the Minister of Finance of that government. From the opposition parties, the Greens were generally siding with the government on the stabilization measures (but not the fiscal measures), whereas the far right parties, the FPÖ and the small BZÖ, were opposing both, the stabilization and the fiscal measures in a general anti-European tone. Probably as a result of the crisis, there was a new 'protest party' that ran for elections in autumn 2013 and that has reached considerable results at regional elections in Carinthia, Lower Austria, Tyrol and Salzburg. It was lead by the Austro-Canadian millionaire Frank Stronach under the title 'Team Stronach' and was fiercely opposing the ESM<sup>2</sup>, and the Euro (e.g. suggesting its replacement with 'National Euros').<sup>3</sup>

National Council elections took place in September 2013 and a new government was constituted in December 2013. The results of the elections were SPÖ 26.82%, ÖVP 23.99%, FPÖ 20.51%, BZÖ 3.53%, Greens 12.42%, Frank Stronach 5.73%, Neos 4.96%. Basically, the two governing parties had small losses while the FPÖ gained a little, the BZÖ did not pass the threshold to enter into the National Council and two new parties entering instead. On the one hand, Stronach, who, however, remained below expectations, and on the other hand a new, liberal party, the Neos, managed to enter the parliament. The Neos are an interesting new party that attracted mostly former voters of the ÖVP or the Greens. It is definitively a pro-European party. The new government consists of again the same SPÖ – ÖVP coalition under the leadership chancellor Werner Faymann (SPÖ), while the Minister of Finance and simultaneous Vice-chancellor), replacing Maria Fekter, was initially Michael Spindelegger (ÖVP, replaced since September 2014 by Hans-Jörg Schelling from the same party

Regional elections took place in all of the nine provinces (Länder) during the 2008-2013 period, but major turnabouts happened only in Carinthia and in Salzburg.

- Carinthia: It is impossible to talk about Carinthia without mentioning Jörg Haider

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<sup>2</sup> Webpage of party "Team Stronach", at <http://www.stronachinstitut.at/stop-esm>

<sup>3</sup> Die Presse, "Jedem sein eigener Euro, September 24, 2012, at [http://diepresse.com/home/politik/innenpolitik/1293771/Team-Stronach\\_Jedem-sein-eigener-Euro](http://diepresse.com/home/politik/innenpolitik/1293771/Team-Stronach_Jedem-sein-eigener-Euro)

who was its governor from 1989 to 1991 and then again from 1999 to his death in 2008. First head of the FPÖ on federal level, he then split off with a group of fellow party members and founded the BZÖ in 2005 that remained rather unsuccessful on federal level but very successful in Carinthia. In 2009 (after Haider's death) its Carinthian branch split off under the name FPK and won the Carinthian elections with 44.9%. It is the Carinthian government under a FPK governor that brought the case against the ESM in front of the Austrian Constitutional Court. However, the FPK shrank to 6.4% (while the FPÖ still 'resurrected to' 16.8%) at the regional election of March 3, 2013. The SPÖ won these elections with 37.1 %, which means that Carinthia now has a social-democrat governor for the first time in 14 years.

- Salzburg: Salzburg that had traditionally been an ÖVP-governed province had been governed by an SPÖ-led coalition from 2004 to 2013. A financial speculation scandal led to anticipated elections in 2013 and the SPÖ lost its majority to the ÖVP. Remarkably, the Greens established themselves as anti-corruption and anti-speculation party in Salzburg and got 20.18%, which means that they are the third strongest force, leaving the far-right parties behind.

Further major events during the crisis were the (partial) nationalizations/restructurings of a handful of medium-sized banks (Hypo Alpe Adria, Kommunalkredit, KA Finanz, Austrian Volksbanken AG). For more details see the IMF's 2013 Country Report Austria - Art. IV Consultation 2013 (the 2014 Report is being published shortly) at <http://www.imf.org/external/pubs/ft/scr/2013/cr13280.pdf>, notably its pages 8 and 9.

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## II CHANGES TO THE BUDGETARY PROCESS

### BUDGETARY PROCESS

#### II.1

DESCRIBE THE MAIN CHARACTERISTICS OF THE BUDGETARY PROCESS (CYCLE, ACTORS, INSTRUMENTS, ETC.) IN AUSTRIA.

The ‘budget’ is an anticipated list of incomes and expenses of the state on the federal level for one ‘financial year’ (Finanzjahr). It binds the administration. It cannot be invoked in order to breach financial obligations with private parties.<sup>4</sup>

According to Art. 51 (1) B-VG (in its 2013 version), the National Council decides about a Federal Financial Framework Law (for one plus three years) and within its boundaries the Federal Financial Act (for upcoming financial year) on the basis of a proposal by the government. The content of these laws (and how they are supposed to be made) is determined in Art. 51 (2) to (13).

### GENERAL CHANGE

#### II.2

HOW HAS THE BUDGETARY PROCESS CHANGED SINCE THE BEGINNING OF THE FINANCIAL/EUROZONE CRISIS?

In 2008, a complete reform of the Federal Budget Law has been decided on constitutional level. In a first step, in 2009, amendments of the existing budget law came into force and a “Financial Framework Law” in which the legislator would fix spending limits for specific “clusters” (such as e.g. “Law and Security”) – around 5, “subdivisions” – around 30 and “global budgets” – around 70<sup>5</sup> for the financial year and also for the three subsequent years.<sup>6</sup> In a second step, the Federal Budget Law was completely substituted by a new one, the *Bundeshaushaltsgesetz 2013 (BHG 2013)*. This new law contains the provisions from the 2009 amendments and several entirely new principles and provisions.<sup>7</sup> One of these new principles is the “output orientation” of the administration – costs should be related to output. The budget should further be better structured which is why the above mentioned new divisions were introduced.<sup>8</sup> All together it should be a “best practice” example of “steering instrument” that lays out not only resources but also effects and measures (to be) taken.

### INSTITUTIONAL CHANGE

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<sup>4</sup> Öhlinger, 2009, p. 208.

<sup>5</sup> Austrian Stability Program, (*cit. supra* note 44), p. 37

<sup>6</sup> Öhlinger 2009, p. 208.

<sup>7</sup> Explanations by the Government for their proposal of the Federal Budget Law 2013 (*Bundeshaushaltsgesetz BHG 2013*) at the National Council, December 9, 2012, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/II/II\\_00578/fname\\_174362.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/II/II_00578/fname_174362.pdf).

<sup>8</sup> Presentation of the Federal Ministry of Finance to explain the new budgetary law, at [https://www.bmf.gv.at/budget/haushaltsrechtsreform/Workshop\\_Die\\_neue\\_Budgetsteuerung\\_im\\_Bund\\_%28Stand\\_8.10.2012%29.pdf?3vtfko](https://www.bmf.gv.at/budget/haushaltsrechtsreform/Workshop_Die_neue_Budgetsteuerung_im_Bund_%28Stand_8.10.2012%29.pdf?3vtfko).

### II.3

WHAT INSTITUTIONAL CHANGES ARE BROUGHT ABOUT BY THE CHANGES IN THE BUDGETARY PROCESS, E.G. RELATING TO COMPETENCES OF PARLIAMENT, GOVERNMENT, THE JUDICIARY AND INDEPENDENT ADVISORY BODIES?

The major innovation is the financial framework law that obliges the National Council to set limits for expenditures for four years (see question II.2 for further details).

## CHANGE OF TIME-LINE

### II.4

HOW HAS THE TIME-LINE OF THE BUDGETARY CYCLE CHANGED AS A RESULT OF THE IMPLEMENTATION OF EURO-CRISIS LAW?

See questions II.3.

## MISCELLANEOUS

### II.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND CHANGES TO THE BUDGETARY PROCESS?

No other relevant information.

## III CHANGES TO NATIONAL (CONSTITUTIONAL) LAW

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### NATURE NATIONAL INSTRUMENTS

#### III.1

WHAT IS THE CHARACTER OF THE LEGAL INSTRUMENTS ADOPTED AT NATIONAL LEVEL TO IMPLEMENT EURO-CRISIS LAW (CONSTITUTIONAL AMENDMENT, ORGANIC LAWS, ORDINARY LEGISLATION, ETC)?

The relevant treaties were approved through standard ratification process; other measures have been implemented through ordinary laws. A constitutional amendment was necessary in order to guarantee the participation rights of the parliament in the ESM (see question VIII.6).

### CONSTITUTIONAL AMENDMENT

#### III.2

HAVE THERE BEEN ANY CONSTITUTIONAL AMENDMENTS IN RESPONSE TO THE EURO-CRISIS OR RELATED TO EURO-CRISIS LAW? OR HAVE ANY AMENDMENTS BEEN PROPOSED?

See question VIII.6 for the ESM related amendment. For the debt ceiling or balanced budget rule, the governing parties tried to achieve a constitutional-amending majority but failed. The balanced budget rule does not stand in constitutional rank (see question IX.5).

### CONSTITUTIONAL CONTEXT

#### III.3

IF NATIONAL CONSTITUTIONAL LAW ALREADY CONTAINED RELEVANT ELEMENTS, SUCH AS A BALANCED BUDGET RULE OR INDEPENDENT BUDGETARY COUNCILS, BEFORE THE CRISIS THAT ARE NOW PART OF EURO-CRISIS LAW, WHAT IS THE BACKGROUND OF THESE RULES?

The balanced budget rule (based on the German model) was introduced in Austria in late 2011 (see question IX.5). The background was the overall crisis, the fear of losing the triple A rating. It was also part of the Austrian measures made in response to the excessive deficit procedure that had been launched against Austria in 2009.<sup>9</sup>

### PURPOSE CONSTITUTIONAL AMENDMENT

#### III.4

WHAT IS THE PURPOSE OF THE CONSTITUTIONAL AMENDMENT AND WHAT IS ITS POSITION IN THE CONSTITUTION?

Austria's constitution is particular in its *form* because it is not entirely contained in one "constitutional document". There is such a "constitutional document", the *Bundes-Verfassungsgesetz (B-VG)*, but there also other laws of constitutional rank, *Bundesverfassungsgesetze (BVG)* and there is even the possibility of passing single norms of one law as "constitutional norms" or "norms of constitutional rank"

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<sup>9</sup> Excessive Deficit Procedure Austria 2009-2010, summarized at [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/deficit/countries/austria\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/countries/austria_en.htm)

(*Verfassungsbestimmungen*). There is no hierarchical difference between these different constitutional provisions; all stand on the same level in the Kelsenian pyramid, above them there are only the basic principles of the constitution<sup>10</sup>. Furthermore, until 2007, treaties or single provisions from treaties could be “lifted into constitutional rank”. Although this was abolished, several old treaties still stand in constitutional rank. The same goes for treaties between the federation and the provinces. Because of this, laws in constitutional rank and therefore hierarchically superior laws can be found in many different places. A distinction has to be therefore made also between “material constitutional law” and “formal constitutional law”. In order to pass a law in constitutional rank, at least half of the members of the National Council need to be present and at least 2/3 of those have to vote for it. The same goes for the Federal Council whenever competences of the provinces (*Länder*) are touched. The purpose of a constitutional “amendment” or a completion of the constitution by passing new provisions in “constitutional rank” is therefore to make them hierarchically superior to ordinary laws. Like this, ordinary laws need to be amended accordingly and can be lifted by the constitutional court if they are not. Additionally, provisions in constitutional rank cannot be changed as easily. There are, however, different degrees of “constitutional amendments” and there are stricter rules for cases in which an amendment would amount to an amendment of the “entire constitution” (*Gesamtänderung*).<sup>11</sup> For such a *Gesamtänderung*, a referendum would generally be necessary. The accession to the EU in 1995 for instance amounted to such a “*Gesamtänderung*”. In the debates of the crisis measures, the FPÖ had brought the argument that the signature of the ESM treaty and its accompanying laws amounted to such a *Gesamtänderung*. The governing parties and the Greens dismissed such a request.<sup>12</sup>

## RELATIONSHIP WITH EU LAW

### III.5

IS THE CONSTITUTIONAL AMENDMENT SEEN AS CHANGING THE RELATIONSHIP BETWEEN NATIONAL AND EUROPEAN CONSTITUTIONAL LAW?

At present it does not appear that the constitutional amendment has changed the relationship between national and European constitutional law.

## ORGANIC LAW

### III.6

HAVE THERE BEEN CHANGES TO ORGANIC LAWS OR OTHER TYPES OF LEGISLATION THAT ARE OF A DIFFERENT NATURE OR LEVEL THAN ORDINARY LEGISLATION, IN RELATION TO EURO-CRISIS

<sup>10</sup> The principles are, briefly put, democracy, federalism, republicanism, rule of law, separation of powers & liberalism, for details see Öhlinger, 2009, pp. 54-62.

<sup>11</sup> Öhlinger, 2009, pp. 25-30.

<sup>12</sup> Press release on parts of the National Council Session No. 164 from July 4, 2012.

[http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0584/](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0584/).

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LAW OR THE BUDGETARY PROCESS?

No.

