Special Section
The ESM Before the Courts

Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012

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A. Introduction

Sometimes less is more. Hence, it is not necessarily bad news if a judgment on a matter of fundamental public interest does not meet public expectations. And it certainly was not bad news that the judgment of the German Federal Constitutional Court of 12 September 2012 on the European Stability Mechanism (ESM) and the Fiscal Treaty[1] did not meet the exaggerated public expectations that had been fuelled by an unprecedented media-hype.[2]

On 12 September 2012, the world looked at Karlsruhe. A long-serving police officer was quoted with the words never to have seen a comparable presence of international press and television at the Court's gates during his years of service.[3] More than 37,000 citizens had filed constitutional complaints, a figure unequalled in the history of the Court. Against a background of increasing concerns about Europe's capability to solve the sovereign debt crisis, it seemed as if the fate of the Economic and Monetary Union (EMU) essentially depended on the findings of eight judges. When the day of the promulgation had finally come, the red gowns of the federal constitutional judges dominated the front pages of newspapers all over Europe and beyond. What was missing, however, was a top story.

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[1] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1390/12 *et al.*, Sept. 12, 2012 (Ger.) [hereinafter *ESM & Fiscal Treaty* case].

[2] *See* also Daniel Thym, *Des Kaisers neue Kleider*, VERFASSUNGSBLOG (Sept. 16, 2012), http://verfassungsblog.de/des-kaisers-neue-kleider/ and Christian Tomuschat, *Anmerkung zum Urteil des BVerfG vom 12.09.2012*, 22 DEUTSCHES VERWALTUNGSBLATT 1431 (2012).

[3] Thomas Darnstädt, *Das überforderte Gericht*, SPIEGEL ONLINE (Sept. 12, 2012), http://www.spiegel.de/politik/deutschland/kommentar-zum-esm-urteil-das-ueberforderte-gericht-a-855377.html.

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While "the markets" seemed temporarily calmed, those who had waited for a ground-breaking verdict to be delivered must have been either disappointed or slightly astonished by the decision's 319 paragraphs, 248 of which were already available in a preliminary English translation provided by the Court.[4]

Certainly, the overall legal result was not unforeseen. Amongst scholars and professional observers, it was a widely predicted scenario that the Second Senate would deliver a "conditional yes"—that is to say, a decision permitting the ratification of the challenged reform instruments in general, but demanding certain additional measures to be undertaken in order to meet constitutional standards.[5] However, the decision of 12 September 2012 stands in sharp contrast to the hope of a considerable part of the German population[6] that the Court would stop the ESM at least temporarily[7] or even call for a referendum on the basis of Article 146 of the Basic Law, an expectation which had been nourished not least by some of the judges themselves.[8]

It should be emphasized that the final word on the matter has not yet been spoken. The judgment of 12 September 2012 is not a decision in the principal proceedings, but deals with applications to issue a temporary injunction. However, within the framework of a so-called summary review, the Court, to a large extent, already examined the prospects of success of the applications in the principal proceedings. On that basis, the Second Senate

[4] Notably, the following sections of the decision's grounds have not been translated yet: paragraphs 189–206 (scope of review for the temporary injunction procedure and admissibility); 223–238 (*i.e.*, reform of Article 136 TFEU); and 280–219 (accompanying domestic legislation) and Fiscal Treaty). Furthermore, starting from paragraph 191, the numeration of the paragraphs in the English translation does not correspond to the numeration of the paragraphs in the official German version. Therefore, when quoting the decision, I will refer to both the paragraphs of the official German version and the preliminary English translation, *e.g.* para. 222 (DE) or 206 (EN prelim.). It should be noted that I will occasionally depart from this translation for the purpose of clarity.

[5] *See, e.g.*, Cerstin Gammelin *et al.*, *Vier Szenarien zur ESM-Entscheidung*, SÜDDEUTSCHE ZEITUNG (Sept. 10, 2012), http://www.sueddeutsche.de/wirtschaft/vier-szenarien-zum-esm-urteil-karlsruhe-spricht-europa-zittert-1.1464310-2.

[6] If one can rely on a survey carried out on behalf of the German Press Agency (dpa) by YouGov, even a majority of German voters—54 percent—held the view that the BVerfG should issue temporary injunctions, *cf. Mehrheit der Deutschen hofft auf Erfolg für Eurogegner in Karlsruhe*, YouGov Deutschland (July 9, 2012), http://yougov.de/news/2012/09/07/mehrheit-der-deutschen-hofft-auf-erfolg-fur-euroge/.

[7] Given the fact that Germany contributes slightly more than 27% of the capital, the ESM could not have entered into force without the ratification of Germany. *See* Article 48 in conjunction with Annex I and II TESM.

[8] *See* President Andreas Voßkuhle, *Mehr Europa lässt das Grundgesetz kaum zu*, FRANKFURTER ALLGEMEINE ZEITUNG ONLINE (Sept. 25 2011), http://www.faz.net/aktuell/wirtschaft/europas-schuldenkrise/im-gespraech-andreas-vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-11369184.html ("I think the framework [for further European integration under the Basic Law, M.W.] is arguably largely exhausted."); Peter M. Huber, *Eine europäische Wirtschaftsregierung ist heikel*, SÜDDEUTSCHE ZEITUNG, (Sept. 19, 2011), *available at* http://www.sueddeutsche.de/wirtschaft/verfassungsrichter-huber-im-sz-gespraech-eine-europaeische-wirtschaftsregierung-ist-heikel-1.1145416.

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allowed Germany to ratify the three challenged reform instruments—*i.e.*, the amendment of Article 136 TFEU,[9] the Treaty establishing the European Stability Mechanism (TESM) and the Fiscal Treaty[10]—already before the forthcoming decision on the principal proceedings. While the Court did not identify constitutional obstacles to the ratification of the amendment of Article 136 TFEU and the Fiscal Treaty, it permitted the ratification of the TESM only under two conditions, both to be ensured by instruments of public international law: Firstly, a certain (far-off) interpretation of the TESM had to be excluded, according to which it was allegedly possible to establish payment obligations for Germany that exceeded the maximum limit expressly fixed by the TESM without a prior agreement of the German ESM representative. Secondly, the Court held that neither the provisions on the inviolability of documents nor those on the professional secrecy of the legal representatives and employees of the ESM must prevent the comprehensive information of the German parliament. In order to meet the Court's requirements, the Contracting Parties to the TESM on 27 September 2012 agreed on an interpretative declaration[11] and thus paved the way for the German ratification (B.).

In the judgment's grounds, three *leitmotivs* stand out: (1) The emphasis on the rights of the German *Bundestag*; (2) a remarkably strong manifestation of judicial restraint; and (3) the return to substantial openness regarding the future development of the Monetary Union against the backdrop of the so-called "eternity clause" of the Basic Law. While the first line of argument closely follows the *ratio* of almost all Constitutional Court decisions on European integration delivered in recent years, the second and the third *leitmotiv* can be regarded as a promising judicial realignment (C.).

Not all legal questions have been resolved yet. Because the judgment was limited to the applications for a temporary injunction, some leftovers remain which will have to be addressed in the decision on the principal proceedings or might even be subject to possible future challenges (D.)

In sum, the *ESM & Fiscal Treaty* judgment is a well-balanced decision, prepared under enormous temporal and political pressure and written in a concise and modest language, a decision that should be welcomed in particular for its manifestation of judicial restraint and its conceptual return to openness (E.).

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[9] European Council Decision, Mar. 25, 2011, EUCO 10/11, Annex II, at 21. Technically, this is a decision within the framework of the simplified revision procedure under Article 48 (6) TEU that only enters into force once approved by all (sic) Member States of the EU in accordance with their respective constitutional requirements.

[10] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also known as the TSCG or the "Fiscal Compact", signed on Mar. 2, 2012 by all EU Member States except the Czech Republic and the UK, *available at* http://www.european-council.europa.eu/media/639235/st00tscg26_ en12.pdf.

[11] Declaration on the European Stability Mechanism, agreed on by the Contracting Parties to the TESM, Sept. 27, 2012, *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/132615.pdf.

B. Procedural Background and Main Findings

A first glance at the legal background and main findings of the judgment of 12 September 2012 already reveals its richness of detail and technical complexity.

I. Procedural Background

With the notable exception of one intra-institutional proceeding initiated by the parliamentary group of the Left Party,[12] the applications in the principal proceedings and those requesting the issuing of a temporary injunction are predominantly based on individual constitutional complaints. The temporary injunction was primarily intended to prevent the President of the Federal Republic from signing the parliamentary acts of approval, a precondition for the final ratification.

In essence, the complainants claimed that the overall budgetary responsibility of the German *Bundestag*, following from the principle of democracy, was violated. Hence, as in previous EU related decisions, the standard of review was the principle of democracy under Article 20(1) and (2), protected in its essential content by the eternity clause of Article 79(3) and, according to the Court, justiciable via the right to vote enshrined in Article 38(1) of the Basic Law. That the Court construes the right to vote as the key to the admissibility of the constitutional complaints, and thus enables virtually every German citizen with the right to vote to initiate a *de facto* objective review of constitutionality regarding domestic acts approving the ratification of EU reform measures, has raised numerous and profound critique ever since this approach was established for the first time in the *Maastricht* judgment.[13] However, the apt criticism did not stop the Court from following this path and from even extending the approach further in its *Lisbon*[14] and *Greece & EFSF* judgments.[15] We will return to the standard of review within the context of the judgment's *leitmotivs*.

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[12] Case No. 2 BvE 6/12.