## CONSTITUTIONAL AMENDMENT AND ORDINARY LAW

III.7

IF ORDINARY LEGISLATION WAS ADOPTED IN CONJUNCTION WITH A CONSTITUTIONAL AMENDMENT, WHAT IS THE RELATIONSHIP BETWEEN THE TWO?

The ordinary legislation specifies what is outlined in the constitutional amendment (see question VIII.6).

## PERCEPTION SOURCE OF LEGAL CHANGE

III.8

IN THE PUBLIC AND POLITICAL DISCUSSIONS ON THE ADOPTION OF ORDINARY LEGISLATION, WHAT WAS THE PERCEPTION ON THE APPROPRIATE LEGAL FRAMEWORK? WAS THE ORDINARY LEGISLATION SEEN AS IMPLEMENTING NATIONAL CONSTITUTIONAL LAW, OR EURO-CRISIS LAW?

In the public discussion, the question whether European law and the relevant treaty law is transposed by laws in constitutional rank or “ordinary laws” is almost only relevant in terms durability: As explained in question III.4, a law in constitutional rank is harder to amend. Which law gets to be passed in constitutional rank is a matter of political consensus, or, under the relevant government, a question of whether the coalition parties can get a small party on board in order to get a 2/3 majority in the National Council.

The overall legislative package in response to the Eurocrisis was, however, rather understood as implementing European provisions, no matter whether that happened with laws in constitutional rank or not.

## MISCELLANEOUS

III.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND TO CHANGES TO NATIONAL (CONSTITUTIONAL) LAW?

No other relevant information.

## IV EARLY EMERGENCY FUNDING

*Prior to 2010, loan assistance to States was made primarily via bilateral agreements (to Latvia, Hungary, Romania, 1<sup>st</sup> round of Greek loan assistance).*

*The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) are two temporary emergency funds, both resulting from the turbulent political weekend of 7-9 May 2010. On May 9, a Decision of the Representatives of the Governments of the Euro Area Member States was adopted expressing agreement on both funds.*

*The EFSM is based on a 'Council regulation establishing a European financial stabilisation mechanism' of May 11, 2010 adopted on the basis of article 122(2) TFEU and therefore binding on all 27 member states of the EU.*

*([http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF)*

*[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF))*

*The EFSF is a special purpose vehicle created under Luxembourgish private law by the 17 member states of the Eurozone. The EFSF Framework Agreement was signed on June 7, 2010. On June 24, 2011, the Heads of State or Government of the Eurozone agreed to increase the EFSF's scope of activity and increase its guarantee commitments.*

*([http://www.efsf.europa.eu/attachments/20111019\\_efsf\\_framework\\_agreement\\_en.pdf](http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf) and [http://www.efsf.europa.eu/attachments/faq\\_en.pdf](http://www.efsf.europa.eu/attachments/faq_en.pdf))*

## NEGOTIATION

### IV.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE NEGOTIATION OF THE EFSF AND THE EFSM, IN PARTICULAR IN RELATION TO (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

Austria already had a legal basis for granting international financial assistance to countries with which it is economically connected, which is called Payment Balance Stabilization Law (Zahlungsbilanzstabilisierungsg, BGBl I Nr. 52/2009)<sup>13</sup> that was written with the Euro-crisis in mind. The first Eurozone-crisis measures, notably the Art. 126 TFEU-based 1<sup>st</sup> round of Greek assistance<sup>14</sup> and the necessary procedures for the Art. 122 (2) TFEU-based EFSM-

<sup>13</sup> Payment Balance Stabilization Law (Zahlungsbilanzstabilisierungsg, BGBl I 52/2009), original version from June 17, 2009, the original version at

[http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2009\\_I\\_52/BGBLA\\_2009\\_I\\_52.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_52/BGBLA_2009_I_52.pdf), pp. 32-33.

<sup>14</sup> The first round of loans to Greece (pooled bilateral loans) was based on Council Decision 2010/320/EU, notably consideration (8). The Decision is based on Art. 126 (9) and 136 TFEU. The conditions for the loan (besides the Memoranda with the Commission and the IMF) were based on the excessive deficit procedure of Art. 126. This is why these bilateral loan package is called here Art. 126-based measure; as opposed to the 122 (2)-based second round (EFSM). The distinction is important because the entire Austrian and German debate on rule of law vs state of necessity/self-caused crisis/circumstance beyond control was referring to Art. 122 (2) vs 125 TFEU and not to the first round.

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regulation were discussed in the plenary of the National Council<sup>15</sup> on May 19, 2010.<sup>16</sup> They were discussed because the Payment Balance Stabilization Law needed to be amended as a consequence of these first Euro-crisis measures. The amendment basically foresees that the Minister of Finance can commit future budget resources to such international financial assistance (up to 2 billion in the 2009 version and up to 2.3 billion in the 2010 version of the law). The amendment further creates a basis for the issue of guarantees in the framework of the EFSF up to 15 billion.<sup>17</sup> (Nota bene that this is a little confusing since the extraordinary ECOFIN meeting where commitment to the EFSF was first made<sup>18</sup> took place on May 9 and 10, 2010, the plenary session of the National Council on May 19 and the signature of the EFSF framework only on June 9, 2010 – more on this in question IV.2).

The Federal Chancellor Fayman (Social Democrat Party) opened the National Council's plenary session from May 19, 2010 with "explanations" about the lessons from the Greek crisis and measures to stabilize the common European currency. He talked about it in terms of necessary budget consolidation within the Eurozone. Budget consolidation was in his opinion necessary in order not to be dependent of debt and interests and in order to discipline speculators. Hedge funds should be brought under control and a financial transaction tax should be introduced. Better coordination of economic and fiscal policy was necessary and tools should be in place to intervene if member states deviated too much from common goals.

The subsequent debate in the plenary remained rather general on European integration, the questions discussed were whether the EMU was a "neoliberal project" per se, the need for more political integration within the Eurozone, the need for fiscal discipline of all members, whether the crisis measures are actually in Austria's own interest and how much are solidarity gestures.

Overall, the main position of the 2008 to 2013 government that was constituted by a coalition of the Social-democrat Party (Sozialdemokratische Partei Österreichs, SPÖ) and the Austrian People's Party (Österreichische Volkspartei, ÖVP) (conservative center-right party) under an SPÖ chancellor, Werner Faymann, was in favor of the proposed amendment to the Payment Balance Stabilization Law and of the crisis measures in general. From the opposition parties, the Greens were divided and voted partially for and partially against the amendment, whereas the far-right parties, the Free People's Party (Freiheitliche Partei Österreich, FPÖ) and the small Coalition for the Future of Austria (Bündnis Zukunft Österreich, BZÖ) were strongly opposing it and voted against.

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<sup>15</sup> The National Council is the bigger and more important one of the two chambers of the parliament and is directly elected. The second chamber, the Federal Council, consists of representatives of the nine provinces (*Länder*). Both together form the Austrian parliament.

<sup>16</sup> Stenographic Protocol of National Council Session No. 66, XXIV Legislative Period, May 19, 2010, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00066/fname\\_190268.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00066/fname_190268.pdf).

<sup>17</sup> First amendments to the Payment Balance Stabilization Law (BGBl I 31/2010) at [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2010\\_I\\_31/BGBLA\\_2010\\_I\\_31.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_I_31/BGBLA_2010_I_31.pdf).

<sup>18</sup> Ecofin, Extraordinary Council Meeting, May 9/10, 2010, Press release at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/114324.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf)

## ENTRY INTO FORCE

### IV.2

ARTICLE 1(1) EFSF FRAMEWORK AGREEMENT PROVIDES THAT IT WILL ENTER INTO FORCE IF SUFFICIENT EUROZONE MEMBER STATES HAVE CONCLUDED ALL PROCEDURES NECESSARY UNDER THEIR RESPECTIVE NATIONAL LAWS TO ENSURE THAT THEIR OBLIGATIONS SHALL COME INTO IMMEDIATE FORCE AND EFFECT AND PROVIDED WRITTEN CONFIRMATION OF THIS. WHAT DOES THIS PROCEDURE LOOK LIKE IN AUSTRIA AND IN WHAT WAY DOES IT INVOLVE PARLIAMENT?

The EFSF Framework agreement was signed by the Austrian Minister of Finance on June, 9, 2010 and since the agreement was about setting up a society under private (Luxembourgish) law, it was considered as part the government's capacities to engage in private law transactions (Art. 17 B-VG<sup>19</sup>). Therefore, an approval of the agreement by the parliament was not necessary for the signature of the agreement. A legal basis for Austria's guarantee commitments had already been decided by the National Council on May 19, 2010, when they agreed on an amendment of the Payment Balance Stabilization Law (Zahlungsbilanzstabilisierungsg (ZaBiStaG), BGBl I Nr. 52/2009)<sup>20</sup> (as mentioned in question IV.1). The amendment stipulates that the Minister of Finance can commit the Federal Republic according to the conclusions of the ECOFIN Council from May 9, 2010 (§ 2a ZaBiStaG). In other words, the amendments of May 19<sup>th</sup>, 2010 already enable the Finance Minister to promise guarantees under the yet to be signed EFSF framework agreement. The amendment further stipulates that for all loans and guarantees made under that Payment Balance Stabilization Law, the Minister of Finance needs to agree with the Federal Chancellor first (§ 3 ZaBiStaG). The Minister of Finance also has to deliver a report to the main committee (of the National Council) at the latest one month after the end of the quarter in which he or she explains all measures taken on the basis of the Payment Balance Stabilization Law (§ 4a ZaBiStaG). The amendment entered into force a day after its publication in the Federal Law Gazette<sup>21</sup>, on June 12, 2010.

## GUARANTEES

### IV.3

MEMBER STATES ARE OBLIGED TO ISSUE GUARANTEES UNDER THE EFSF. WHAT PROCEDURE WAS USED FOR THIS IN AUSTRIA? WHAT DEBATES HAVE ARISEN DURING THIS PROCEDURE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE GUARANTEES FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE

<sup>19</sup> Bundes-Verfassungsgesetz (Federal Constitutional Statute = the constitution), available in its current version at:

<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138>; and available in English at [http://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_1930\\_1/ERV\\_1930\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf) (the English version is from 2010 and does not contain the latest amendments yet).

<sup>20</sup> Supra note 13.

<sup>21</sup> Idem.

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BUDGETARY PROCESS?

See questions IV.1 and IV.2.

## ACTIVATION PROBLEMS

IV.4

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER DURING THE NATIONAL PROCEDURES RELATED TO THE ENTRY INTO FORCE OF THE EFSF FRAMEWORK AGREEMENT AND/OR THE ISSUANCE AND INCREASE OF GUARANTEES?

Increasing the commitments under the EFSF as agreed by the Heads of State and Government on March 11, 2011 was a major issue discussed in the National Council. The reason for that was that the Payment Balance Stabilization Law had to be amended again in order to raise the possible guarantees to which the Minister of Finance is entitled to commit (§ 2a ZaBiStaG) from 15 billion to 21.629 billion.<sup>22</sup> The SPÖ, the ÖVP and the Greens voted for the amendment that entered into force on October 8, 2011, a day after its publication in the Federal Law Gazette.<sup>23</sup>

The office of the Chancellor, several provinces, the Court of Auditors, the chamber of labour, and the chamber of commerce all gave written opinions in a pre-parliamentary proceeding and sent them to the National Council.<sup>24</sup> The Financial Committee of the National Council recommended the adoption of the amendment<sup>25</sup> and the Committee's report was discussed in parliament at length.<sup>26</sup> The head of the far-right party FPÖ, Strache, wanted to initiate a referendum about the proposed amendment but the proposal did not get the necessary majority (51 yes-votes against 116 no-votes).<sup>27</sup> Otherwise, the government's position was again that strengthening the "rescue umbrella" is fundamental for the Euro to survive. Then Finance Minister Fekter (ÖVP) specified that the entire European strategy of combating the crisis through the EFSF has also helped Austria fighting the banking crisis. The fact that Austria had managed the crisis pretty well until then was further due to the fact that a common, European solution had been found and Austria would have never gotten away so well alone. In particular, she refers to EU efforts that have helped Austrian banks

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<sup>22</sup> Explanation of the government for the proposed amendment of the Payment Balance Stabilisation Law at: [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00300/fname\\_227389.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00300/fname_227389.pdf). Such an „explanation“ (Vorblatt/Erläuterungen) is given by the government for any proposed legislation to the National Council.

<sup>23</sup> Second amendment of the Payment Balance Stabilization Law (BGBl 90 I/2011) at: [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_I\\_90/BGBLA\\_2011\\_I\\_90.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_90/BGBLA_2011_I_90.pdf).

<sup>24</sup> Opinion of the Audit Court (*Rechnungshof*) on the Second Amendment of the Payment Balance Stabilization Law, August 18, 2011, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME\\_00300\\_04/imfname\\_228732.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00300_04/imfname_228732.pdf).

<sup>25</sup> Report of the Financial Committee (of the National Council) the Second Amendment of the Payment Balance Stabilization Law, September 27, 2011, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01409/fname\\_231505.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01409/fname_231505.pdf)

<sup>26</sup> Stenographic Protocol of National Council Session No. 120, XXIV Legislative Period, September 30, 2011, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00120/fname\\_233946.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00120/fname_233946.pdf), pp. 10-74.