[13] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134, 2159/92, Oct. 12, 1993, 89 BVERFGE 155 paras. 58–63 (Ger.) [hereinafter *Maastricht* case]. For an early critique, see Christian Tomuschat, *Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts*, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (EuGRZ) 489 (1993).

[14] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/08 *et al.*, June 30, 2009, 123 BVERFGE 267 paras. 168–183, 210 (Ger.) [hereinafter *Lisbon* case]; *see particularly* Daniel Thym, *In the name of Sovereign Statehoo*d, 46 COMMON MKT. L. REV. 1795, 1796–1797 (2009); Roland Bieber, *An Association of Sovereign States*, 5 EUR. CONST. L. REV. 391, 396 (2009).

[15] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 987/10 *et al.*, Sept. 7, 2011, 129 BVERGE 124 at para. 101 (Ger.) [hereinafter *Greece & EFSF* case] even with explicit reference to the critique. For this particular aspect, see Matthias Ruffert, *Die europäische Schuldenkrise vor dem Bundesverfassungsgericht*, 46 EUROPARECHT 842, 844–845 (2011).

In procedural terms, the decision of 12 September 2012 is characterized by a particularity. The Court decided within the framework of a temporary injunction procedure, but did not apply the usual standard of review, which consists of a mere "weighing of consequences" (*Folgenabwägung*), provided that the outcome of the principal proceeding is open.[16] Instead, the Court carried out a so-called "summary review."[17] Karlsruhe thus reviewed whether it was to be expected with a high degree of probability that the applications in the principle proceedings would be successful, i.e., that the challenged statutes approving the ratification of the three reform instruments as well as the accompanying laws indeed violated constitutional rights.[18]

This solution is to be seen as a compromise. On the one hand, the Court had to prevent a situation where an actual violation of constitutional rights could not be remedied anymore in the principal proceedings, presuming that a temporary injunction was not issued and Germany could already bind itself under international law.[19] The fact that the legal effects of ratification under international law cannot be reversed easily, is *prima facie* a considerable argument in favor of issuing a temporary injunction on the basis of a mere weighing of consequences. On the other hand, presuming that the Court had issued a temporary injunction, while the applications in the principal proceedings turned out to be unsuccessful, the Court would have blocked a constitutionally legal ratification process for a significant period of time, thus causing potentially devastating political and economic consequences. The procedural compromise allows the Court to carry out a substantial, albeit summary, constitutional review and thus to avoid such negative effects in case that the applications in the principal proceedings are unlikely to succeed. In other words, the Court can provide for legal certainty at a relatively early stage of the proceedings and can even pave the way for ratification before the promulgation of the final judgment, provided that a violation of constitutional rights is unlikely to be affirmed. This aspect also explains why the Federal Government explicitly suggested applying the summary approach, emphasizing that it was imperative not to create more than short-term uncertainty regarding the progress of the German ratification procedure.[20] The decision to carry out a

[16] In such a case, the Court tries to exclude, from an *ex ante* perspective, the worst case scenario by weighing the consequences that could arise in the event that a temporary injunction is not issued while the applications in the main proceedings were successful against the negative effects which would arise if the requested temporary injunction was granted but the underlying constitutional complaint later turned out to be unsuccessful. In other words, the Court does not carry out an analysis in substance yet.

[17] *See* already Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No 2 BvQ 1/73, June 4, 1973, 35 BVERFGE 193, 196 f. [*Basic Treaty* case]. *Cf.* Tomuschat, *supra* note 2, at 1432.

[18] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 192 (DE, not translated into EN).

[19] This is a circumstance to be avoided particularly when a violation of the key principles protected by the eternity clause of Article 79 (3) of the German Basic Law is in question.

[20] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 176.

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summary review and to even hold an oral hearing put the Court under enormous time pressure, on top of the already existing political and economic pressure.

II. Main Findings of the Summary Review

Within the framework of the summary review, the Court concludes that the applications in the principal proceedings will—to the extent examined—be mainly unsuccessful. The Court therefore rejects the applications for a temporary injunction, albeit submitting the ratification of the TESM to the two conditions already mentioned. Despite the fact that it does not conclude the principal proceedings, the decision of 12 September 2012 makes (or reiterates) several fundamental statements not only as to the interpretation of German constitutional law but also with regard to the interpretation of the new legal instruments complementing or "surrogating"[21] EU law. These statements, particularly the in-depth analysis of the TESM, should be seen in a transnational perspective, as they are also addressed to an audience beyond the national legal community, in particular to other constitutional courts and the Court of Justice of the European Union.[22]

1. Amendment of Article 136 TFEU

The first instrument under review is the act approving the ratification of the European Council decision to insert a new Article 136(3) into the TFEU, stating that 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," while the "granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

The Court holds the view that the amendment does not violate Articles 38(1), 20(1) and (2) in conjunction with Article 79(3) of the German Basic Law. Given this result, one might have expected it to be based predominantly on the argument that the new Article 136(3) TFEU does not change the current architecture of the EMU in a constitutionally relevant way and essentially constitutes a declarative clarification, confirming the interpretation that certain voluntary financial aids, regarded as indispensable to safeguard the stability of the euro area as a whole, are not prohibited under current EU law in general and Article 125 TFEU in particular.[23] Given that the wording, systematic context and *telos* of Article

[21] *See* Alexander Lorz and Heiko Sauer, *Ersatzunionsrecht und Grundgesetz*, 65 DIE ÖFFENTLICHE VERWALTUNG 573, 575 (2012).

[22] On the transnational dimension of the national EU-related case law, see Mattias Wendel, *Comparative Reasoning and the Making of a Common Constitutional Law—The Europe-Decisions of National Constitutional Courts in a Transnational Perspective*, I-CON (2013), *forthcoming*.

[23] *Cf.* the legal opinion of the German Federal Government, summarized in *ESM & Fiscal Treaty* case, *supra* note 1, at para. 169.

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125 TFEU are much more subtle than the misleading denomination "no-bail-out clause" suggests, several authors convincingly argue that Article 125 TFEU does not prohibit voluntary aids of Member States under certain conditions[24] and that Article 136(3) TFEU can thus be neither seen as an exemption from Article 125 TFEU nor as an authorization for Member States to establish mechanisms of financial assistance amongst themselves.[25] A considerable number of (German) scholars, however, argue that already the EFSF and the bilateral aids for Greece did not comply with Article 125 TFEU and that the new Article 136(3) TFEU has a constitutive character, establishing an exemption to Article 125 TFEU without which the legal obligations arising for the contracting parties under the TESM would constitute a breach of Article 125 TFEU.[26] While this debate cannot be dealt with in detail here,[27] it is important to note that the Court of Justice has now not only decided that the introduction of Article 136(3) TFEU is in conformity with the conditions established by Article 48(6) TFEU regarding the simplified revision procedure, but also that Article 125 TFEU does not preclude the conclusion and the ratification of the TESM, irrespective of the entry into force of Article 136(3) TFEU.[28]

While the Court of Justice clearly states that the new Article 136(3) TFEU (declaratively) "confirms" that EU Member States have the competence to establish a stability mechanism,[29] the German Federal Constitutional Court presents a mix of several, even slightly antithetical arguments. On the one hand, Karlsruhe holds that Article 136(3) TFEU

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[24] Christoph Herrmann*, Griechische Tragödie—der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 413, 415–416 (2010); Ulrich Häde*, Die europäische Währungsunion in der internationalen Finanzkrise—An den Grenzen europäischer Solidarität?*, EUROPARECHT 854, 859–860 (2010); Christian Calliess*, Perspektiven des Euro zwischen Solidarität und Recht—Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 270–274 (2011).

[25] Distinctly Alberto de Gregorio Merino, *Legal developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance*, 49 COMMON MKT. L. REV. 1613, 1629–1630 (2012).

[26] *See* particularly Ruffert, *supra* note 15, at 849, 852 with further references; Hannes Rathke, *Von der Stabilitäts- zur Stabilisierungsunion: Der neue Art. 136 Abs. 3 AEUV*, 64 DIE ÖFFENTLICHE VERWALTUNG 753, 754, 758 (2011); Hanno Kube, *Rechtsfragen der völkervertraglichen Eurorettung*, WERTPAPIERMITTEILUNGEN 245, 247–248 (2012); more differentiated Ferdinand Wollenschläger, *Völkerrechtliche Flankierung des EU-Integrationsprogramms als Herausforderung für den Europa-Artikel des Grundgesetzes (Art. 23 GG)*, 31 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 713, 716. For a distinguished non-German voice, see Jean-Victor Louis*, Guest Editorial: The No-Bailout Clause and Rescue Packages*, 47 COMMON MKT. L. REV. 971, 977–978 (2010).

[27] For an in-depth analysis, *cf.* Calliess, *supra* note 24, at 256–74.

[28] Case C-370/12, Pringle v. Ireland, Nov. 27, 2012 (not yet reported), paras. 45–76, 129–147, 184–185, *available at* http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0370&lang1=en&type=NOT&ancre=. See Andreas Fischer-Lescano and Lukas Oberndorfer, *Fiskalvertrag und Unionsrecht*, 66 NEUE JURISTISCHE WOCHENSCHRIFT 9 (2013); Martin Nettesheim, *Europarechtskonformität des Europäischen Stabilitätsmechanismus* 66 NEUE JURISTISCHE WOCHENSCHRIFT 14 (2013).

[29] *Id.* at paras. 72–73, 184.