<sup>27</sup> *Idem*, p. 78.

that were exposed in many of these countries a lot.<sup>28</sup> The rest of the Austrian People's Party joined in this tone. They stressed that Austria was not only helping Greece but first of all helping itself by helping to stabilize and save the Euro. The Social Democrat party stressed some social aspects of the crisis measures and the problems of austerity. Loosening austerity would be a sign of solidarity. The Greens are in favour of the crisis measures but stress that their democratic legitimacy of the loan facilities must be better safeguarded.

Finally, the SPÖ, ÖVP and Greens vote for the amendment whereas the FPÖ and BZÖ vote against it, which means that it was adopted with a majority of 117 against 53 votes.

## CASE LAW

### IV.5

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ABOUT THE EFSM OR EFSF IN AUSTRIA?

No.

## IMPLEMENTATION

### IV.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE EFSF, FOR EXAMPLE WITH REGARD TO DECISIONS ON AID PACKAGES (LOAN FACILITY AGREEMENT AND MEMORANDUM OF UNDERSTANDING) AND THE DISBURSEMENT OF TRANCHES, BOTH OF WHICH NEED UNANIMOUS APPROVAL BY THE SO-CALLED GUARANTORS, I.E. THE EUROZONE MEMBER STATES?

There is only a small explicit role for the parliament foreseen in the Payment Balance Stabilization Law, although the Minister of Finance can issue guarantees only as authorized by such a Law that goes through the parliament, therefore, in a way the Minister remains 'bound' by the parliament. As explained in question IV.2, according to § 3 ZaBiStaG the Minister of Finance has to agree with the Chancellor on guarantee issues. According to § 4a ZaBiStaG (introduced in the 2010 amendment, left untouched in 2011 and then amended again in 2012<sup>29</sup>), the Minister of Finance has to report to the main committee of the National Council. There, these reports are "acknowledged" by vote in the main committee. The disbursement of tranches could be discussed in the same way – on the basis of the Finance Minister's Reports to the main committee. Main committees' meetings are not documented like the National Council meetings through stenographic protocols, which means that only

<sup>28</sup> Background: Art. 143 TFEU based Balance of Payment assistance to Hungary, Latvia and Romania were crucial for Austria because of the exposure of its banks in these countries – Austria's banks are invested with EUR 300 billion in Eastern Europe. Austria profited from BoPs indirectly and the government was conscious of that in the further handling of the crisis measures, especially the first ones.

<sup>29</sup> The third amendment of the Payment Balance Stabilization law (BGBl I 65/2012) [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_I\\_65/BGBLA\\_2012\\_I\\_65.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_I_65/BGBLA_2012_I_65.pdf) passed as accompanying law of the TESM approval that will be discussed in the section on the TESM. The 2012 version of §4 ZaBiStaG says that the Minister of Finance has to report at the latest one month after the end of a quarter to the committee dealing with financial issues (in the 2010 version it had been the main committee) of the National Council. However, in the accompanying legislative package to the TESM there is an entirely new role of the National Council introduced through constitutional amendment that will be discussed in question VIII.6.

## AUSTRIA

press releases give an insight into the content of the debates.

However, § 2a ZaBiStaG that was introduced in the 2010 amendment and in its again amended version from 2011, as explained in question IV.4, contain both a numerical limit up to which the Minister of Finance is allowed to issue guarantees (up to 15 billion under the original EFSF Framework Agreement and 21.629 billion under the Amended EFSF Agreement for Austria). Due to the particular set-up of the EFSF, a Member State that becomes a borrower steps out as a guarantor which means that the guarantee commitments for all other Member States raise (because they need to step in order to maintain the overall upper ceiling). Therefore, the decision on a new aid package automatically raises the overall guarantee limit for which an amendment of the Payment Balance Stabilization Law (and therefore the involvement of the parliament) would have been necessary. This, however, did not happen (as opposed to Germany). It did not happen because the Payment Balance Stabilization Law from 2010 authorized the issue of guarantees up to 15 billion, which is a bit more than the maximum amount Austria was committed to under the original EFSF agreement (12.24 billion). Therefore, the fact that Ireland and Portugal became step-out-guarantors did not exceed the authorized 15 billion guarantee commitment. In the 2011 amendment of the Payment Balance Stabilization Law however, only precisely the amount Austria was committed to under the amended EFSF agreement was authorized (21.629 billion) which means that new bailout packages would have necessarily lead to an amendment of the Payment Balance Stabilization Law. The only new bailout package after the entry into force of the 2011 amendment of the EFSF agreement was the second package for Greece. Greece, however, had been a step-out guarantor from the very beginning of the EFSF (Art. 8 (2) EFSF Agreement) which means that the shares of the other countries had been calculated accordingly. Therefore, no amendment of the Payment Balance Stabilization Law was necessary. The case of Spain is complicated (see also question VIII.7) because the bailout happened in the middle of the ratification process of the ESM – when the capital and setting of the ESM were already agreed (and at that time in Austria had already passed through parliament, see question VIII:2) it was already clear that EFSF-commitments would be taken over by the ESM.

## IMPLEMENTING PROBLEMS

### IV.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE APPLICATION OF THE EFSF?

As explained in the first part of question IV.6, the Minister of Finance has to report the measures he or she takes to the main committee of the National Council. In the case of the package for Ireland, the FPÖ and the BZÖ criticized the respective reports of the Minister of Finance at the main committee meeting of November 25, 2011.<sup>30</sup> Their major criticism was that aid packages were never-ending and that it was yet another bank-bailout in disguise. The

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<sup>30</sup> Press Release on the meeting of the Main Committee of the National Council from November 25, 2011, at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2010/PK0940/index.shtml](http://www.parlament.gv.at/PAKT/PR/JAHR_2010/PK0940/index.shtml)

ÖVP and SPÖ acknowledged that this situation was not ideal but that there were no other options at present. With a little cynicism, the Greens pointed out that the BZÖ and FPÖ had not objected to the (federal) bailout of the provincial Hypo-Alpe-Adria bank (see question I.1 for details on this). Nevertheless, the reports were approved by the majority.

No press release exists on a discussion of the package for Portugal.

The last press release about the main committees' discussion of specific bailout measures before the 2012 reform of the National Council's participation in the bailout measures (see Footnote 25 and question VIII.6) exists on the second package for Greece.<sup>31</sup> The Minister of Finance pointed out that a Greek default would be too costly and the risk of Greek insolvency had to be reduced. She further pointed out that PSI is discussed on the European level but that default is out of question because of the lacking procedure for that. The then Vice-Chancellor Spindlegger (ÖVP) added to that that the private sector should be involved in a smart and creative way. The chancellor Faymann (SPÖ) specified that he is much more in favour of a financial transaction tax than of a bank tax because the latter would not oblige the entire financial sector to contribute. Former chancellor and MP Schüssel (ÖVP) said the expectations from a financial transaction tax are exaggerated and that a bank tax would only be passed on to the clients. The Greens criticized that the government was not taking an explicit position on the PSI. The BZÖ suggests a separation of a core Eurozone and a light Eurozone but remains alone with this idea.

## BILATERAL SUPPORT

### IV.8

IN CASE AUSTRIA PARTICIPATED IN PROVIDING FUNDING ON A BILATERAL BASIS TO OTHER EU MEMBER STATES DURING THE CRISIS, WHAT RELEVANT PARLIAMENTARY DEBATES OR LEGAL ISSUES HAVE ARISEN?

Austria participated in the bilateral loan package for Greece, referred to as "First round of loans to Greece" or "Greek loan facility". For the debate on this, see question IV.1.

## MISCELLANEOUS

### IV.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND THE EFSM/EFSF?

Not other relevant information.

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<sup>31</sup> Press Release on the meeting of the Main Committee of the National Council from July 17, 2011, regarding the Second Package for Greece available at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2011/PK0741/](http://www.parlament.gv.at/PAKT/PR/JAHR_2011/PK0741/).

## V TREATY AMENDMENT ARTICLE 136(3) TFEU

*At the 16/17 December 2010 European Council a political decision was taken to amend the Treaties through the simplified revision procedure of article 48(6) TFEU. On March 25, 2011 the European Council adopted the legal decision to amend article 136 TFEU by adding a new third paragraph: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”*

*The process of approval of this decision by the member states in accordance with their respective constitutional requirements as prescribed by article 48(6) has been completed and the amendment has entered into force on 1 May 2013.*

### NEGOTIATION

#### V.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE NEGOTIATION OF THE AMENDMENT OF ARTICLE 136 TFEU?

Overall, the main position of the government (see question IV.1 for details) was favoring the introduction of Art. 136 (3) TFEU (and the ESM) (see also question VIII.1 and question I.1). From the opposition parties, the Greens were siding with the government whereas the far-right parties FPÖ and BZÖ were strongly opposing it.<sup>32</sup> The fact that the Greens were siding with the government was essential because a 2/3 majority (see question V.2) was necessary and could not be reached only by the governing parties.

### APPROVAL

#### V.2

HOW HAS THE 136 TFEU TREATY AMENDMENT BEEN APPROVED IN AUSTRIA AND ON WHAT LEGAL BASIS/ARGUMENTATION?

Generally, treaties are ratified through signature of the Federal President (Art. 65 (1) B-VG). Political treaties and treaties leading to the amendment or completion of laws need to be approved by the National Council prior to the ratification (Art. 50 (1) 1 B-VG). This approval passes as ‘decision’ and not as ‘law’. If the treaty in question touches competences of the provinces (Länder), it also has to be approved by the Federal Council.<sup>33</sup> Treaties that amend or complete the constitution need to be approved by qualified majorities (in both

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<sup>32</sup> Summary of the Positions in the meeting of the Constitutional Committee of the National Council from July 2, 2012, available at: [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0574/](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0574/); summary of the debate in the Plenary Session No. 164 of the National Council from July 4, 2012 (when the amendment and the TESM were approved), available at: [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0587/](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0587/); Stenographic Protocol of that Plenary Session of the National Council No. 164, XXIV. Legislative Period, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00164/fname\\_276567.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00164/fname_276567.pdf).

<sup>33</sup> Öhlinger, Verfassungsrecht, 2005, p. 78. The Federal Council is the chamber of the parliament that consists of representatives of the nine *Länder*.

chambers, at least half of the deputies have to be present and have to reach a 2/3 majority, Art. 44 (1) and (2) B-VG). Furthermore, a treaty amending the foundations of the European Union would also need approval by the higher majorities in the National and in the Federal Council (Art. 50 (1) 2 and Art. 50 (4) B-VG). The Federal Chancellor (Head of Government) has to publish the treaty after its ratification through the Federal President in the Federal Law Gazette. The Federal President, however, does not have the right to review the substance of the approval, as opposed to Germany (see also the discussion of the ESM case at the constitutional court in Annex I.1), his sole task is to check the procedure of how in this case the decision or generally a law came about. From the day following the publication, the treaty is considered in force - unless specified differently in the treaty, as it is the case here in Art. 48 TESH.

According to Art. 23i (4) B-VG<sup>34</sup> decisions of the European Council or the Council of the European Union that enter into force only after the approval by the single Member States have to be approved according to Art. 50 (4) B-VG.: The approval comes in the form of a “decision”. Then the decision of the National Council and the Federal Council is then signed by the president, counter-signed by the Chancellor and published in the Federal Official Gazette. Under certain circumstances, the approval of treaties can be reviewed by the Constitutional Court.

For details on the general treaty ratification procedure in Austria, please see question VIII.2, for details on constitutional review of treaties see Annex I.1 on the Constitutional Court decision on the ESM treaty.

The Constitutional Committee of the National Council recommended in its report the approval of the European Council Decision 2011/199/EU.<sup>35</sup> The National Council voted on July 4, 2012 with 125 votes for and 52 against it<sup>36</sup>. The Federal Council voted on July 6, 2012, with 43 votes for and 12 against it.<sup>37</sup> It was signed by the Federal President and the European Council was notified about Austria’s approval on July 30, 2012. It was further published in the Federal Law Gazette on May 13, 2013.<sup>38</sup>

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<sup>34</sup> Supra note 19.

<sup>35</sup> Final Report of the Constitutional Committee no. 1877 on government’s proposition no. 1716 regarding the decision of the European Council to amend Art. 136 (3) TFEU from July 2, 2012, available at: [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01877/fname\\_258128.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01877/fname_258128.pdf)

<sup>36</sup> Decision of the National Council to approve the amendment of Art. 136 TFEU from July 4, 2012, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/BSE/BSE\\_00001/fname\\_258886.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/BSE/BSE_00001/fname_258886.pdf)

<sup>37</sup> Report of the Committee for Constitution and Federalism from July 5, 2012, on the proposed amendment of Art. 136 TFEU at [http://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR\\_08755/fname\\_258959.pdf](http://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_08755/fname_258959.pdf) and the decision of the Federal Council on the same issue from July 6, 2012, at: [http://www.parlament.gv.at/PAKT/VHG/XXIV/BSE/BSE\\_00001/fname\\_259208.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/BSE/BSE_00001/fname_259208.pdf).