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contains an "authorization" to establish a permanent mechanism for mutual aid between the Euro States and "from now on" allows for voluntary financial aids within the scope of Article 125 TFEU.[30] According to the Court, the insertion of Article 136(3) TFEU amounts to a "significant reconfiguration" (*grundlegende Umgestaltung*) of the present design of the EMU, "moving away from the principle of the independence of the national budgets."[31] On the other hand, the Court states that the "stability-oriented character" of the EMU is not abolished, given that particularly the "independence of the ECB, the commitment of the Member States to observe budget discipline and the autonomous responsibility of the national budgets remain intact."[32] Furthermore, according to the Court, the introduction of Article 136(3) TFEU does not result in a loss of national budget autonomy because it does not itself establish a stabilization mechanism, "but merely opens up to the Member States the possibility of installing such a mechanism on the basis of an international agreement," thus confirming the Member States' sovereignty in this respect.[33]

The ambiguity of the argument may be an indication that the judges of the Second Senate could not agree on a coherent line of argument. If one took the argument seriously that Article 136(3) TFEU was a provision with constitutive character, one might of course ask what the legal consequences of a failure to ratify the amendment of Article 136(3) TFEU would be, given that its entry into force requires, in contrast to that of the TESM, the ratification of all 27 Member States.[34] However, the Court did not subject the ratification of the TESM to the condition of a prior entry into force of the amendment of Article 136(3) TFEU.

2. TESM

According to the German Federal Constitutional Court, the act approving the ratification of the TESM and the accompanying legislation (ESM Financing Act—*ESMFinG*) essentially complies with the constitutional requirements to safeguard the overall budgetary responsibility of the *Bundestag*. In this respect, the Court carries out a detailed and comprehensive analysis. This examination, which constitutes the substantial core of the decision, can hardly be summarized without (at least partially) fading out the various legal nuances it contains. Nevertheless, a brief summary must suffice at this point, before taking a closer look at the three *leitmotivs*.

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[30] *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 233–234 (DE, not translated into EN).

[31] *Id.*

[32] *Id.*

[33] *Id*. at para. 236.

[34] While the TESM entered into force on 27 September 2012 with the deposition of the German ratification certificate, the amendment of Article 136(3) TFEU has not yet entered into force (as of Nov. 27, 2012).

1.1 Overall Result: What Is Required and What Is Not Required

Against the backdrop of the above mentioned public expectations, it is not only interesting to see what the Court demands, but also what it *does not* demand: The Court neither calls for a referendum under Article 146 of the Basic Law, nor does it establish a maximum limit in nominal terms that would *a priori* be regarded as incompatible with the (future) overall budgetary responsibility of the *Bundestag*.[35] The Court also does not demand for the provision of an express right to terminate the Treaty.[36] Furthermore, the Court seems to be conciliatory regarding the assessment of Article 4(8) TESM, which allows the suspension of voting rights under certain conditions. The Second Senate does not find this provision to violate the relevant constitutional standards, essentially because Germany could prevent the suspension of its voting rights by meeting its (alleged) payment obligations.[37]

However, the Court establishes the requirement to ensure by instruments of public international law that firstly, the provisions of the TESM may only be interpreted or applied in such a way that the liability of Germany cannot be increased beyond its share in the authorized capital stock of the ESM without the consent of the German ESM representative and that secondly, the parliamentary right to information is guaranteed according to constitutional standards.[38]

The necessity to establish these conditions is highly questionable. Regarding the first, the Court itself presents a multitude of convincing arguments why such an increase could not, without the consent of the German ESM representative, be based on the provisions of the TESM.[39] Stating that the liability of each ESM Member "shall be limited, in all circumstances, to its portion of the authorized capital stock at its issue price," Article 8(5) TESM (the key provision in this respect) could not have been framed in a clearer manner. Moreover, the second condition does not seem to be indispensable either, given that the relevant treaty provisions are, as the Court points out itself, above all intended to prevent a flow of information to unauthorized third parties, but not to the parliaments of the Member States bearing political responsibility.[40]

[35] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 253 (DE), 222 (EN prelim.).

[36] *Id*. at para. 279 (DE), 248 (EN prelim.).

[37] *Id.* at para. 269 (DE), 238 (EN prelim.).

[38] *Id.* at paras. 240, 253, 259 (DE), 209, 222, 228 (EN, prelim.).

[39] *Id.* at paras. 243–250 (DE), 212–219 (EN prelim.).

[40] *Id.* at para. 257 (DE), 226 (EN prelim.).

1.2 Implementing the Court's Demands: Reservation or Declaration?

The two conditions posed by the Court also raise questions as to their proper implementation.[41] While the Second Senate did not specify the mode of implementation, speaking both of "reservations"[42] and "declarations,"[43] it demanded the government to "clearly express" in terms of legal consequences that Germany "cannot to be bound by the ESM Treaty in its entirety" (sic) if the instrument should prove to be ineffective.[44] It is questionable whether the demands of the Court could have been properly implemented by a reservation.[45] According to Article 2(d) of the Vienna Convention on the Law of Treaties (VCLT),[46] a reservation "purports to exclude or modify the legal effect of certain provisions of the treaty."[47]

As already stated above, the Contracting Parties to the TESM on 27 September 2012 finally agreed on an interpretative declaration.[48] It reads as follows:

> Article 8(5) of the Treaty Establishing the European Stability Mechanism ("the Treaty") limits all payment liabilities of the ESM Members under the Treaty in the sense that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorized capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member's representative and due regard to national

[41] *Cf.* Christian Calliess and Christopher Schoenfleisch, *Wie das ESM-Urteil umgesetzt werden kann*, VERFASSUNGSBLOG (Sept. 13, 2012), http://verfassungsblog.de/wie-das-esmurteil-umgesetzt-werden-kann.

[42] *ESM & Fiscal Treaty* case, *supra* note 1, paras. 253, 259, 279 (DE), 222, 228, 248 (EN prelim.).

[43] *Id.* at para. 240 (DE), 209 (EN prelim.). The term "völkerrechtliche Erklärungen" [declarations under international law] might have also been used in a broader sense here.

[44] *Id.* at paras. 253, 259 (DE), 222, 228 (EN prelim.).

[45] This cannot be dealt with in detail here. For further discussion see the comments of Matthias Ruffert, Ulrich Karpenstein and Oliver Sauer to Calliess & Schoenfleisch (note 41) and Tomuschat, *supra* note 2, at 1432.

[46] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. This provision arguably restates, at least partially, customary law, *cf.* Philippe Gautier, *Article 2*, *in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, VOLUME I, para. 1 (Olivier Corten & Pierre Klein, eds., 2011).

[47] VCLT. See also the definition in the ILC Guide to Practice on Reservations to Treaties (2011), at point 1.1 ("certain provisions of the treaty").

[48] Germany also issued a unilateral declaration, pointing to this joint declaration, deposited with the German instruments of ratification.

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> procedures.
>
> Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.
>
> The above mentioned elements constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty.

While the first two paragraphs essentially rephrase the requirements of the German Federal Constitutional Court, the third paragraph is to be seen against the background of the *clausula rebus sic stantibus* as recognized under customary international law and as laid down in Article 62(1) of the VCLT. According to this rule, a "fundamental change of circumstances" can, under certain conditions, be invoked as a ground for terminating or withdrawing from a treaty as long as "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty" and "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." The key idea to rely on a declaration in the present context is that the declaration (authentically) specifies this "essential basis" and thus provides a possibility to legally withdraw from the treaty under the *clausula*.[49]

However, this construct is problematic as well, because it remains unclear whether the departure from a certain interpretation can be qualified as a "fundamental change of circumstances" in the sense of the *clausula*.[50] Or to frame it differently, while the legal consequences of the *clausula rebus sic stantibus* correspond to the requirement of the Court, it is questionable whether the *clausula* would actually apply to a situation in which the TESM was interpreted in a way differing from the standard specified in the declaration of 27 September 2012.

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[49] *Cf.* the comment of Ulrich Karpenstein to Calliess & Schoenfleisch, *supra* note 41 and Frank Schorkopf, *"Startet die Maschinen"*, 31 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1273, 1275 (2012).

[50] On this criterion, see Malcolm N. Shaw and Caroline Fournet, *Article 62*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, VOLUME II paras. 4–5, 25–26 and 35 (Olivier Corten & Pierre Klein, eds., 2011).

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3. Fiscal Treaty

Finally, according to the Court, the act approving the ratification of the Fiscal Treaty[51] likewise does not contradict the overall budgetary responsibility of the *Bundestag*.[52] The Court emphasizes that the regulatory content of the Treaty "is for the most part identical" with existing requirements of the Basic Law's "debt brake" and also with budgetary obligations under EU law.[53] Just like the French *Conseil constitutionnel*,[54] the German Federal Constitutional Court states that the obligation under Article 5(1) of the Treaty (to submit a budgetary and economic partnership program that requires approval) does not empower the bodies of the European Union to take actions that have a direct effect on national budget legislation.[55] Furthermore the Court takes the view that the Fiscal Compact does not confer competencies to EU institutions that would affect the overall budgetary responsibility of the *Bundestag*, particularly not by the so-called correction mechanism under Article 3(2) of the Treaty.[56]

C. Leitmotivs

In the *ESM & Fiscal Treaty* decision of 12 September 2012, three key arguments or *leitmotivs* stand out.

I. Once Again: Safeguarding the Rights of the Bundestag

The first *leitmotiv* is at the heart of the Court's reasoning and keeps in line with all major EU-related case law delivered by Karlsruhe in recent years. In essence, it aims at safeguarding the rights of the (present or future) *Bundestag*.

[51] For a critical assessment, see INGOLF PERNICE ET AL., A DEMOCRATIC SOLUTION TO THE CRISIS 100–103 (2012). For an in-depth analysis *cf.* Paul Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 E.L. Rev. 231 (2012).