<sup>38</sup> Approval of the amendment of Art. 136 TFEU as published in the Federal Law Gazette, BGBl III 132/2013, at [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2013\\_III\\_132/BGBLA\\_2013\\_III\\_132.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_III_132/BGBLA_2013_III_132.pdf).

## RATIFICATION DIFFICULTIES

### V.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER DURING THE RATIFICATION OF THE 136 TFEU TREATY AMENDMENT?

The main issues debated were connected to the debate of the TESM. The pros argued by SPÖ, ÖVP and Greens were that Austria needed a stable EMU and a stable Euro for its export-oriented economy, that letting Eurozone members default was not an option. A permanent European stabilization mechanism would be the only way of dealing with the crisis. Specific issues related to the Art. 136 (3) TFEU and to the simplified treaty revision procedure were not raised, not even at the expert hearing that had been convened at the National Council on June 28, 2012 upon initiative of the Constitutional Committee to debate the ESM (see question VIII.1). The counter-arguments of the FPÖ and the BZÖ were in particular the criticism of the establishment of a ‘transfer union’, the reproach that Austrian taxpayer money was going to be wasted and the loss of budgetary sovereignty. For the FPÖ, the budgetary sovereignty issue remains, however, much more of a problem for the Fiscal Compact.

## CASE LAW

### V.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT IN AUSTRIA ON THE 136 TFEU TREATY AMENDMENT?

There is a constitutional court judgment on the ESM from March 16, 2013.<sup>39</sup> References to Art. 136 (3) TFEU do exist in that judgment but since it was not yet in force at the time when the judgment was rendered, they are rather minor. Please see Annex I.1 for a detailed analysis of the case. Here, it remains to be mentioned that the applicant invoked some “EU law questions” about the legality of the TESM, in particular the fact that it had been signed and ratified without a proper basis in EU law because Art. 136 (3) TFEU was not yet in force at the time of its signature. The applicant argued that the TESM collides with Art. 125 TFEU. Therefore, the National Council should have treated the TESM as a treaty that amends EU law. For a ratification of such a treaty, higher majorities in the National and in the Federal Council would have been necessary (Art. 50 (4) B-VG). Instead, the TESM had been approved by simple majorities.<sup>40</sup> For details on this, see question VIII.2. The court, however, says that in as far as the applicant invokes some “EU-law-questions”, it is not within the court’s competence to render decisions about them.

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<sup>39</sup> Österreichischer Verfassungsgerichtshof (VfGH), Decision SV 2/12-18 from March 16, 2013, at: [http://www.vfgh.gv.at/cms/vfgh-site/attachments/1/0/8/CH0003/CMS1364972071410/esm\\_sv2-18.12\\_endg.pdf](http://www.vfgh.gv.at/cms/vfgh-site/attachments/1/0/8/CH0003/CMS1364972071410/esm_sv2-18.12_endg.pdf); Press release in English at: [http://www.vfgh.gv.at/cms/vfgh-site/attachments/3/4/1/CH0003/CMS1364972214030/esm\\_presseinformation\\_english.pdf](http://www.vfgh.gv.at/cms/vfgh-site/attachments/3/4/1/CH0003/CMS1364972214030/esm_presseinformation_english.pdf)

<sup>40</sup> *Supra* note 25, pp. 11-12.

## MISCELLANEOUS

V.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD AUSTRIA AND THE 136 TFEU TREATY AMENDMENT?

No other relevant information.

## VI EURO-PLUS-PACT

*On March 11, 2011 the Heads of State or Government of the Eurozone endorsed the Pact for the Euro. At the 24/25 March 2011 European Council, the same Heads of State or Government agreed on the Euro Plus Pact and were joined – hence the ‘Plus’ - by six others: Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania (leaving only the UK, Czech Republic, Sweden and Hungary out).*

*The objective of the pact is to foster competitiveness, foster employment, contribute to the sustainability of public finances and reinforce financial stability. In the Euro-Plus-Pact the Heads of State or Government have entered into commitments on a number of policy areas, in which member states are competent.*

*([http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/120296.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf))*

### NEGOTIATION

#### VI.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE NEGOTIATION OF THE EURO-PLUS-PACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE PACT FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

Besides legislation, the control of the executive (administration) is the second major task of the parliament (Art. 52 B-VG). One form of this control is the so-called “urgent request” (Art. 52 (1) B-VG) that can be made if certain conditions are met, for example when at least five members of parliament make it (Art. 93 Parliamentary Law – Geschäftsordnung des Nationalrats)<sup>41</sup>. An “urgent request” is debated within the same session of the National Council within which it is made. For the Euro-Plus-Pact, a request was made by six members of the National Council that belong to the BZÖ and it regarded the decisions made at the European Council on March 24 and 25, 2011, inter alia about the Euro-Plus-Pact.<sup>42</sup> In the request, the major criticism was that the Federal Chancellor had made decisions without discussing them in the National Council in advance.

As far as the content of the Euro-Plus-Pact is concerned, the major criticism articulated in the request was the question of wages and the fear of loan-dumping. The parliamentary member Blucher, who made the oral reasoning of the request in front of the National Council<sup>43</sup>, argued that the Euro-Plus-Pact lead to common wage- and fiscal policy and would be a first level of a central European government. “Brussels” would decide on minimum wages for example. The Chancellor answered that the Euro-Plus-Pact was important because it ensured

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<sup>41</sup> Öhlinger, Verfassungsrecht, 2009, p. 213.

<sup>42</sup> „Urgent Request“ in the National Council Plenary Session, No. 99, XXIV Legislative Period, March 30, 2011, [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00099/fname\\_214992.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00099/fname_214992.pdf), on pp. 130-137; oral reasoning of the request on pp. 137-142; response of the Federal Chancellor Faymann on pp. 143-144; general discussion on pp. 149-185; Summary of the Plenary Session from March 30, 2011 in Press release at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2011/PK0311/](http://www.parlament.gv.at/PAKT/PR/JAHR_2011/PK0311/).

<sup>43</sup> Stenographic Protocol No. 99 (cit. supra note 28), pp. 137-142.

competitiveness and took the focus away of the two well know criteria of debt and deficit. He however specified that no loan negotiations would take place in Brussels, that the social partners' (traditionally very strong) role in wage determination would not change and that collective bargaining will take place in Austria and nowhere else. However, the urgent request did not lead to any decision or new legislation.

## MISCELLANEOUS

### VI.2

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND THE EURO-PLUS-PACT?

Since 2011, the measures taken in order to achieve the objectives of the Euro-Plus-Pact have been integrated into the overall Austrian National Reform Programs for the achievement of the European Agenda 2020. The Austrian National Reform Programs are coordinated by the Office of the Federal Chancellor (executive branch) but involve institutions on all levels (federal and province), social partners and NGOs.<sup>44</sup>

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<sup>44</sup> National Reform Program 2011, at <http://www.bka.gv.at/DocView.axd?CobId=43425>, pp. 3-4 and Euro-Plus-Pact measures are separately listed in its Annex II at <http://www.bka.gv.at/DocView.axd?CobId=43427>; National Reform Program 2012 at <http://www.bka.gv.at/DocView.axd?CobId=47619>, pp. 15-16 with special focus on youth unemployment; National Reform Program 2013 <http://www.bka.gv.at/DocView.axd?CobId=51122>, Euro-Plus-Pact commitments are listed on p. 18 in Annex II at <http://www.bka.gv.at/DocView.axd?CobId=51124>

## VII SIX-PACK

*The ‘Six-Pack’ is a package of six legislative measures (five regulations and one directive) improving the Economic governance in the EU. The Commission made the original proposals in September 2010. After negotiations between the Council and the European Parliament, the package was adopted in November 2011 and entered into force on December 13, 2011. Part of the ‘Six-Pack’ measures applies only to the Eurozone member states (see the individual titles below).*

*The ‘Six-Pack’ measures reinforce the Stability and Growth Pact (SGP), among others by introducing a new Macroeconomic Imbalances Procedure, new sanctions (for Eurozone member states) and reversed qualified majority voting. Also, there is more attention for the debt-criterion.*

*([http://ec.europa.eu/economy\\_finance/economic\\_governance/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/index_en.htm))*

## NEGOTIATION

### VII.1

WHAT POSITIONS DID AUSTRIA ADOPT IN THE NEGOTIATION OF THE ‘SIX-PACK’, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE ‘SIX-PACK’ FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

Background information is necessary for answering this and the subsequent questions of this section: For better “handling of EU membership”, a law on constitutional level had been adopted in 1998<sup>45</sup> (BGBl I 61/1998). Art. 1 (1) stipulates that institutions on federal, provincial and municipal level were entitled to conclude a consultation mechanism and a stability pact among each other. Art. 1 (3) of above-quoted law stipulates that the stability pact regulates the obligations of the territorial entities regarding the compliance with the criteria set out in (then) Art. 104c TEC by the public Austrian budgets, especially with regard to the rules of secondary law on budgetary discipline; the pact, which implements the economic pillar of the EMU, has to create a rule for the distribution of burdens among the federal, the provincial and the municipal level. The pact is an agreement concluded between the three levels of government and then, on each level, it is implemented (as federal law, as provincial constitutional law, as municipal law). Without getting too much in depth here, Art. 1(3) of that law has to be interpreted in a way that it allows implementation of EU secondary law without constitutional amendment, even when it completes or amends Austrian budgetary law and even if that amounts to a constitutional amendment.<sup>46</sup> The disputed Austrian principle of “double obligation” of the legislator (according to which the application/implementation of EU law has to be equally conform with EU-law and with the Austrian constitution – that needs to be changed in case of conflict”)<sup>47</sup> does not play a role in

<sup>45</sup> BGBl I 61/1998, at [http://www.ris.bka.gv.at/Dokumente/BgblPdf/1998\\_61\\_1/1998\\_61\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/1998_61_1/1998_61_1.pdf)

<sup>46</sup> Griller, S., Zur verfassungsrechtlichen Bedeutung des Fiskalpaktes, *Journal für Rechtspolitik*, 20, 177-194 (2012), p. 184

<sup>47</sup> Öhlinger, *Verfassungsrecht*, 2009, p. 109-111.

the case of that specific law (BGBl I 61/1998).<sup>48</sup> Therefore, the implementation of the Six-Pack does not need any formal constitutional amendment even if its content amends the constitution. This is relevant for the discussion of the ratification of the Fiscal Compact that will be discussed in question IX.3.

Consequently, whereas the Austrian Stability Pact 2011<sup>49</sup> already referred to the crisis and measures necessary for budgetary stability, the Austrian Stability Pact 2012<sup>50</sup> directly refers to the Six-Pack (and also to the Two-Pack). Nota bene that elements of the Six-Pack, the Two-Pack and the Fiscal Compact had already been implemented through amendments of the federal budgetary law through which a deficit ceiling based on the German model had been introduced<sup>51</sup> and through a law on upper limits of federal guaranties.<sup>52</sup> The Austrian Stability Pact 2012 was approved two days after the Fiscal Compact (that will be discussed in section II.6) had been approved by the National Council. The discussion in the National Council relates to the preceding discussion on the Fiscal Compact and simultaneously to the amendment of the “*Finanzausgleichsgesetz*”, the law on “burden-sharing in financial matters” between the single territorial entities that needs to be amended for the new Austrian Stability Pact.<sup>53</sup> In a nutshell, at least from an observer’s perspective, the discussion on the Six-Pack was more centred on the distribution of the burden between the different territorial entities than on its actual content.

In the negotiations, the governing parties SPÖ and ÖVP favour the Austrian Stability Pact. The entire debate is limited to the issues of the reasonability of the deficit ceiling and on the question how the single territorial entities should comply with it – and share the burden. The Greens who were already opposing the Fiscal Compact now oppose the amendment of the burden-sharing law and are against the approval of the Austrian Stability Pact because they consider a debt limit for all territorial entities, especially municipalities, as contra-productive.

In sum, however, the National Council authorizes the government to conclude the Austrian Stability Pact 2012 with the provinces and the municipalities. The SPÖ and ÖVP vote for, the Greens, the FPÖ and the BZÖ against the approval.<sup>54</sup> The amendment of the burden-sharing law is also approved.<sup>55</sup>

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<sup>48</sup> Supra note 45.

<sup>49</sup> Details on the Austrian Stability Pact 2011 and all the necessary materials can be found and downloaded here: [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01206/](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01206/)

<sup>50</sup> Details on the Austrian Stability Pact 2012 and all the necessary materials can be found and downloaded here: [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01792/](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01792/)

<sup>51</sup> “Deficit ceiling” introduced on December 29, 2011, BGBl I 150/2011, [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_I\\_150/BGBLA\\_2011\\_I\\_150.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_150/BGBLA_2011_I_150.pdf)

<sup>52</sup> Upper limit on federal guarantees from December 29, 2011, BGBl I 149/2011, [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_I\\_149/BGBLA\\_2011\\_I\\_149.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_149/BGBLA_2011_I_149.pdf)

<sup>53</sup> Stenographic Protocol, Session No. 167 of the National Council, XXIV Legislative Period, pp. 120-151, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00167/fname\\_276574.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00167/fname_276574.pdf)

<sup>54</sup> Vote on “*Finanzausgleichsgesetz*” amendment, Stenographic Prot. 167 (*cit. supra note 39*), p. 151.

<sup>55</sup> Vote on approval of Austrian Stability Pact 2012, Stenographic Prot. 167 (*cit. supra note 39*), 151.

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## **DIRECTIVE 2011/85/EU**

[Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States](#)

### **IMPLEMENTATION**

VII.2

WHAT MEASURES ARE BEING TAKEN TO IMPLEMENT DIRECTIVE 2011/85/EU ON REQUIREMENTS FOR BUDGETARY FRAMEWORKS (REQUIRED BEFORE 31 DECEMBER 2013, ARTICLE 15 DIRECTIVE 2011/85/EU)?

The directive was implemented through the Austrian Stability Pact 2012 explained in question VII.1, particularly its Art. 12, but also Art. 17 regarding information requirements.<sup>56</sup> Overall, the Stability Pact is aimed at budget deficit avoidance and should lead Austria to “zero deficit” in 2016.<sup>57</sup>

### **IMPLEMENTATION DIFFICULTIES**

VII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE IMPLEMENTATION PROCESS, IN PARTICULAR IN RELATION TO IMPLICATIONS OF THE DIRECTIVE FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Its implementation was discussed in the framework of the Austrian Stability Pact 2012 and the question of burden-sharing explained in question VII.1.

### **MACROECONOMIC AND BUDGETARY FORECASTS**

VII.4

WHAT INSTITUTION WILL BE RESPONSIBLE FOR PRODUCING MACROECONOMIC AND BUDGETARY FORECASTS (ARTICLE 4(5) DIRECTIVE 2011/85/EU)? WHAT INSTITUTION WILL CONDUCT AN UNBIASED AND COMPREHENSIVE EVALUATION OF THESE FORECASTS (ARTICLE 4(6) DIRECTIVE 2011/85/EU)?

The Bundesanstalt Statistik Austria (Federal Austrian Institute for Statistics) is charged with providing the necessary information, data, and decision making basis to comply with all obligations of the Austrian Stability Pact 2012.<sup>58</sup>

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<sup>56</sup> Full text of the Austrian Stability Pact 2012 available at [http://www.parlament.gv.at/PAKT/VHG/XXIV/BNR/BNR\\_00587/fname\\_259966.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/BNR/BNR_00587/fname_259966.pdf)

<sup>57</sup> See European Commission, Interim Progress Report on the implementation of Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, occasional paper 128, February 2013, p. 68.

<sup>58</sup> Explanation of the government given to the National Council on the proposed legislation introducing the Austrian Stability Pact 2012, [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01792/fname\\_254607.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01792/fname_254607.pdf), in particular p. 4.

## FISCAL COUNCIL

### VII.5

DOES AUSTRIA HAVE IN PLACE AN INDEPENDENT FISCAL COUNCIL (ARTICLE 6(1) DIRECTIVE 2011/85/EU: ‘INDEPENDENT BODIES OR BODIES ENDOWED WITH FUNCTIONAL AUTONOMY VIS-À-VIS THE FISCAL AUTHORITIES OF THE MEMBER STATES’)? WHAT ARE ITS MAIN CHARACTERISTICS? DOES AUSTRIA HAVE TO CREATE (OR ADAPT) A FISCAL COUNCIL IN ORDER TO IMPLEMENT DIRECTIVE 2011/85/EU?

The predecessor of the Austrian Fiscal Advisory Council established implementing Directive 2011/85/EU was the state debt committee (“Staatsschuldenausschuss”) that had existed since 1970. The Austrian Fiscal Advisory Council’s statute, tasks and reports can be found (in English) at <http://www.fiskalrat.at/en/>. Its members are not bound by instructions. *Inter alia*, their tasks are assessing the current fiscal situation with an outlook for the future against the backdrop of Austria’s fiscal policy objectives and development trends in the money and capital markets; analysing economic effects of financial operations in connection with the indebtedness of all public authorities on the basis of their research activities; analysing the sustainability and the quality of budgetary policies of all public authorities; providing written recommendations on the fiscal policies of the public authorities in Austria, taking economic conditions into consideration; preparing an annual report on the recommendations made to the Federal Minister of Finance, including the results of studies and their analyses; and tasks according to Article 3 TSCG; Article 6 of Directive 2011/85/EU; and according to Article 5 of Regulation (EU) No 473/2013 (“Two-Pack”); such tasks specifically include providing recommendations on the medium-term budget objectives according to EU Regulation 1466/97; providing recommendations on the adjustment path to reach medium-term budget objectives; monitoring rule compliance under Article 5 of EU Regulation 1466/97 as amended by EU Regulation 1175/2011 in a timely fashion; observing circumstances and submitting recommendations that activate, extend or end corrective measures according to Article 7 Federal Law Gazette I No. 30/2013.

## REGULATION NO 1176/2011 ON THE PREVENTION AND CORRECTION OF MACROECONOMIC IMBALANCES

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1176:EN:NOT>)

## MEIP DIFFICULTIES

### VII.6

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

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The new framework is perceived as stricter because the two Maastricht criteria Austria has always struggled with are debt and deficit. The method EU method of calculating the objectives was not undisputed but overall accepted as part of the new legal framework one had to comply with.

## **REGULATION No 1175/2011 ON STRENGTHENING BUDGETARY SURVEILLANCE POSITIONS**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1466:20111213:EN:PDF>

### **MTO PROCEDURE**

VII.7

WHAT CHANGES TO THE RULES ON THE BUDGETARY PROCESS ARE MADE TO ACCOMMODATE THE AMENDED MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) PROCEDURE?

The budgetary process had been changed in two steps, once already in 2009 and then in 2013. The 2009 version of the budgetary law was already in conformity with the amended MTO procedure (see also question II.2).<sup>59</sup>

### **EUROPEAN SEMESTER**

VII.8

WHAT CHANGES HAVE TO BE MADE TO THE RULES AND PRACTICES ON THE NATIONAL BUDGETARY TIMELINE TO IMPLEMENT THE NEW RULES ON A EUROPEAN SEMESTER FOR ECONOMIC POLICY COORDINATION (SECTION 1-A, ARTICLE 2-A CONSOLIDATED REGULATION 1466/97)?

In compliance with consolidated regulation 1466/97, Austria sends every year a Stability Program together with a national reform program to the commission and the council. The stability program is decided in conformity with the Austrian Stability Pact (and the national budget coordination laid out therein).

### **MTO DIFFICULTIES**

VII.9

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Nothing specific on this issue.

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<sup>59</sup> Austrian Stability Program (Österreichisches Stabilitätsprogramm 2012-2017) in compliance with MTO procedure at [https://www.bmf.gv.at/wirtschaftspolitik/in-oesterreich/StaPro\\_2012-2017.pdf?3vtn20](https://www.bmf.gv.at/wirtschaftspolitik/in-oesterreich/StaPro_2012-2017.pdf?3vtn20), p. 36-37.

## RESPECT MTO

VII.10

HOW IS RESPECT OF THE MEDIUM-TERM BUDGETARY OBJECTIVE INCLUDED IN THE NATIONAL BUDGETARY FRAMEWORK (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)?

There is a federal law on a deficit ceiling plus the Austrian Stability Pact (question VII.1) that stipulate the objective. In a nutshell, the law lays out the framework while the Austrian Stability Pact specifies in particular how the burden is distributed between the different territorial entities.

## CURRENT MTO

VII.11

WHAT IS AUSTRIA CURRENT MEDIUM-TERM BUDGETARY OBJECTIVE (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)? WHEN WILL IT BE REVISED?

In the Austrian Stability Pact of 2012, it was agreed that a structural deficit of 0.45% of the GDP should be achieved by 2017. However, based on Art. 3 (1) b TSCG, the Council suggested upon recommendation of the Commission in May 2013 that Austria should achieve this objective already in 2015. Measures were therefore taken in the planning of the budget for 2014.<sup>60</sup>

## ADOPTION MTO

VII.12

BY WHAT INSTITUTION AND THROUGH WHAT PROCEDURE IS AUSTRIA'S MEDIUM-TERM BUDGETARY OBJECTIVE ADOPTED AND INCORPORATED IN THE STABILITY PROGRAMME (EUROZONE, ARTICLE 3(2)(A) CONSOLIDATED REGULATION 1466/97)?

The MTO is formulated in the Stability Program that is prepared by the government (notably Ministry of Finance) in accordance with internal coordination rules (the Austrian Stability Pact).

## REGULATION NO 1177/2011 ON THE EXCESSIVE DEFICIT PROCEDURE

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF>

## EDP DIFFICULTIES

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<sup>60</sup> Übersicht über die österreichische Haushaltsplanung 2014, Ministry of Finance, at [http://www.parlament.gv.at/PAKT/VHG/XXV/III/III\\_00028/imfname\\_330245.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/III/III_00028/imfname_330245.pdf)

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VII.13

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Nothing specific.

## **REGULATION No 1173/2011 ON EFFECTIVE ENFORCEMENT OF BUDGETARY SURVEILLANCE**

[\(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT>\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT)

### **SANCTIONS**

VII.14

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Nothing specific.

### **GENERAL CHANGES**

VII.15

WHAT FURTHER CHANGES HAVE TO BE MADE TO THE RULES ON THE BUDGETARY PROCESS IN ORDER TO COMPLY WITH THE SIX-PACK RULES?

None that have not been mentioned in the previous questions.

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### **MISCELLANEOUS**

VII.16

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND THE SIX-PACK?

None.<sup>61</sup>

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<sup>61</sup> For the academic debate on the new economic governance and the six-pack, see Fisahn A., *Autoritäre Krisenlösung – der neue Weg der Europäischen Union*, *juridikum* 2011, 445

## VIII ESM TREATY

*The European Stability Mechanism (ESM) Treaty was signed on July 11 2011. It was later renegotiated and a new ESM Treaty was signed on February 2, 2012. The Treaty provides a permanent emergency fund that is intended to succeed the temporary emergency funds. It entered into force on September 27, 2012 for 16 contracting parties (Estonia completed ratification on October 3). The 17 contracting parties are the member states of the Eurozone, but the ESM Treaty is concluded outside EU law.*

*(<http://www.european-council.europa.eu/eurozone-governance/esm-treaty-signature?lang=it> and <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf>)*

### NEGOTIATION

#### VIII.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE NEGOTIATION OF THE ESM TREATY, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

Overall, the main position of the SPÖ-ÖVP government under SPÖ-Chancellor Faymann (see also question V.1 and question I.1) was similar to that of the German government, namely that there is no alternative to a permanent stabilization mechanism, that a stable EMU is essential for the Austrian (strongly export-oriented) economy and that default of a member state of the currency union was too risky and therefore not an option. The at that time Minister of Finance (Maria Fekter, ÖVP) said in parliament that whoever votes against the ESM is voting in favor of speculators. She further made clear that the fiscal pact would be there to tackle debt issues and that the Austrian parliament would get the strongest participation rights in the ESM's decision making procedure of all member states. The ESM would show how to handle crises and would avoid burying heads in the sand at moments of crisis. She admitted that it is not the perfect solution but the only viable solution at present.<sup>62</sup> A member of the SPÖ acknowledges that budgetary sovereignty might be partially at stake, but that all the commitments made have limits, which is why budgetary sovereignty is not lost. From the opposition parties, the Greens were siding with the government whereas the far-right parties FPÖ and BZÖ were strongly opposing it with arguments such as that Austrian taxpayer money was being wasted to bailout banks and speculators and that Austria had not signed up for a 'transfer-union'. The leader of the FPÖ even said in parliament that the fact that SPÖ, ÖVP and Greens agreed on the ESM amounted to a 'coup d'État'. The BZÖ tried to initiate a referendum about the ESM but failed to reach the necessary majorities. However, the question of why a referendum on the TESM was not held was also

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<sup>62</sup> Stenographic Protocol No. 164 (cit. supra note 32), Finance Minister Fekter's statements on pp. 117-119.

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debated in parliament.<sup>63</sup>

Several debates took place in the National Council and its committees prior to the signature of the first treaty, in May and June 2011, and then in June and July 2012, prior to the ratification of the final version. The Constitutional Committee and the Budgetary Committee were both charged to write reports on the proposed legislation that included the treaty and several accompanying laws, including a constitutional amendment that would ensure the National Council's participation in the ESM's decision-making process. Both committees recommended adopting the treaty and the accompanying legislation. The Constitutional Committee only requested that given the extensive participation rights in the ESM's decision-making given to the parliament through the constitutional amendment, the government would have to come up with a legislative proposition that would tackle the possible problem of insider-trading that would result from the ESM's secondary market operations being discussed in parliament.<sup>64</sup>

A public expert hearing was held upon recommendation of the Constitutional Committee at the plenary meeting of the National Council on June 28, 2012<sup>65</sup> consisting mostly of university professors and professionals from the (central) banking sector. Despite the fact that several experts were skeptical about the ESM's actual capacity to tackle the problems of the monetary union, none of the experts claimed that the ESM Treaty could be unconstitutional. Several of them actually pointed out once again that a small country like Austria with an open market economy and strong export-orientation needs a European solution to the crisis and cannot survive alone in a globalized world.<sup>66</sup> The Greens were maybe slightly more skeptical about the ESM than the governing parties, but in the end they agreed to it mainly because of the strong position the parliament got in the decision-making process of the ESM through the constitutional amendment.