[52] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 300 (DE, not translated into EN).

[53] *Id.* at para. 311 (DE, not translated into EN).

[54] Conseil constitutionnel [CC – Constitutional Council], decision No. 2012-653 DC, Aug. 9, 2012, at para. 32 (Fr.) [hereinafter French *Fiscal Treaty* case]. An English translation by the CC is *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-653-dc-of-9-august-2012.115501.html.

[55] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 311 (DE, not translated into EN), referencing para. 32 of the French *Fiscal Treaty* case, *supra* note 54.

[56] *Id.* at para. 315 (DE, not translated into EN), referencing para. 25 of the French *Fiscal Treaty* case, *supra* note 54.

1. The Concept of Parliamentary Responsibility in the Court's EU Related Case Law

According to the Court's established case law, safeguarding the rights of the *Bundestag* first and foremost means safeguarding the *Bundestag*'s function to ensure parliamentary representation of the popular will.[57] Hence, competences of the *Bundestag* must not be constrained or exercised in a manner rendering current or future parliamentary representation at national level virtually impossible, i.e., leading to a situation in which no substantial issues would be left to decide on for the elected representatives of the people.[58] In other words, in fields which the Court considers to be essential for shaping the political development in Germany, the *Bundestag* must have a continuous and decisive say. The Court deduces this requirement from the principle of democracy, protected in its essential content by the eternity clause of the Basic Law and justiciable via the right to vote.[59] This approach does not only raise fundamental objections regarding its procedural dimension,[60] but also—and even more severely—as to its substantial foundation. It relies on an apodictic and theoretically highly questionable claim of necessary state functions,[61] is ultimately bound to the (pre-)existence of statehood,[62] remains blind to other forms of constitutive democratic legitimation in multi-leveled settings,[63] and goes along with an unprecedented deconstruction of the European Parliament.[64] It also establishes considerable constitutional limitations to potential "conferrals"[65] of competences to the EU or associated entities—limitations which are deduced from the eternity clause and are thus

[57] *Maastricht* case, *supra* note 13, at paras. 58–63; *Lisbon* case, *supra* note 14, at paras. 210, 246–260; *Greece & EFSF* case, *supra* note 15, at headnote 1 and paras. 98–104, 120–128; reiterated in *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 210–215 (DE), 194–199 (EN prelim.).

[58] *Id.*

[59] *Id.*

[60] *Cf.* already *supra* Part B(I).

[61] *See* particularly the criticism by Daniel Halberstam and Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland!"*, 10 GERMAN L. J. 1241, 1249–1250 (2009); Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, 10 GERMAN L. J. 1201, 1208–1209 (2009); Martin Nettesheim, *Die Karlsruher Verkündigung*, EUROPARECHT-BEIHEFT 101, 112 *et seq.* (2010).

[62] *See* MATTIAS WENDEL, PERMEABILITÄT IM EUROPÄISCHEN VERFASSUNGSRECHT 85–91 (2011).

[63] This stands in sharp contrast to the interdisciplinary discussion. *See, e.g.*, DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION (Beate Kohler-Koch & Berthold Rittberger eds., 2007).

[64] *Lisbon* case, *supra* note 14, at paras. 280–288; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], 2 BvC 4/10, Nov. 9, 2011, 65 DIE ÖFFENTLICHE VERWALTUNG 75 (2012), at paras. 118 *et seq*. with dissenting opinions of Reporting Judge Di Fabio and Judge Mellinghoff (Ger.) [*Five Percent EP-Election Threshold* case].

[65] The frequently used "term transfer" is misleading because it suggests that supranational public authority is nothing more than a mere addition of derivated national competences. *See* Erich Kaufmann, *Rechtsgutachten zum Vertrage über die Gründung der Europäischen Verteidigungsgemeinschaft und zum Deutschlandvertrage*, *in* 2 DER KAMPF UM DEN WEHRBEITRAG 42, 55 (Institut für Staatslehre und Politik Mainz ed., 1953).

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insurmountable under the Basic Law. As a consequence, certain decision-making rights may either not be conferred on the EU or it has to be ensured that the *Bundestag* keeps a decisive influence, if necessary by a parliamentary mandate binding the acting representatives of the German government.[66]

In this respect, the Court coined the enigmatic, albeit catchy term of (parliamentary) "responsibility,"[67] a concept, the essence of which[68] is possibly better captured by the term *accountability*. In its *Lisbon* judgment, the Second Senate introduced this concept as a "responsibility for integration."[69] It is a responsibility to be observed particularly by prior parliamentary approval to certain types of decision at EU level that are considered by the Court as endangering the principle of conferral as their application could allegedly expand the EU's competences in a gradual manner.[70] Like no other constitutional court in Europe,[71] Karlsruhe demanded a prior assent of parliament for the application of so-called (and ill-termed) "dynamic treaty provisions".[72]

Given that already the *Lisbon* judgment construed budgetary autonomy as a key to the "ability of a constitutional state to democratically shape itself" (*demokratische Selbstgestaltungsfähigkeit*),[73] it could have been expected that the Second Senate would extend the concept of parliamentary responsibility to budgetary decision-making powers sooner or later. Hence, the introduction of the concept of "budgetary responsibility" was only a matter of time. In its *Greece & EFSF* judgment of 7 September 2011, the Court consequently held that the right to vote would be violated if the *Bundestag* relinquished its "parliamentary budget responsibility" by giving up the capability to decide on the budget

[66] Essentially, this is a fallback to classic intergovernmentalism, including the requirement of "unanimity."

[67] *Lisbon* case, *supra* note 14, at paras. 236, 245-247; *see also* Greece & EFSF case, *supra* note 15, at headnote 3 and paras. 121–128; *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 210–222 (DE), 194–206 (EN prelim.).

[68] For the different connotations of "responsibility for integration," *cf.* Ulrich Hufeld, in SYSTEMATISCHER KOMMENTAR ZU DEN LISSABON-BEGLEITGESETZEN 25, 33–35 (Andreas von Arnauld & Ulrich Hufeld, eds., 2011).

[69] *Lisbon* case, *supra* note 14, at paras. 236, 245-247, also addressed to the other constitutional institutions.

[70] *Id.*

[71] In detail Mattias Wendel, *Lisbon Before the Courts: Comparative Perspectives*, 7 EUR. CONST. L. REV. 96, 114–120 (2011).

[72] *Lisbon* case, *supra* note 14, at paras. 411–419. Only two categories of these provisions relate to the simplified (and insofar "dynamic") amendment of EU primary law. The other categories, *i.a.*, Article 352 TFEU, essentially relate to the legislative process at the EU level. The requirements of prior parliamentary approval were later implemented in the "Responsibility for Integration Act," available in English at: http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/intvg.html. For a comment, see Martin Nettesheim, *Die Integrationsverantwortung—Vorgaben des BVerfG und gesetzgeberische Umsetzung*, 63 NEUE JURISTISCHE WOCHENSCHRIFT 177 (2010).

[73] *Lisbon* case, *supra* note 14, at paras. 252, 256.

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on its own terms.[74] However, the particular novelty of this move was that the *Bundestag*, according to the Court, risked diminishing its own powers not only by conferring competences to the EU or associated entities, but also by authorizing financial commitments under Article 115 of the Basic Law that could "by their nature and extent result in massive adverse effects on budgetary autonomy" of a future *Bundestag*.[75] In this respect, the *ESM & Fiscal Treaty* decision of 12 September 2012 largely draws on the *Greece & EFSF* judgment, particularly as regards the constitutional requirements for the protection of budgetary responsibility.[76] The key section of the *Greece & EFSF* judgment, taken up in the decision of 12 September 2012, reads as follows:

> Against this background, the German *Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which—whether by reason of their overall conception or by reason of an overall evaluation of the individual measures—may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue. This prohibition of the relinquishment of budgetary responsibility does certainly not impermissibly restrict the budgetary competence of the legislature, but is specifically aimed at preserving it.[77]

Karlsruhe thus tries to ensure that "an irreversible legal predetermination of future generations" will not be established.[78] Given the dramatic demographic development in Germany, this argument might also become of major importance in contexts other than the field of budgetary responsibility.[79] Furthermore, the decision of 12 September 2012 draws on the Court's recent EU-related case law on parliamentary rights, *i.e.*, the

[74] *Greece & EFSF* case, *supra* note 15, at para. 121.

[75] *Id.* at para. 103; *see also* Ruffert, *supra* note 15, at 844–845.

[76] *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 210–220 (DE), 194–204 (EN prelim.). To consider the Court's reference to the responsibility of integration, see *id.* at paras. 238, 282 (DE, not translated into EN).

[77] *Greece & EFSF* case, *supra* note 15, at para. 125; *see also ESM & Fiscal Treaty* case, *supra* note 1, at para. 212 (DE); 196 (EN prelim.).

[78] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 228 (DE, not translated into EN).

[79] *See* particularly Markus Kotzur, *Demokratie als Wettbewerbsordnung*, 69 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 173, 192–193 (2010).

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judgments on the *Special Parliamentary Committee* of 28 January 2012[80] and on the *ESM & Euro Plus Pact* of 19 June 2012.[81]

2. Implications for the Present Case

Regarding the three challenged reform instruments, the Court in its *ESM & Fiscal Treaty* decision of 12 September 2012 essentially considers the rights of the *Bundestag* to be sufficiently protected according to the constitutional standards set out above. In contrast to its previous decision on the *Lisbon* case, the Court thus takes the view that the German legislator has met the constitutional requirements for the most part. With a view to the legal implications of the concept of parliamentary responsibility for the present case, several aspects should be distinguished, however.