After the Constitutional Committee's final reports on the TESM<sup>67</sup> and on the accompanying laws (in particular the constitutional amendment that should ensure parliamentary participation in the ESM's decision making, see question VIII.6)<sup>68</sup> on July 2, 2012, and after

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<sup>63</sup> Idem, p. 107.

<sup>64</sup> "Entschließung" (=Decision) of the Constitutional Committee in addition to its Final Report No. 1878 (see below note 51) from July 2, 2012, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01878/fname\\_258139.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01878/fname_258139.pdf).

<sup>65</sup> Summary of the Expert Hearing in the plenary meeting of the National Council from June 28, 2012 in Press Release at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0558/](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0558/).

<sup>66</sup> Idem.

<sup>67</sup> Final Report of the Constitutional Committee No. 1880 on the government's proposition no. 1731 (TESM) from July 2, 2012 available at: [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01881/fname\\_258130.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01881/fname_258130.pdf);

<sup>68</sup> accompanying explanations of the proposition are available at [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01731/fname\\_247805.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01731/fname_247805.pdf)

<sup>o</sup> Final Reports of the Constitutional Committee No. 1878 on several deputies' propositions no. 1985/A regarding the constitutional amendment and the amendment of the payment balance stabilization statute from July 2, 2012, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01878/fname\\_258137.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01878/fname_258137.pdf) and No. 1879 regarding on several deputies' proposition no. 1986/A regarding the amendment of the federal parliamentary law from July 2, 2012, at d [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01879/fname\\_258135.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01879/fname_258135.pdf).

the Budget Committees report on the necessary amendments of budgetary laws<sup>69</sup>, all issued on July 2, 2012, the TESM and the accompanying laws were approved on July 4, 2012 in the plenary meeting of the National Council after a fierce debate in which none of the parties, especially not the FPÖ and the BZÖ, changed their original positions.<sup>70</sup> The Federal Council gave its approval on July 6, 2012.

## RATIFICATION

### VIII.2

HOW HAS THE ESM TREATY BEEN RATIFIED IN AUSTRIA AND ON WHAT LEGAL BASIS/ARGUMENTATION?

For the overall treaty ratification process, please see question V.2.

As mentioned in question VIII.1, the TESM was first discussed by the Constitutional Committee of the National Council and then approved by the National Council by a majority of 126 against 53 votes on July 4, 2012. The Federal Council gave its approval on July 6, 2012 by a majority vote of 45 against 10.<sup>71</sup> Although it was considered as law amending and law-completing, it was not considered to amend the treaty foundations of the European Union and it was not considered to interfere with the constitution. However, several laws necessary for its implementation accompanied the treaty.<sup>72</sup> In particular, several paragraphs were added to the constitution (Art. 50a -50d B-VG) in order to ensure the role of the Austrian parliament in the ESM decision-making processes. This will be elaborated in detail under question VIII.6. Here, it is just important to note that the approval of the treaty was based on Art. 50 (1) 1 B-VG and did not therefore need higher majorities, whereas the approval of the constitutional amendment accompanying the treaty did (124 against 51 votes).

The Federal President signed the treaty on July 17, 2012 and therewith ratified it.<sup>73</sup> An important difference in comparison to Germany is the weight of the Federal President's signature in the ratification process. One can argue that the German president's constitutional review competences go further than those of the Austrian president, the extent of the president's review competence is disputed in Germany and sometimes even in Austria. The important difference is, however, that whereas the German president can withhold his signature and ask the constitutional court to review the constitutionality of the statute/treaty

<sup>69</sup> See question VIII.6 for detail.

<sup>70</sup> Stenographic Protocol No. 164 (cit. supra note 32)

<sup>71</sup> Stenographic Protocol No. 164 (cit. supra note 32) pp. 161-162.

<sup>72</sup> Constitutional Amendment and Payment Balance Stabilization Law amendment 2012 (known as "ESM-Begleitnovelle", BGBl I 65/2012, at [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_I\\_65/BGBLA\\_2012\\_I\\_65.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_I_65/BGBLA_2012_I_65.pdf); amendment of the federal parliamentary law known as "Änderung des Geschäftsordnungsgesetzes 1975, BGBl I No. 66/2012, at: [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_I\\_66/BGBLA\\_2012\\_I\\_66.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_I_66/BGBLA_2012_I_66.pdf).

<sup>73</sup> Federal President's Office communication from July 17, 2012, at: <http://www.bundespraesident.at/newsdetail/artikel/bundespraesident-unterzeichnet-fiskalpakt-und-esm-vertrag-1/>

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in question first, an application to verify the constitutionality of a statute/treaty can only be brought in front of the court once the president has signed it. Therefore, the case at the Austrian Constitutional Court was brought only after ratification, on October 22, 2012 (for details see question VIII.4).

The treaty was counter-signed by the Federal Chancellor and deposited at the European Council on July 30, 2012.<sup>74</sup> It was then been further published in the Federal Law Gazette on September 28, 2012 which states that it had gotten into force on September 27, 2012 (according to Art. 48 TESM).<sup>75</sup>

## RATIFICATION DIFFICULTIES

### VIII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER DURING THE RATIFICATION OF THE ESM TREATY?

The relevant publication in the Federal Law Gazette <sup>76</sup> further contains the Declaration of September 27, 2012 on the interpretation of the TESM signed by representatives of the treaty parties in Brussels.<sup>77</sup> The declaration was made in reaction to the German Constitutional Court's BVerfG, 2 BvR 1390/12 of September 12, 2012<sup>78</sup>. The German Constitutional Court had raised concerns that in several constellations, the upper limit of each member states' financial commitment could be exceeded without each member state's consent and further, that professional secrecy and immunity provisions would hinder members of the ESM's board of governors to properly inform their parliaments. The declaration therefore specifies that the relevant provisions of the TESM should be interpreted in a way that the upper limit can in no case be exceeded without each member state's representatives' consent and that the TESM does not hinder the information of national parliaments.

The legal status of this declaration has been, however, subject to controversy in Austria. The Austrian Constitutional Court specified in its decision (see question VIII.4) that the declaration does not amount to a 'reservation', but that it is an interpretative explanation. It is because of this reason that the Federal President did not consider it necessary to ratify it and that it was not necessary to submit it for approval at the National Council. Given the uncertain legal status of the declaration, a major question raised in the parliament even after the Austrian Constitutional Court's decision from March 16, 2013, was why Austria had not made – like Germany – a proper reservation under public international law.

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<sup>74</sup> Indeed, all legislative acts are to be signed by the President and counter-signed by the Chancellor as a formal requirement for a law being enacted.

<sup>75</sup> ESM Treaty and Declaration from September 27, 2012 as published in BGBl III 138/2012, at: [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_III\\_138/BGBLA\\_2012\\_III\\_138.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_III_138/BGBLA_2012_III_138.pdf)

<sup>76</sup> See note above.

<sup>77</sup> Declaration from September 27, 2012 (original version), at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/132615.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/132615.pdf).

<sup>78</sup> Bundesverfassungsgericht BVerfG, 2 BvR 1390/12 vom 12.9.2012, at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html); a detailed summary is available here: <http://europeanlawblog.eu/?p=1057>.

## CASE LAW

### VIII.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE ESM TREATY?

The Austrian Constitutional Court (Österreichischer Verfassungsgerichtshof) rendered its judgement on the ESM on March 16, 2013. It rejected all applicant's arguments invoking (in eventuality partial) unconstitutionality and/or illegality of the TESSM and the Declaration from September 27, 2012. A detailed analysis of the case can be found in Annex I.1.

## CAPITAL PAYMENT

### VIII.5

WHAT IS THE ROLE OF PARLIAMENT IN THE PAYMENT OF THE (FIRST INSTALMENT OF) PAID-IN CAPITAL REQUIRED BY THE ESM TREATY (ARTICLE 36 ESM TREATY)? WHAT RELEVANT DEBATES HAVE ARISEN IN RELATION TO THIS PAYMENT?

According to the general budgetary process (see question II.1 and II.2), for the first instalment (and any other instalment) the Federal Financial Law (*BundesfinanzG*) 2012, the Federal Financial Framework Laws (*BundesfinanzrahmenG*) 2012-2015 and 2013-2016 and the Federal Budget Law needed to be amended. The budgetary committee of the National Council recommended the adoption of the amendments including the modifications from the original government proposition that were suggested on the same day of the discussion. The meeting of the budgetary committee took place directly following the meeting of the constitutional committee regarding (regarding the approval of the TESSM and the accompanying laws) on July 2, 2012 (see question VIII.1). No specific discussion about the first instalment takes place. The debate continues to be general about the ESM.<sup>79</sup> However, in the general TESSM-discussions in the National Council referred to in question VIII.1 and VIII.2, several speakers repeat how the capital need to be paid in. Austria's share in the ESM's paid-in capital is 2.78%, the amount to be paid-in is EUR 2.23 billion, to be paid in five tranches of à 20% between 2012 and 2014. Austria paid the first tranche of 890,688 million on October 12, 2012.<sup>80</sup> Art. 41 TESSM on *how* the capital needs to be paid and that the first instalment needs to be paid at the latest 15 days after the entry into force of the treaty is not mentioned as specific problem anywhere.

## APPLICATION & PARLIAMENT

### VIII.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE ESM TREATY, FOR EXAMPLE WITH REGARD TO DECISIONS TO GRANT FINANCIAL ASSISTANCE AND THE DISBURSEMENT OF

<sup>79</sup> Press Release about the discussion in the Budget Committee of the National Council from July 2, 2012 at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0576/index.shtml](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0576/index.shtml), Report of the Budget Committee at [http://www.parlament.gv.at/PAKT/VHG/XXIV/II\\_01883/fname\\_258140.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/II_01883/fname_258140.pdf).

<sup>80</sup> Press release of the Finance Minister's report on the Euro Stabilization Measures in the 4<sup>th</sup> quarter of 2012, at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2013/PK0065/index.shtml](http://www.parlament.gv.at/PAKT/PR/JAHR_2013/PK0065/index.shtml)

## AUSTRIA

TRANCHES, WHICH BOTH REQUIRE UNANIMOUS ADOPTION BY THE BOARD OF GOVERNORS COMPOSED OF THE NATIONAL FINANCE MINISTERS?

As mentioned in questions VIII.1 and VIII.2, the approval of the TESM came with a constitutional amendment that is aimed at establishing a role for the parliament in the decision-making process of the TESM. Basically, four new articles were added to the constitution.<sup>81</sup>The (partial) translation of the articles is the following:

Art. 50a B-VG: The National Council contributes to the subject matters of the European Stability Mechanism.

Art. 50b B-VG: The Austrian representative in the European Stability Mechanism may only agree to or abstain from

1. a proposal for a decision to principally grant a Member State stability aid,
2. a modification of the authorized paid-in capital and an adaption of the maximum lending capacity of the European Stability Mechanism, as well as calls of authorized but not paid-in capital and
3. a modification of the lending instruments,

if the National Council has enabled him to do so on the basis of a proposal of the Federal Government. In cases of special urgency, the responsible Federal Minister brings this proposal in front of the National Council. Without enablement of the National Council the Austrian member has to refuse the proposal of such a decision.

Art. 50c B-VG:

- The responsible Federal Minister has to immediately inform the National Council about the subject matters of the European Stability Mechanism according to the provisions of the federal parliamentary law. In the federal parliamentary law, rights for the National Council to make statements shall be foreseen.
- When the National Council has made a statement on subject matters of the European Stability Mechanism in time, the Austrian representative has to take it into account in negotiations and in votings. The responsible Minister has to report to the National Council immediately about a voting and has to eventually give the reasons why it did not take the National Council's opinion into account.
- The responsible Minister reports regularly to the National Council about the measures taken in the framework of the European Stability Mechanism.

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<sup>81</sup> Bundes-Verfassungsgesetz (Federal Constitutional Statute = the constitution), available in its current version at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138>; available in English [http://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1930\\_1/ERV\\_1930\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf) (the English version is from 2010 and does not contain the latest amendments yet). The added articles are available in German at: [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_I\\_65/BGBLA\\_2012\\_I\\_65.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_I_65/BGBLA_2012_I_65.pdf)

Art. 50d B-VG:

The details about Art. 50 (b) and 50 (c) par. (2) and (3) are determined by the federal parliamentary law [see the answers to questions VIII.1 and VIII.2].<sup>82</sup>

The amendment of the federal parliamentary law (*Geschäftsordnungsgesetz des Nationalrats GOGNR*) leads to the introduction of two permanent subcommittees to the budget committee (§ 32f GOGNR). The first subcommittee is charged with the cooperation in secondary market operations of the ESM and the second subcommittee is charged with all other subject matters of the ESM and all the pre-consultations of propositions based on § 74d (1) GOGNR (which specifies the National Council's powers according to Art. 50b B-VG). In each subcommittees, at least one member of the parties represented in the main committee has to be present. Documentation of the activities of the second<sup>83</sup> subcommittee and its reports are available online.