1.1 Parliamentary Right to Participation

Parliamentary responsibility demands parliamentary participation. While the introduction of Article 136(3) TFEU[82] and the future regime of the Fiscal Treaty[83] did not raise any major concerns in this respect,[84] the Court considers the provisions on the involvement of the *Bundestag* in the decision-making processes of the ESM—laid down in the Act of assent to the TESM as well as in the ESM Financing Act (*ESMFinG*)—to comply with this requirement at least to a large extent.[85] Read together, both statutes provide for a detailed and differentiated framework regarding prior parliamentary approval.[86] Above all, they ensure

[80] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 8/11, Jan. 28, 2012, 65 NEUE JURISTISCHE WOCHENSCHRIFT 1419 (2012), paras. 113 *et seq.* (Ger.) [hereinafter *Special Parliamentary Committee* case].

[81] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 4/11, June 19, 2012, 31 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 954 (2012), paras. 94 *et seq.*, 107 (Ger.) [hereinafter *ESM & Euro Plus Pact* case].

[82] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 237 (DE, not translated into EN). According to the Court, the requirement of ratification ensures that the entry into force of the TESM is preceded by parliamentary assent. Hence it is ensured that the legislator observes its parliamentary responsibility regarding the concrete design of the ESM.

[83] *Id.* at paras. 314–319 (DE, not translated into EN).

[84] However the Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union [EUZBBG - Law on Cooperation Between the Federal Government and the German Bundestag in Matters Concerning the European Union], available at http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg.html, was previously changed.

[85] *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 280–299. (DE, not translated into EN).

[86] *See* Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus [ESMFinG - Act on Financial Participation in the European Stability Mechanism], Sept. 13, 2012, §§ 4–6, available at http://dipbt.bundestag.de/extrakt/ba/WP17/434/43458.html and Gesetz zu dem Vertrag vom 2. Februar 2012

that the key activities of the German ESM representatives are determined and controlled by the *Bundestag* and thus provided with sufficient democratic legitimation.[87]

However, in order to prevent any possibility of circumventing parliamentary participation, the Court deemed it necessary to demand the above-mentioned interpretative safeguard under public international law, aiming at the exclusion of any interpretation of the TESM allowing payment obligations that exceed the defined maximum sum without the consent of the *Bundestag*.[88] According to the Court, the limitation of liability under the TESM sufficiently ensures that no "automatic and irreversible procedure regarding payment obligations or commitments to accept liability" is established by the ESM, given that every new payment obligation or commitment to accept liability requires a constitutive approval of the *Bundestag*.[89] Taking into consideration that every act of parliamentary approval is potentially subject to constitutional review, it becomes clear that a non-negligible effect of this requirement is to keep the Court in the game as well.[90] However, it is important to note that Karlsruhe does *not* establish a maximum limitation in nominal terms, *i.e.* a specified sum that would be regarded as *a priori* incompatible with preserving the overall budgetary responsibility of the *Bundestag*.[91]

With regard to parliamentary participation, the Second Senate announces in its decision of 12 September 2012 that it will examine two issues more closely in the upcoming principal proceedings: Parliamentary participation concerning decisions to issue shares of the authorized capital stock at higher than par value under Article 8(2) sentence 4 TESM and the question of (parliamentary) arrangements to avoid a suspension of the voting rights under Article 4(8) TESM.[92]

1.2 Parliamentary Right to Information

Parliamentary responsibility also calls for parliamentary information. No control without prior information. According to the Court, the (national) constitutional principle of democracy requires access to information in a way allowing the *Bundestag* to assess the

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zur Einrichtung des ESM [Act on the Treaty of Febr. 2, 2012, establishing the ESM], Sept. 13, 2012, Article 2 available at http://dipbt.bundestag.de/extrakt/ba/WP17/434/43455.html.

[87] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 287 (DE, not translated into EN).

[88] *Id.* at para. 253 (DE), 222 (EN prelim.).

[89] *Id.* at para. 279 (DE), 248 (EN prelim.).

[90] The concept of parliamentary responsibility was, from the beginning, connected to the possibility of constitutional review, *cf.*, expressly, *Lisbon* case, *supra* note 14, at para. 236.

[91] *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 216, 253, 271, 279 (DE), 200, 222, 240, 248 (EN prelim.).

[92] *Id.* at paras. 280, 290–293 (DE, not translated into EN).

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essential foundations and consequences of its decisions and thus exercise its parliamentary responsibility.[93] Based on this assumption, the decision of 12 September 2012 contains a veritable novelty compared to its precedents.

Like the majority of Member States' constitutions,[94] the German Basic Law contains a provision on the parliamentary right to information in EU affairs. According to Article 23(2) sentence 2,[95] parliament has a right to be comprehensively informed by the government at the earliest possible time on "matters concerning the European Union." Already in its *ESM & Euro Plus Pact* decision of 19 June 2012, the Court decided—within the framework of an inter-institutional proceeding (*Organstreit*)—that the Federal Government had infringed this right to information with regard to certain key documents relating to the negotiations on the ESM and on the so-called Euro Plus Pact.[96] The Court interpreted the term "matters concerning the European Union" in a broad manner, extending the scope of application of Article 23(2) to "international treaties that complement European Union law or otherwise show particular proximity" to it.[97] Whether such proximity exists, according to the Court, depends on an "overall consideration of the circumstances, including planned contents, objectives and effects" of the project in question.[98] Given that the creation of the ESM goes along (to use a neutral term) with an amendment of the TFEU, that the Commission and the Court of Justice are integrated in its institutional architecture and that Karlsruhe sees the ESM's purpose in complementing and safeguarding the economic and monetary policy, which falls under the category of exclusive EU competences,[99] the Court qualified the establishment of the ESM as a matter concerning the EU in the sense of Article 23(2) of the Basic Law.[100] It also established an obligation for the government to provide information in a particularly comprehensive and detailed way, as the creation and

[93] *Id.* at para 215 (DE), 199 (EN prelim.).

[94] Austria (Article 23e); Belgium (Article 168); Bulgaria (Article 105 (3) and (4)); Czech Republic (Article 10b); Finland (§ 96); France (Article 88-4); Germany (Article 23 (2) in conjunction with the *EUZBBG*); Greece (Article 70 (8)); Hungary (Article 19); Lithuania (Article 3 of the EU constitutional act); Portugal (Articles 161 lit. n, 163 lit. f, 197 lit. i); Romania (Article 148 (5)); Slovenia (Article 3a (4)); Sweden (Chapter 10 § 6). For a comparative analysis, see WENDEL, *supra* note 62, at 356–366; PHILIPP DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS 190–198 (2004); Christoph Grabenwarter, *Staatliches Unionsverfassungsrecht*, *in* EUROPÄISCHES VERFASSUNGSRECHT 121, 149–158 (Armin von Bogdandy & Jürgen Bast, eds., 2d ed. 2009).

[95] Concretized in §§ 4 *et seq.* of the EUZBBG, *supra* note 84.

[96] *ESM & Euro Plus Pact* case, *supra* note 81.

[97] *Id.* at para. 100.

[98] *Id.* See also Wollenschläger, supra note 26, at 718.

[99] However, see the Court of Justice, *Pringle* case, *supra* note 28, at para. 95, arguing that "the activities of the ESM do not fall within the monetary policy . . . ."

[100] *ESM & Euro Plus Pact* case, *supra* note 81, at para. 135.

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institutional design of the ESM concerned the overall budgetary responsibility of the *Bundestag*.[101]

In its decision of 12 September 2012, the Second Senate consequently argues that not only the creation but also the future activities of the ESM constitute a "matter concerning the EU" and thus fall under Article 23(2) sentence 2 of the Basic Law.[102] Article 23(2) sentence 2 is concretized by the accompanying legislation to the TESM in a manner meeting the Court's requirements, though.[103] However, as Article 23(2) sentence 2 establishes a genuine right of parliament, it can be invoked in inter-institutional proceedings by members of parliament, but not by an individual within the framework of a constitutional complaint.

Here, the new approach comes into play. The Court now—for the very first time—explicitly puts the essence of the parliamentary right to information under the protection of the eternity clause: The "core of the right of parliament to be informed" is, according to the Court, "entrenched in Article 79(3) of the Basic Law."[104] To frame it differently, the parliamentary right to information is now protected not only by Article 23(2) sentence 2 and other specific constitutional provisions, like Article 114, but also, in a more fundamental way, by Articles 38(1),[105] 20(1) and (2) in conjunction with Article 79(3) of the Basic Law. This right of parliamentary information by definition cannot be limited to cases involving the EU but is instead a key guarantee of the *Bundestag*'s general ability to exercise its parliamentary responsibility. It is on this basis that the Court demands for the second interpretative safeguard under public international law, ensuring that the TESM provisions on the inviolability of documents and on professional secrecy do not restrain the comprehensive information of the *Bundestag*.[106]

The new construction apparently allows an individual to claim within the framework of a constitutional complaint that the *Bundestag* has relinquished its parliamentary responsibility by allegedly failing to ensure that the core of the parliamentary right to information is guaranteed. However, it seems to be excluded that an individual can invoke a violation of this parliamentary right on a case-to-case basis. Article 20(1) and (2) in conjunction with Article 79(3) require that the *Bundestag* "is able to"[107] receive the

[101] *Id*. at para. 145.

[102] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 286 (DE, not translated into EN).

[103] *Id.*

[104] *Id.* at para 215 (DE), 199 (EN prelim.).

[105] For an explicit reference to Article 38(1), see *id.* at para. 254 (DE), 223 (EN prelim.).