Nota bene that the creation of sub-committees of the budget committee was precisely the issue at stake in the German Constitutional Court Decision BVerfG, 2BvE 8/11 from February 28, 2012 regarding an injunction. The German Constitutional Court had argued then that the delegation of the then-EFSF-related decisions for the sake of efficiency violated the principle of democracy which is why EFSF-related decisions had to be made by the parliament.

## APPLICATION DIFFICULTIES

### VIII.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE APPLICATION OF THE ESM TREATY?

For the procedure, see question VIII.6.

- Neither the TESM treaty, nor the accompanying laws (amendment of the constitution and amendment of the Payment Balance Stabilization Law) nor the amendment of the Federal Parliamentary Law were yet in force when the measures for Spain were decided. The accompanying laws and the amendment of the Federal Parliamentary Law came into force on July 26, 2012, however, while the package for Spain was decided on July 20, 2012.<sup>84</sup>

<sup>82</sup> Amendment of Federal Parliamentary Law (Gesetz über die Geschäftsordnung des Nationalrats), BGBl I 66/2012, at [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_I\\_66/BGBLA\\_2012\\_I\\_66.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_I_66/BGBLA_2012_I_66.pdf).

<sup>83</sup> List of reports of the subcommittee in overall ESM Matters at [http://www.parlament.gv.at/PAKT/VHG/XXIV/SA-ESM/SA-ESM\\_00001\\_00316/index.shtml#tab-Berichte](http://www.parlament.gv.at/PAKT/VHG/XXIV/SA-ESM/SA-ESM_00001_00316/index.shtml#tab-Berichte)

<sup>84</sup> European Commission, Summary on Stabilization Measures for Spain, at [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/spain/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/spain/index_en.htm).

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Cyprus: The subcommittee recommended<sup>85</sup> that the National Council enabled the Austrian representative at the ESM according to Art. 50b Z 1 B-VG in connection with § 74d Abs. 1 Z 1 GOG-NR to approve the Cyprus-measures<sup>86</sup>. The interesting thing is that the Greens, that had always voted for ESM-related measures, voted against. Still, since only a simple majority is required, the SPÖ/ÖVP majority was sufficient.

## IMPLEMENTATION

VIII.8

HAVE THERE BEEN ANY RELEVANT CHANGES IN NATIONAL LEGISLATION IN ORDER TO IMPLEMENT OR TO COMPLY WITH REQUIREMENTS SET BY THE ESM-TREATY?

See question VIII.1, VIII.2 and VIII.5.

## MISCELLANEOUS

VIII.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND THE ESM TREATY?

No other relevant information.

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<sup>85</sup> Report of the Pemanent Subcommittee in ESM subject matters from April 16, 2013, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/II\\_02272/fname\\_300280.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/II_02272/fname_300280.pdf)

<sup>86</sup> Discussion, vote and enablement of the Austrian Representative during the Plenary Session of the National Council from April 22, 2013, on pp. 22-89 in Stenographic Protocol of the National Council's session no. 198, XXIV Legislative Period, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00198/fname\\_308804.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00198/fname_308804.pdf)

## IX FISCAL COMPACT

*The Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was signed on March 2, 2012. Negotiations on this Treaty began between 26 member states of the EU (all but the UK) after the 8/9 December 2011 European Council. 25 contracting parties eventually decided to sign the Treaty (not the Czech Republic). After ratification by the twelfth Eurozone member state (Finland) in December 2012, the Fiscal Compact entered into force on 1 January 2013. For several contracting parties the ratification is still on-going.*

*(<http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>)*

### NEGOTIATION

#### IX.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER IN THE NEGOTIATION OF THE FISCAL COMPACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

The governing parties SPÖ and ÖVP were in favour of approving the ratification of the treaty whereas the opposition parties FPÖ and BZÖ and – in contrast to the ESM position – also the Greens opposed it.

The Federal president authorized the negotiation on January 12, 2012 while the National and the Federal Council were informed about the initiation of the negotiation. The Ministry for European and International Affairs has regularly reported about the negotiations to both chambers.

Prior to its ratification, the discussion in Austria was centred around a (higher) deficit ceiling introduced in Austria prior to the ratification of the TSCG – this is explained in question VII.1. The debate on the deficit ceiling was obviously triggered by the TSCG negotiations.

The ÖVP and SPÖ position on the Fiscal Compact was that it complemented of the ESM, that economic coordination was necessary if on the other hand bailout measures were taken. There was no monetary union without economic coordination and for that, a common framework was necessary. The Green position was that the ESM did not need the Fiscal Compact to go with it, that it was economically counter-productive and that it would lead to unemployment. Additionally, the Greens argued that the Fiscal Compact would have to be approved with a constitutional majority. The FPÖ and BZÖ stuck to usual jargon on loss of sovereignty and the call for a referendum.

### RATIFICATION

#### IX.2

HOW HAS THE FISCAL COMPACT BEEN RATIFIED IN AUSTRIA AND ON WHAT LEGAL BASIS/ARGUMENTATION?

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Treaties leading to the amendment or completion of laws need approval by the National Council, see question V.2.

After the positive report from the Constitutional Committee from July 2, 2012<sup>87</sup>, the treaty was approved at the plenary session of the National Council by a simple majority of 103 versus 60 votes.<sup>88</sup> The Federal Council approved by a 42 versus 13 vote.

The Federal President signed the treaty on July 17, 2012 and therewith ratified it.<sup>89</sup> 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.<sup>90</sup>

## RATIFICATION DIFFICULTIES

### IX.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID AUSTRIA ENCOUNTER DURING THE RATIFICATION OF THE FISCAL COMPACT?

The main issue criticized about the ratification of the TSCG is that it was approved based on Art. 50 (1) 1 B-VG only. The opposition parties and several experts hold that it is in many regards constitution-amending and that it should therefore have been approved by higher majorities.

The debate in the parliament took place right after the debate on the ratification of the ESM (see question VIII.1). The expert hearing in the Constitutional Committee from June 28, 2012 was divided in two parts, the first on the ESM and the second on the Fiscal Compact. Experts stressed that growth incentives need to go hand in hand with budgetary discipline. Griller, professor of constitutional law and the expert who is to a large extent the author of the application regarding the constitutionality of the TSCG brought to the Austrian Constitutional court, pointed out that the TSCG could only be approved by a constitutional majority (see question IX.3 for details). His main point was that the TSCG is constitution-amending as far as it goes beyond the SGP and Six-Pack obligations (see also question VII.1).<sup>91</sup> The head of the constitutional service of the Federal Chancellor's office sustained, however, that a simple majority is sufficient. Griller<sup>92</sup> held that the Fiscal Compact was in as far constitution amending, as it went beyond the Six-Pack (question VII.1). His three major points (among others) are the following: First, he argues that the rules on the deficit of Art. 2a of regulation 1466/97 as amended by Six-Pack regulation 1175/2011 differs from Art. 3

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<sup>87</sup> Report of the Constitutional Committee of the National Council No. 1881 on the TSCG, from July 2, 2012, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01881/fname\\_258130.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01881/fname_258130.pdf).

<sup>88</sup> Stenographic Protocol No. 164, (cit supra note 32), p. 198.

<sup>89</sup> Federal President's communication (cit. supra note 58).

<sup>90</sup> 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](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_III_17/BGBLA_2013_III_17.pdf).

<sup>91</sup> Press release on expert hearing on Fiscal Compact from June 28, 2012, [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0564/index.shtml](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0564/index.shtml).

<sup>92</sup> Griller, S., Zur verfassungsrechtlichen Bedeutung des Fiskalpaktes, Journal für Rechtspolitik, 177 (2012)

(1) TSCG when it comes to the upper limit of the structural deficit: The regulation allows 1% whereas the TSCG only 0.5%. Therefore, the deficit ceiling of its Art. 3 (2) compromises budgetary sovereignty and would have needed a constitutional amendment. Second, Art. 7 TSCG (the reversed majority issue) is problematic because it transfers a sovereign right (Art. 9 (2) B-VG) to the Commission. Even if one does not share that opinion, Griller holds that the fact that the Austrian member in the Council has to vote with the commission amounts to the Austrian member being subject to superior instructions – what he is not supposed to be as highest member of the administration (Art. 20 (1) in connection with Art. 69 (1) B-VG), amounts to a constitutional amendment. Third, he argues that the compatibility clause in Art. 2 (2) TSCG is problematic because it would force the Austrian Minister to evaluate the compatibility of the Commission’s recommendation with EU law – a competence that is new. In order to introduce such a competence, a constitutional amendment would be necessary.

Potacs and Mayer<sup>93</sup> articulate counter-arguments to Griller’s theses. First, they argue that the difference between the secondary law provision and the TSCG provision on the upper limit for a structural deficit is so little, that one can conclude that the TSCG provision (Art. 3 (2)) is covered by EU law and that therefore no constitutional amendment is necessary, because of direct effect. They read it as “specifying” Art. 2a of regulation 1466/77. Second, regarding Art. 7 TSCG, they say that there is no transfer of a sovereign right taking place, Council members merely agree to self-bind themselves. Third, the authors also do not see a constitutionality problem Art. 2 (2) TSCG. In their opinion, this is nothing new for members of the administration because they always have to evaluate the compatibility of laws with EU law – because of the latter’s primacy. They conclude that the TSCG does not contain any constitution-amending or constitution-completing provision, which is why its approval by simple majority (according to Art. 50 (1) 1 B-VG) was legitimate.

The constitutional court decided on this case on October 3, 2013, and will be discussed in Annex I.2.

## BALANCED BUDGET RULE

### IX.4

ARTICLE 3(2) FISCAL COMPACT PRESCRIBES THAT THE BALANCED BUDGET RULES SHALL TAKE EFFECT IN NATIONAL LAW THROUGH “PROVISIONS OF BINDING FORCE AND PERMANENT CHARACTER, PREFERABLY CONSTITUTIONAL, OR OTHERWISE GUARANTEED TO BE FULLY RESPECTED AND ADHERED TO THROUGHOUT THE NATIONAL BUDGETARY PROCESSES.” HOW IS THE BALANCED BUDGET RULE (INTENDED TO BE) IMPLEMENTED IN AUSTRIA? WILL THERE BE AN AMENDMENT OF THE CONSTITUTION? IF NOT, DESCRIBE THE RELATION BETWEEN THE LAW IMPLEMENTING THE BALANCED BUDGET RULE AND THE CONSTITUTION. IF THE CONSTITUTION ALREADY CONTAINED A BALANCED BUDGET RULE, DESCRIBE THE POSSIBLE CHANGES MADE/REQUIRED, IF ANY.

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<sup>93</sup> Potacs, M., Mayer, C., Fiskalpakt verfassungswidrig?, Journal für Rechtspolitik, 140 (2013)

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A balanced budget rule had already existed prior to the signature of the Fiscal Compact. It had been introduced on December 29, 2011 and commits Austria on the federal level to a maximum structural deficit of 0.35% of the GDP with exceptions foreseen for extraordinary fluctuation of business cycles and natural catastrophes.<sup>94</sup> Further, agreements with the provinces and the municipalities have to be made so that they also comply with the limit.<sup>95</sup> It was introduced as simple law by simple majorities because it did not get enough votes (2/3) to pass as law in constitutional rank.<sup>96</sup> The debate whether this was sufficient to comply with Art. 3 (2) TSCG continued and will be discussed in question IX.5.

### **DEBATE BALANCED BUDGET RULE**

#### IX.5

DESCRIBE THE NATIONAL DEBATE ON THE IMPLEMENTATION OF THE FISCAL COMPACT/BALANCED BUDGET RULE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

The debate about the deficit ceiling was rather intense. The governing parties SPÖ and ÖVP wanted the law introducing such a limit (see question IX.4) to pass in constitutional rank, with a 2/3 majority. In the plenary session of the National Council, it did not get the necessary majority, which is why it was sent back to the Constitutional Committee and then passed as simple law in the plenary.<sup>97</sup>

The governing parties favoured the debt ceiling for several reasons. The biggest reason was that when it was negotiated, Austria was afraid of losing the triple-A rating for its government bonds. The introduction of the debt ceiling, so they thought, would calm down the markets. The opposition parties, in particular the Greens, said that this was mere rhetoric.<sup>98</sup> The Greens point out that the debt ceiling is unnecessary because the Six-Pack already foresees a rather tough deficit reduction. A debt ceiling would be an excuse for the government to push through unpopular reforms. The FPÖ and BZÖ oppose the debt ceiling because of democracy issues and accuse the government of not having any other solutions to avoid the threatening downgrading.