[106] *Id.* at paras. 259 (DE), 228 (EN prelim.).

[107] *Id.* at para. 259 (DE), 228 (EN prelim.).

necessary information. Against the background that the constitutional principle of democracy as protected in its essential content under the eternity clause is a very general and abstract standard of review,[108] this can only be understood to mean that Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law require an institutional and legal framework in which the information of parliament is structurally guaranteed in a general manner. These articles certainly do not establish an individual right to challenge violations of the parliamentary right to information on behalf of the *Bundestag*. Nevertheless, this example illustrates once more how problematic it becomes to draw clear lines on the limits of individual standing in this respect.

1.3 Intra-Parliamentary Allocation of Responsibilities

A third implication relates to the question as to what extent responsibilities may be exercised by parliamentary (special) committees and how far their exercise must be reserved to the plenary session. In its judgment of 28 February 2012, the Court established the basic rule that the *Bundestag*'s right to decide on the budget and its overall budgetary responsibility generally have to be "exercised through deliberation and decision-making in the plenary sitting."[109] Arguing that the constitutional rights of Members of Parliament are violated if they are excluded from substantial decisions affecting the German *Bundestag*'s budgetary responsibility, Karlsruhe essentially scrapped a statute according to which the *Bundestag*'s competences to decide on certain measures within the framework of the EFSF should, in cases of particular urgency and confidentiality, generally be exercised by a special parliamentary committee (*Sondergremium*) composed of nine members of the *Bundestag*'s Budget Committee.[110] The Court accepted the conferral of responsibilities to the special committee only with regard to the purchase of government bonds by the EFSF on the secondary market because such an emergency measure would be deprived of its effects if it was not subject to absolute confidentiality.[111]

The decision of 12 September 2012 reiterates the basic rule established in the *Special Parliamentary Committee* Case.[112] Furthermore, the Second Senate now specifies that it is up to the plenary session to decide on "every large-scale measure involving public expenditure" as well as on "fundamental questions relating to the modalities of how to use

[108] *Id.* at para. 216 (DE), 200 (EN prelim.).

[109] *Special Parliamentary Committee* case, aupra note 80, at para. 13 .

[110] *Id.* at paras. 133–153. On 27 October 2011, the Court had already issued a temporary injunction prohibiting the exercise of the *Bundestag*'s competences by the *Sondergremium* until the issuing of a decision in the main proceedings.

[111] *Id.* at para. 150.

[112] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 286 (DE, not translated into EN).

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the granted financial means."[113] Hence, the Budget Committee may only supplement the plenary session when it comes to decisions which are of secondary importance or have been determined by the plenary session in a sufficiently precise manner.[114] The Court holds the view that the accompanying legislation in principle complies with these criteria, given that §§ 4–6 *ESMFinG* differentiate between decisions affecting *overall* budgetary responsibility (reserved exclusively to the plenary session), other activities concerning budgetary responsibility (generally exercised by the Budget Committee but retrievable by plenary session at any time) and parliamentary participation in decisions on the purchase of government bonds on the secondary market (assigned to the Special Committee).

However, the Court indicates that further review in the principal proceedings might reveal that some of the powers currently assigned to the Budget Committee, given their implications, must be exercised by the plenary session.[115] Therefore, the first "leftover" for the principal proceeding of the decision in this respect is that the intra-parliamentary "fine-tuning" might have to be adapted. The second leftover concerns a procedural aspect. While the intra-parliamentary allocation of responsibilities can be subject to an inter-institutional proceeding, as demonstrated by the decision of 28 February 2012, the extent to which this aspect might be justiciable within the framework of a constitutional complaint is a question expressly left open for the ruling in the principal proceedings.

II. Judicial Restraint

The second *leitmotiv* is a remarkably strong manifestation of judicial restraint. Compared to its *Greece & EFSF* judgment, the Court substantially extends the margin of assessment conceded to the German legislature and distinctly applies this doctrine no less than six times, including several key sections of the ruling.[116]

1. Restriction to Manifest Violations

The first element of judicial restraint is inherent in the standard of review and has been established in the *Greece & EFSF* judgment. Regarding the question as to what extent guarantees can be granted or financial commitments be made without violating the budgetary responsibility of the (future) *Bundestag*, the Court restricts the standard of

[113] *Id.* at para. 294 (DE, not translated into EN).

[114] *Id.*

[115] *Id.* at paras. 297–299 (DE, not translated into EN). This may, for instance, concern decisions on material changes of the procedure and of the conditions of the ESM's capital calls.

[116] *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 213, 217, 222, 228, 234, 271 (DE), 197, 201, 206, 240 (EN prelim.).

review to "manifest violations".[117] Accordingly, with a view to the amount of liability, the principle of democracy would only be violated if Germany became liable to such an extent that budgetary autonomy would not only be constrained, but would in fact cease to exist—at least for a considerable period of time.[118] Hence, the relevant constitutional criterion with regard to (hypothetical) maximum limits is construed almost in the narrowest sense possible and thus considerably limits the scope of constitutional review.

2. The Legislator's Margin of Assessment

The second element is closely intertwined with the first. It concerns the legislature's *Einschätzungsspielraum*, or its margin or "latitude" of assessment, as it is termed in the preliminary translation.[119] In this respect, the Second Senate could also rely on the *Greece & EFSF* judgment, in which it had expressly acknowledged the legislature's margin to assess the financial risk of liability as well as the future capacity of the federal budget and the economic potential of Germany.[120] The Court now emphasizes that it may not, by claiming specific expertise in this field, replace the decisions of the legislative body, given that the latter is the institution "first and foremost democratically appointed for this task".[121]

From this starting point, the *ESM & Fiscal Treaty* decision of 12 September 2012 goes beyond its precedent in several ways. First of all, the Court now explicitly speaks of a "wide" margin of assessment.[122] This semantic alteration, which relates to the density of constitutional review, certainly should not be overestimated as such. But it conceptually corresponds to the above-mentioned limitation of the standard of review and indicates that the exercise of judicial restraint is particularly distinct, a consideration confirmed by the judgment's overall result. Furthermore, the Court extends its margin-of-assessment-doctrine in substance. The doctrine is now also applied to impact assessments regarding alternative courses of action,[123] in particular the possible political and economic impact of not establishing a permanent stability mechanism in the current situation of crisis. Above

[117] *Greece & EFSF* case, *supra* note 15, at para. 131; *see also ESM & Fiscal Treaty* case, *supra* note 1, at para. 216 (DE), 200 (EN prelim.).

[118] *Id.*

[119] The best translation would probably be "margin of appreciation." However, as this term is specifically associated with the doctrine developed by the European Court of Human Rights (ECtHR), it shall not be used in this context.

[120] *Greece & EFSF case*, *supra* note 15, at para. 132; *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 217, 228 (DE), 201, (EN prelim.).

[121] *Id.*

[122] *Id.* at para. 217 (DE), 201 (EN prelim.).

[123] *Id.*

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all, the Second Senate extends the legislator's margin of assessment to the fundamental choices regarding the future development of the Monetary Union, the key question of the proceedings.[124]

3. Taking Judicial Restraint Seriously

Hence, the margin of assessment conceded to the legislator plays a key role with a view to the general outcome of the decision, i.e., the constitutionality of the challenged reform instruments and particularly the establishment of the ESM. In one of the central sections, the Court states that it has to respect both the decision of the legislature to supplement the EMU by additional "active stability measures" as well as the underlying prognosis that such measures will safeguard and further develop the EMU, even if a certain risk of price instability cannot be excluded from an *ex ante* perspective.[125] The very fact that the Court thus allows the (constitutional) legislature to take measures which the Court itself qualifies as being an "elementary reconfiguration" of the EMU, confirms that the Court takes its doctrine of a wide margin of assessment seriously.[126]

From the perspective of a judge, accepting a decision that falls within a margin of assessment might sometimes end up in legally approving the personally disapproved. At all events, the constitutional judges of the Second Senate did not accept the challenged crisis mechanisms in a light-hearted way. In this respect, the following paragraph, another section of particular importance for the judgment's outcome, is worth being quoted in full, even though the dry, almost sarcastic undertone gets lost in translation:

> According to the standards [of review], the legislature's assessment that the payment obligation . . . of a total nominal value of EUR 190 024 800 000 . . . referred to as a 'guarantee authorisation' . . . does not lead to a complete failure of budget autonomy is to be accepted by the Federal Constitutional Court. This also applies if the German participation in the [EFSF], bilateral assistance in favour of Greece and risks resulting from the participation in the [ESCB] and in the [IMF] are included in the calculation of Germany's overall commitment undertaken with regard to the

[124] *Id.* at paras. 222, 234 (DE), 206 (EN prelim.).

[125] *Id.* at para. 234 (DE, not translated into EN).

[126] The fact that this qualification of Article 136(3) is questionable (see *infra* Part B.II.1.) has no bearing on the argument that the Court allows the legislator to take a political course which the Second Senate (or at least several of its Members) regards as being a fundamental adjustment.

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> stabilisation of the [EMU]. In the oral hearing, the *Bundestag* and the Federal Government stated in detail that the risks involved with making available the German shares in the [ESM] were manageable, while without the granting of financial facilities by the [ESM] the entire economic and social system was under the threat of unforeseeable, serious consequences. Even though these assumptions are the subject of great controversy among economic experts, they are at any rate not evidently erroneous. Therefore the Federal Constitutional Court may not replace the legislature's assessment by its own.[127]

Anyone having consulted an economist in recent years, in the hope to better understand the economic correlations and interdependencies leading into or out of the crisis, may have made the experience that an often-quoted saying about lawyers that "where there are two lawyers there will usually be three opinions"—seems to apply equally to economists. However, if one looks, through the eyes of a constitutional lawyer, at the multitude of economic explanations being presented almost on a daily basis, one should not make the mistake and believe that a constitutional court could solve these issues by interpreting constitutional norms and by replacing the legislature's and also the government's assessment of the value of certain economic and monetary policies or of the budget legislator's future freedom to act.

This is not to say that a judicial decision on these issues would necessarily lack conclusiveness. But it would lack legitimation. The fact that Karlsruhe sticks to its institutional role under the Basic Law and does not supplement or even supplant the legislature's—certainly questionable—decisions by the ruling of 12 September 2012, is to be welcomed not so much because the judgment upholds a substantially "right" decision, but because it respects that this key decision (including the assessment of its future implications) is to be taken primarily by the legislature. This is why it should not be seen as a sign of weakness that the Court distinctly relies on the margin-of-assessment doctrine.

III. Future Development of the EMU: A Return to Openness

The third *leitmoti*v is closely linked to the second. It can be termed a return to constitutional openness regarding the future development of the EMU, even against the backdrop of Article 79(3) of the Basic Law.

[127] *Id.* at para. 271 (DE), 240 (EN prelim.).

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1. Article 79 (3) Basic Law—A New Formula?

In this context, it is again worth quoting the judgment's key paragraph in full:

> Article 79(3) of the Basic Law does not guarantee the unchanged further existence of the law in force but those *structures and procedures which keep the democratic process open* and, in this context, safeguard parliament's overall budgetary responsibility. Already in its Maastricht judgment, the Federal Constitutional Court held that, in order to comply with the stability mandate, *a continuous further development of the monetary union may be necessary* if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from . . . . If the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further . . . . *It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law*.[128]

In essence, the Court paves the way for a "continuous further development" of the EMU and pays respect, as we have already seen, to the legislator's margin of assessment in this context. While the preceding *Greece & EFSF* ruling might have raised doubts if the Court would, on the basis of its interpretation of Article 79(3) of the Basic Law, allow an (alleged) rearrangement of the EMU's architecture in general and the creation of a permanent stability mechanism in particular,[129] the Court now specifies that the constitutional requirement of a "stability union" does not necessarily entail to maintain the *status quo* by all means.[130] As "not every single feature of the current stability community" is guaranteed by the principle of democracy in conjunction with Article 79(3), a "democratically legitimized change" regarding the concrete design of the stability requirements under EU law is "not from the outset" incompatible with Article 79(3).[131] The Court thus returns to a

[128] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 222 (DE), 206 (EN prelim.) (emphasis added).

[129] *Greece & EFSF* case, *supra* note 15, at paras. 128–129. For an early prediction that the ESM would in fact comply with constitutional standards, see Ruffert, *supra* note 15, at 852.

[130] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 221 (DE), 205 (EN prelim.).

[131] *Id.*

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statement that was already contained in its *Maastricht* judgment.[132]

Certainly, it is not a radical turnaround to interpret Article 79(3) in a manner that does not demand to freeze the legal *status quo*, but to keep the (national!) democratic process "open." When the Second Senate in its *Lisbon* judgment identified five *marques de souveraineté*,[133] i.e., key areas within which the future conferral of competencies to the EU would bear a high risk of violating the constitutional core protected by the eternity clause, it did so precisely with the argument of ensuring sufficient room for the determination of the political development in Germany.[134] Also, the Court now explicitly underlines that the prohibition of monetary financing by the ECB constitutes "an essential element" in order to safeguard, at EU level, the constitutional requirements resulting from the principle of democracy protected in its essential content by Article 79(3) and thus seems to further extend the eternity clause.[135]

However, read together with the margin-of-assessment doctrine, the new formula seems to place less emphasis on the judicial definition of certain substantial key areas, but relies on the more abstract notion of "structures and procedures" instead. One may therefore hope that it is the beginning of a jurisprudence which shows more reluctance and sensitivity regarding the interpretation of the eternity clause, a jurisprudence taking into account the massive and legitimate critique of the "unnecessary theory of necessary state functions."[136] The eternity clause was predominantly framed in order to prevent a slide back of Germany "into dictatorship and barbarism, and nothing serves this aim with higher probability than Germany's integration into the European Union," as a present Member of the Second Senate has put it aptly in the past.[137]

2. Comparative Constitutional Law Perspective

A comparative perspective should also remind the Court to reconsider its handling of Pandora's eternity box. While Karlsruhe is not the only constitutional court which derives constitutional limits to European integration from an eternity clause, no other court in

[132] *See Maastricht* case, *supra* note 13, at para. 151.

[133] *Cf.* JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE—BOOK I, at 295, 306 and 309 (10th ed. 1593, reprint 1986).

[134] *Lisbon* case, *supra* note 14, at para. 249.

[135] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 220 (DE), 204 (EN prelim.).

[136] *See* particularly Halberstam & Möllers, *supra* note 61, at 1249–1250.

[137] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], July 18, 2005, 113 BVERFGE 273 para. 180 (Lübbe-Wolff, J., dissenting) (Ger.) [*European Arrest Warrent* case]. For the historic background of the German eternity clause see, Matthias Herdegen, *Article 79*, *in* GRUNDGESETZ—KOMMENTAR paras. 63–69 (Theodor Maunz & Günter Dürig, eds., 66th ed. 2012).

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Europe followed suit in interpreting an eternity clause in such a detailed and catalogue-style manner.

Particularly the French *Conseil constitutionnel* shows extreme self-restraint with regard to Article 89(5) of the French constitution.[138] Consequently, this provision does not belong to the relevant norms of reference, neither in the decision on the Lisbon Treaty nor in its recent decision on the Fiscal Treaty.[139] The *Conseil constitutionnel* has been described aptly as a "pointsman" (*aiguilleur*) which only indicates whether ratification requires a revision of the constitution or not.[140]

A restrictive approach towards (potential) constitutional eternity clauses can also be observed when looking at several other EU Member State constitutions.[141] The Czech Constitutional Court in its second *Lisbon* judgment even openly objected to the demand of establishing an abstract catalogue of non-transferrable rights deduced from the Czech eternity clause.[142] The petitioners had asked the Constitutional Court to set "substantive limits to the transfer of powers," a demand which was, in the words of the Court, "evidently inspired by the decision of the German Constitutional Court."[143] However, the Czech Constitutional Court replied that it did "not consider it possible, in view of the position that it [the Court] holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine 'substantive limits to the transfer of powers.'"[144] It reiterated what it had already stated in

[138] Conseil constitutionnel [CC - Constitutional Council], decision No. 2003-469 DC, Mar. 26, 2003, paras. 2–3 (Fr.) [*Decentralisation* case], *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc2003469dc.pdf. According to Article 89(5) of the French constitution, the "republican form of government shall not be the object of any amendment." That the *Conseil constitutionnel* shows extreme reluctance with regard to Article 89(5) of the French constitution is also illustrated by its Maastricht decisions, *cf.* Jacques Ziller, *Sovereignty in France: Getting Rid of the Mal de Bodin*, *in* SOVEREIGNTY IN TRANSITION 261, 271–272 (Neil Walker ed., 2003).

[139] *French Fiscal Treaty* case, *supra* note 54, at paras. 4–8 and Conseil constitutionnel [CC - Constitutional Court], decision No. 2007-560DC, Dec. 20, 2007, at paras. 3–7 (Fr.) [*Lisbon* case]. An English translation is *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2007560DCa2007560dc.pdf.

[140] LOUIS FAVOREU, LA POLITIQUE SAISIE PAR LE DROIT 30 (1988).

[141] For more details concerning the interpretation of eternity clauses by national constitutional courts in Europe, see WENDEL, *supra* note 62, at 331–337.

[142] According to Article 9(2) of the Czech constitution, the "substantive requisites of the democratic, law-abiding State may not be amended." According to Article 1(1), the "Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen."

[143] Ústavní soud [Constitutional Court], case No ÚS 29/09, Nov. 3, 2009, para. 110 (Czech) [*Treaty of Lisbon II* case]. An English translation of the most important sections by Jan Komárek is contained in 6 EUR. CONST. L. REV. 345 (2009).

[144] *Id.* at para. 111.

its first *Lisbon* decision, namely that such limits "should be left primarily to the legislature to specify, because this is *a priori* a political question, which provides the legislature wide discretion."[145] Following this general line, the Czech Constitutional Court also did not consider itself authorized to concretize in advance the precise content of the eternity clause. This would "not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favor of political processes."[146] In essence, the Czech Constitutional Court raised the question of the separation of powers, i.e., of "institutional choice" between the judiciary and the (constitutional) legislator.[147] The answer given by the Court was clearly in favor of the political process.

3. Substantial Openness Under the German Basic Law

Against this background, one might hope that the German Federal Constitutional Court will (gradually) follow a new path regarding the interpretation of the eternity clause.

A positive signal in this respect certainly is that the Court does not reiterate the concept of "sovereign statehood" as developed in the *Lisbon* judgment.[148] Furthermore, it is to be welcomed that the decision of 12 September 2012 does not mention Article 146 of the Basic Law at all. Unlike the French *Conseil constitutionnel* and the Czech Constitutional Court, which stay within the boundaries of their constitutional order by referring to the legislature or the constituent authority, Karlsruhe's *Lisbon* judgment called for revolution when it referred to the pre-constitutional (and thus outer-systemic) right to give oneself a constitution, allegedly mirrored in Article 146[149] and therefore allegedly justiciable.[150] Even if one accepted the highly doubtful claim that Article 146 can be construed as a normative

[145] *Id.*

[146] *Id.* at para. 113.