Since Austria was downgraded by Standard and Poor's on January 15, 2012, the deficit

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<sup>94</sup> "Debt ceiling" introduced on December 29, 2011, BGBl 150/2011, at [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_I\\_150/BGBLA\\_2011\\_I\\_150.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_150/BGBLA_2011_I_150.pdf); Upper limit on federal guarantees from December 29, 2011, BGBl 149/2011, at [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2011\\_I\\_149/BGBLA\\_2011\\_I\\_149.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_149/BGBLA_2011_I_149.pdf)

<sup>95</sup> Press release on debt ceiling debate in the National Council from December 7, 2012, at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2011/PK1204/](http://www.parlament.gv.at/PAKT/PR/JAHR_2011/PK1204/)

<sup>96</sup> *Cit. supra note 80.*

<sup>97</sup> Stenographic Protocol of the National Council's Session No. 137, XXIV Legislative Period, December 7, 2011, at

[http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00137/fname\\_245620.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00137/fname_245620.pdf).

<sup>98</sup> Stenographic Protocol No. 137, *cit. supra note 82.*

ceiling issue was debated again on January 18, 2012 in the National Council.<sup>99</sup> The debate was requested by the head of the BZÖ.<sup>100</sup> However, none of the parties changed a previous position.

Strong criticism of the Fiscal Compact and in particular the debt ceiling (in its European dimension was articulated in academia though, notably by Oberndorfer<sup>101</sup>. A critique of the Austrian version of the debt ceiling and of the attempt to lift it into constitutional rank provided by Noll.<sup>102</sup>

## RELATIONSHIP BBR AND MTO

### IX.6

WHAT POSITIONS, IF ANY, ARE TAKEN IN THE NATIONAL DEBATE ABOUT THE RELATIONSHIP BETWEEN THE BALANCED BUDGET RULE OF ARTICLE 3(1)(B) FISCAL COMPACT AND THE MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) RULE IN THE SIX-PACK (SECTION 1A, ARTICLE 2A REGULATION 1466/97, ON WHICH SEE ABOVE QUESTION VII.10)?

The question was raised in the context of the constitutionality of an approval of the TSCG by simple majority (see question IX.3).

## CASE LAW

### IX.7

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE FISCAL COMPACT/IMPLEMENTATION OF THE BALANCED BUDGET RULE?

The Austrian Constitutional Court ruled on the constitutionality of the TSCG on October 3, 2013.<sup>103</sup> As opposed to the ESM-judgement that had been rendered upon an application of the FPK-government of the province of Carinthia (see Annex I.2), this application was brought by deputies of all opposition parties. Whereas the ESM was opposed only by the far-right parties FPÖ and BZÖ/FPK, the TSCG was also opposed by the Greens. The major argument of the applicants is that the TSCG is constitution-amending and/or constitution-completing. As a consequence, it would have had to be approved by the 2/3 majorities in the National Council and in the Federal Council.

## NON-EUROZONE AND BINDING FORCE

### IX.8

<sup>99</sup> Stenographic Protocol of the National Council's Session No. 140, XXIV Legislative Period, January 18, 2012, at [http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ\\_00140/fname\\_245459.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00140/fname_245459.pdf); Press Release summarizing the session at [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2012/PK0028/](http://www.parlament.gv.at/PAKT/PR/JAHR_2012/PK0028/).

<sup>100</sup> Stenographic Protocol No. 140 (*cit. supra* note 84), *Aktuelle Stunde* „Genug gezahlt – keine neuen Steuern“; p. 46-70.

<sup>101</sup> Oberndorfer L., *Der Fiskalpakt – Umgehung der „europäischen Verfassung“ und Durchbrechung demokratischer Verfahren?*, *juridikum* 2012, 168;

<sup>102</sup> Noll A., *Schuldenbremse – Vertrottelter Angriff auf die Demokratie*, *juridikum* 2011, 405

<sup>103</sup> Österreichischer Verfassungsgerichtshof, Decision 1/2013-15, 03.10.2013

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HAS AUSTRIA DECIDED TO BE BOUND BY PARTS OF THE FISCAL COMPACT ON THE BASIS OF ARTICLE 14(5) FISCAL COMPACT ALREADY BEFORE JOINING THE EURO AREA, OR HAS THIS OPTION BEEN DEBATED?

Not applicable.

## MISCELLANEOUS

IX.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND THE FISCAL COMPACT?

No other relevant information.

## **X QUESTIONS ABOUT MEMBER STATES RECEIVING FINANCIAL SUPPORT**

*A number of member states have received direct financial assistance through balance of payments support (Hungary, Rumania, Latvia), bilateral agreements/IMF (Greece), the temporary emergency funds/IMF (Ireland, Portugal, Greece), and the permanent emergency fund (Spain and Cyprus).*

*([http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm))*

*Several member states have (also) indirectly benefited through the Securities Markets Programme (SMP) created in May 2010, a bond-buying programme of the European Central Bank that was replaced in September 2012 by the Outright Monetary Transactions (OMT) programme (Greece, Ireland, Portugal, Italy, Spain).*

*(<http://www.ecb.int/mopo/liq/html/index.en.html#portfolios>)*

### **CONTEXT**

X.1

IF RELEVANT, DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT OF THE FORMAL REQUEST OF DIRECT FINANCIAL ASSISTANCE.

Not relevant.

### **NEGOTIATION**

X.2

DESCRIBE THE PUBLIC AND POLITICAL DEBATE DURING THE NEGOTIATIONS ON THE FINANCIAL ASSISTANCE INSTRUMENTS, NOTABLY THE MEMORANDUM OF UNDERSTANDING (MoU) AND FINANCIAL ASSISTANCE FACILITY AGREEMENT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

Not relevant.

### **STATUS INSTRUMENTS**

X.3

WHAT IS THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS IN THE NATIONAL LEGAL ORDER (POLITICAL AGREEMENT, INTERNATIONAL TREATY, ETC.)?

Not relevant.

### **TRANSPOSITION NATIONAL LEGAL ORDER**

X.4

CONSIDERING THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS, WHAT PROCEDURE DOES THE CONSTITUTION PRESCRIBE FOR THEIR ADOPTION/TRANSPOSITION INTO THE NATIONAL

AUSTRIA

LEGAL ORDER?

Not relevant.

## **ROLE PARLIAMENT**

X.5

WHAT IS THE ACTUAL ROLE OF PARLIAMENT WITH REGARD TO THE ADOPTION/TRANSPOSITION INTO THE NATIONAL LEGAL ORDER OF THE FINANCIAL ASSISTANCE INSTRUMENTS?

Not relevant.

## **ADJUSTMENT REQUIREMENTS**

X.6

DESCRIBE THE RELEVANT CONTENT OF THE FINANCIAL ASSISTANCE INSTRUMENTS.

Not relevant.

## **MISSIONS**

X.7

WHAT LEGAL CHANGES, IF ANY, HAD TO BE MADE TO ACCOMMODATE 'TROIKA' REVIEW MISSIONS, POST-PROGRAMME SURVEILLANCE MISSIONS, ETC?

Not relevant.

## **CASE LAW INTERNATIONAL INSTRUMENTS**

X.8

HAVE THERE BEEN DIRECT OR INDIRECT LEGAL CHALLENGES AGAINST THE FINANCIAL ASSISTANCE INSTRUMENTS BEFORE A NATIONAL (CONSTITUTIONAL) COURT?

No.

## **CASE LAW IMPLEMENTING MEASURES**

X.9

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON NATIONAL POLICY MEASURES ADOPTED IN RELATION TO THE MEMORANDA OF UNDERSTANDING?

No.

## **BOND PURCHASES ECB**

X.10

DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT WHERE THE EUROPEAN CENTRAL BANKS STARTED BUYING GOVERNMENT BONDS ON THE SECONDARY MARKET (THROUGH THE SECURITIES MARKETS PROGRAMME, SMP).

Not relevant.

## **CONDITIONALITY BOND PURCHASES ECB**

X.11

WHAT NATIONAL POLICY MEASURES HAVE BEEN REQUESTED BY THE ECB IN EXCHANGE FOR THE ACQUISITION OF GOVERNMENT BONDS ON THE SECONDARY MARKET? HOW HAVE THESE REQUESTS BEEN SUBJECT TO DEBATE IN LIGHT OF THEIR IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Not relevant.

## **MISCELLANEOUS**

X.12

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO AUSTRIA AND FINANCIAL SUPPORT?

No other relevant information.

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)<sup>1</sup>. 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 FPK<sup>2</sup> 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.

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<sup>1</sup> Öhlinger, *Verfassungsrecht*, 2009, p. 480.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

<sup>3</sup> BGBl III 138/2012, at

[http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2012\\_III\\_138/BGBLA\\_2012\\_III\\_138.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_III_138/BGBLA_2012_III_138.pdf)

<sup>4</sup> [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 Gazette<sup>5</sup> (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)

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<sup>5</sup> *Cit. supra* note 102.

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' 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 case<sup>6</sup> 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.<sup>7</sup> 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

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

<sup>7</sup> 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](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 eventu” 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.<sup>8</sup> The to-be constituted

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<sup>8</sup> 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](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.<sup>9</sup>

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 ratification<sup>10</sup> (like in Germany).

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

<sup>10</sup> Die Presse, ESM Vertrag nicht verfassungswidrig, April 3, 2013, at [http://diepresse.com/home/politik/eu/1383770/Urteil\\_ESMVertrag-nicht-verfassungswidrig-](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 2<sup>nd</sup> 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 24<sup>th</sup> 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.<sup>11</sup> 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.<sup>12</sup>

## 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

<sup>11</sup> Federal President's communication (*cit. supra* note 58).

<sup>12</sup> 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](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.

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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.

### **Bibliographic references**

- Ahri A., Der Euro-Rettungsschirm, Juristische Ausbildung und Praxisvorbereitung 2012/2013, 6
- Ahri A., Der ESM und die Verfassung - Erste Gedanken zur Entscheidung des deutschen Bundesverfassungsgerichts vom 12. 9. 2012, Österreichische Juristenzeitung 2012, 95
- Aichinger P., Schuldenbremse gegen „Casino-Kapitalismus“, Die Presse – Rechtspanorama, 2011/09/01
- Aiginger K., Sozialpolitik bei Budgetengpässen und Fiskalpakt, Soziale Sicherheit 2013, 168
- Boric T., Rudolf C., Knaus M., Eine Wirtschaftsregierung für Europa?, eastlex 2011, 161
- Fisahn A., Autoritäre Krisenlösung – der neue Weg der Europäischen Union, juridikum 2011, 445
- Griller, S., Zur verfassungsrechtlichen Bedeutung des Fiskalpaktes, Journal für Rechtspolitik, 2012, 20
- Kumin, „Reverse Majority Voting“ – Auf dem Weg zur Herrschaft der Exekutive über die Legislative? ZÖR 2013, 441.
- Lödl, Matzinger, Zimmer, Europarechtliche Rechtssetzung zur Haushaltsdisziplin der Mitgliedstaaten und deren Umsetzung in Österreich, ÖHW 1-3/2012, 16
- Mayer C., Europäische Solidarität vs. nationale Identität, Österreichische Zeitschrift für Wirtschaftsrecht 2012, 47
- Mayer C., Vertrag Stabilität, Koordinierung und Steuerung in der WWU und Europäischer Stabilitätsmechanismus, JRP 2012, 124
- Moser I., Kann der Gesetzgeber den Euro retten, Festheft als multos annos Univ. Prof. Dr. Georg Wilhelm, ecolex 2012, 569
- Noll A., Schuldenbremse – Vertrottelter Angriff auf die Demokratie, juridikum 2011, 405
- Oberndorfer L., Der Fiskalpakt – Umgehung der „europäischen Verfassung“ und Durchbrechung demokratischer Verfahren?, juridikum 2012, 168.
- Obwexer W., Das ESM Urteil des EuGH, ecolex 2013, 87
- Oberwexer W., Das System der „Europäischen Wirtschaftsregierung“ und die Rechtsnatur ihrer Teile: Sixpack – Euro-Plus-Pakt – Europäisches Semester – Rettungsschirm, ZÖR 2012, 209
- Pilz S., Dittmann H., Economic Governance, Zeitschrift für Rechtsvergleichung 2012/13
- Potacs M., Kapitalmarktregulierung durch Solidaritätsprinzip, Journal für Rechtspolitik 2012, 373
- Potacs, M., Mayer, C., Fiskalpakt verfassungswidrig?, Journal für Rechtspolitik, 2013, 140
- Raffer, Kunibert, Eurokrise und griechische Tragödie verlangen Staateninsolvenz, ecolex 2012, 101

Rautner U., Euroausstieg: Risiko und Verträge, Die Presse – Rechtspanorama, 2012/09/05

Sääf-Norden J., Finanzkrise, Währungs- und Staatsschuldenkrise, Nova & Varia Zeitschrift des Juristenverbundes, 2012, 116

Stark J., Finanz- und Schuldenkrise: Wo stehen wir?, Österreichisches Bankarchiv, 2011, 771