[147] *See e.g.*, Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501, 530 (Neil Walker ed., 2003); Jan Komárek, *European Constitutionalism and the European Arrest Warrant—in Search of the Limits of "Contrapunctual Principles"*, 44 COMMON MKT. L. REV. 9, 38–40 (2007) within the context of the *European Arrest Warrant* cases.

[148] The term "sovereignty" is mentioned only once in the context of the new Article 136(3) TFEU (para. 236). See the comment of Ingolf Pernice in THE EUROPEAN (Sept. 19, 2012), http://www.theeuropean.de/ingolf-pernice/12291-nach-dem-esm-urteil. For a different appraisal see Schorkopf, *supra* note 49, at 1274, arguing that the Court hereby adheres to its understanding of sovereignty as developed in the *Lisbon* judgment. For the concept of "sovereign statehood," see the *Lisbon* case, *supra* note 14, at paras. 224, 228-229, 247–248, 263.

[149] *Lisbon* case, *supra* note 14, at paras. 179, 232, 263. S*ee* the criticism by Matthias Jestaedt, *Warum in die Ferne schweifen, wenn der Maßstab liegt so nah?*, 48 DER STAAT 496, 501, 512–513 (2009).

[150] The logical fracture is that, according to the Court, the inner-systemic voter shall be entitled, by relying on Article 38(1) Basic Law, to become the guardian of the outer-systemic constituent power reflected in Article 146 Basic Law. *See Lisbon* case, *supra* note 14, at paras. 179–180.

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basis for overcoming the limits protected by the eternity clause,[151] the question still remains if (and with which consequences) it can be up to a Court to act as a "transnormative pointsman," i.e., to initiate a process at the end of which the constitutional order, which forms the Court's own constitutional basis, would be superseded.[152] One may therefore hope that the Court's new openness will remain an openness under the German Basic Law.

D. Leftovers

Given that the judgment was limited to the summary review within the framework of a temporary injunction procedure, some leftovers for the principal proceeding do remain.

I. The Ultra Vires *Claim: Acquisition of Government Bonds on the Secondary Market by the ECB*

The most important leftover concerns the constitutional evaluation of rescue measures taken by the European Central Bank (ECB), in particular the acquisition of government bonds on the secondary market. These measures were challenged exclusively by the applicants in proceeding 2 BvR 1421/12. Their application to declare these measures *ultra vires*, i.e., transgressing the competences conferred to the ECB and thus being inapplicable in Germany,[153] was considered by the Court as being not included in the application for the issue of a temporary injunction and thus will have to be addressed in the principal proceedings.[154]

The first question arising in this context relates to the admissibility of the *ultra vires* claim.[155] It is not the first time that the Court is confronted with such a claim in the context of EU rescue measures. In its *Greece & EFSF* judgment, the Court declared a constitutional complaint directed against comparable measures inadmissible, because the challenged acts were "not sovereign acts of German state authority" and could therefore not be

[151] For convincing arguments against this claim, see Tobias Herbst, *Legale Abschaffung des Grundgesetzes nach Art. 146 GG?*, 45 ZEITSCHRIFT FÜR RECHTSPOLITIK 33 (2012).

[152] For a profound analysis of the Court's approach, see Martin Nettesheim, *Wo "endet" das Grundgesetz? Verfassungsgebung als grenzüberschreitender Prozess*, 51 DER STAAT 313, 340–342, 349–355 (2012).

[153] *Lisbon* case, *supra* note 14, at paras. 240–241; *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2661/06, July 6, 2010, at paras. 55–66 [*Honeywell* case]. For the concept of *ultra vires* acts *cf.* the in-depth analysis of FRANZ C. MAYER, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG 67 et seq. (2000).

[154] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 202 (DE, not translated into EN).

[155] The Court addresses this issue within the context of admissibility.

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challenged within the procedural framework of a constitutional complaint.[156] However, referring to its *Maastricht* and *Honeywell* decisions, the Court declared the complaint inadmissible "notwithstanding" other possibilities to review the applicability of the challenged acts in Germany.[157] Hence, the Court has left the door open for *ultra vires* claims beyond the exclusive procedural context of a constitutional complaint.[158]

Even if it seems unlikely on the basis of the preceding *Greece & EFSF* judgment that the Court should declare the claims admissible this time, one may wonder about the consequences if Karlsruhe decided differently. A (founded) *ultra vires* review would lead to the inapplicability of the respective act in Germany.[159] However, a declaration of "inapplicability" regarding the decision of the ECB to acquire government bonds on the secondary market cannot effectively stop these measures and thus hardly meets the complainants' procedural objective. In any case, if the Court carried out an *ultra vires* review on the question if the activities of the ECB manifestly violate its competences, it would have to refer a preliminary question to the European Court of Justice—not only under Article 267(3) TFEU but also according to its own standards.[160] Like the preliminary reference of the Irish Supreme Court leading to the *Pringle* judgment,[161] such a preliminary reference would finally lead to a legal assessment by the judicial body which is first and foremost competent to ensure that "in the interpretation and application of the Treaties the law is observed," as Article 19(1) sentence 1 TEU states.

The primary competence of the Court of Justice to interpret EU law, however, did not prevent the German Federal Constitutional Court from already presenting its interpretation[162] of Article 123 TFEU, the key provision in this respect. With specific view to the relationship between the ESM and the ECB, the Court holds that borrowing by the ESM from the ECB, "alone or in connection with the depositing of government bonds, would be incompatible" with EU law.[163] Furthermore, the Court classifies the ESM as an institution in the sense of Article 123(1) TFEU to which no loans may be granted by the ECB. Also a depositing of government bonds by the ESM with the ECB would "infringe the

[156] *See Greece & EFSF* case, *supra* note 15, at para. 116.

[157] *Id.*

[158] *See* Ruffert, *supra* note 15, at 847. Ruffert takes the view that an *ultra vires* review would have been admissible.

[159] *See Lisbon* case, *supra* note 14, at para. 241; *Honeywell* case, *supra* note 153, at para. 55.

[160] *Honeywell* case, *supra* note 153, at para. 60.

[161] *See supra* note 28 and accompanying text.

[162] *Cf.* Schorkopf, *supra* note 49, at 1275.

[163] *ESM & Fiscal Treaty* case, *supra* note 1, at para. 276 (DE), 245 (EN prelim.).

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ban on the direct acquisition of debt instruments of public entities."[164] According to the Court, it could remain open whether this would constitute an acquisition on the primary or on the secondary market, for "an acquisition of government bonds on the secondary market by the European Central Bank *aiming* at financing the Members' budgets independently of the capital markets is prohibited as well."[165] This statement could have a significant impact, even though the condition that a forbidden acquisition must "aim" at financing the Members' budgets independently, i.e., must follow a certain intention, is certainly a hard nut to crack.

II. Parliamentary Involvement

The second group of leftovers concerns the question of parliamentary involvement. As already stated within the context of the first *leitmotiv*, the Court will examine several issues more closely in the principal proceedings in this respect. The first aspect relates to the intensity of parliamentary participation concerning decisions to issue shares of the authorized capital stock at higher than par value under Article 8(2) sentence 4 TESM. The second concerns the question of parliamentary arrangements to avoid a suspension of the voting rights under Article 4(8) TESM.[166] Thirdly, the Court stated that a further review in the principal proceedings might be necessary regarding the intra-parliamentary allocation of responsibilities. Here, some of the powers currently assigned to the Budget Committee may have to be exercised by the plenary session.[167] The fourth issue left expressly open for the principal proceedings is the question to what extent the intra-parliamentary allocation of tasks is justiciable within the framework of a constitutional complaint.[168] However, these issues address the institutional "fine-tuning" and will possibly not lead to judicial statements of major significance in the principal proceedings.

[164] *Id.* at paras. 277–278 (DE), 246–247 (EN prelim.).

[165] *Id.* at para. 278 (DE), 247 (EN prelim.) (emphasis added). One should note that in the *Pringle* case, the Court of Justice did not address the acquisition of government bonds by the ECB, but by the ESM. *See supra* note 28, at paras. 140–141.

[166] *ESM & Fiscal Treaty* case, *supra* note 1, at paras. 280, 290–293 (DE, not translated into EN).

[167] *Id.* at paras. 297–299 (DE, not translated into EN). This may, for instance, concern decisions on material changes of the procedure and of the conditions of the ESM's capital calls.

[168] *Id.* at para. 294 (DE, not translated into EN).

E. Conclusion

The *ESM & Fiscal Treaty* decision of 12 September 2012 might not be a *grand arrêt*, that is to say a leading case which breaks entirely new ground and opens new horizons. In many respects, it relies on Karlsruhe's preceding case law relating to European integration.

However, several promising realignments can be identified. In particular, the potential return to substantial openness regarding the future development and adjustment of the EMU against the backdrop of the eternity clause has to be welcomed. One may hope that the Constitutional Court stands at the beginning of a path towards a more careful and contained handling of the Basic Law's eternity clause. The remarkably strong manifestation of judicial restraint should also be highly appreciated, a manifestation that not only paid lip service but had significant impacts on the judgment's outcome. Compared to precedents like the *Lisbon* judgment, the decision of 12 September 2012 is also characterized by a rather concise, modest and down-to-earth language.

The German Federal Constitutional Court could not fulfill public expectations because a constitutional court cannot fulfill such "hopes of salvation" without transgressing the limits of its judicial mandate. The Court did well not to transcend this boundary. Indeed, sometimes less is more.

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