

German Constitutional Court decisions on EU anti-crisis measures

SUMMARY

In response to the financial crisis in the EU, a permanent crisis mechanism – the European Stability Mechanism (ESM) – was adopted by the euro area Member States. A number of cases, lodged with the German Federal Constitutional Court (BVerfG), aimed at blocking Germany's participation.

The BVerfG has established four requirements for German participation in rescue packages and fiscal stability mechanisms: observance of the Bundestag's budgetary autonomy, prior consent of the Bundestag to participation in rescue packages, influence of the Bundestag on spending of funds and limited participation in large rescue packages. According to the BVerfG, in order for further EU integration to be in line with the Basic Law (German Constitution) any transfer of powers needs to be democratically legitimated by the Bundestag. Certain state powers, e.g. budgetary decisions, cannot be given up through European integration.

In March 2014, the BVerfG delivered a final judgment confirming Germany's participation in the ESM. It thus followed the line of its September 2012 interim ruling, in which it had refused to issue a temporary injunction against the ratification of the ESM Treaty and the fiscal compact, provided the liability limits are clarified and the information rights of the Bundestag guaranteed. The rulings have been broadly welcomed, although there are fears that they could lead to the "disarming" of the ESM, and worries about the consequences of the rulings where further EU integration is contemplated.



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Background

Euro rescue packages and fiscal stability mechanism

At its meeting on 28-29 October 2010, the European Council agreed to establish a permanent crisis mechanism. The [European Stability Mechanism](#) (ESM) consequently replaced the temporary [European Financial Stability Facility](#) (EFSF) in mid-2013. Like the EFSF, the ESM is an international agreement between the euro area Member States outside the EU institutional framework. The adoption of the ESM was facilitated by a Treaty amendment, softening the "no bail-out" clause of Article 125 TFEU, with a new third paragraph [included](#) in Article 136 TFEU.

Moreover, in order to foster budgetary discipline and strengthen the coordination of economic policies among Member States, the [Treaty on Stability, Coordination and Governance in the Economic and Monetary Union](#) (TSCG), also known as the "Fiscal Compact", was concluded on 2 March 2012 among 25 Member States (all except the UK and the Czech Republic).

All three instruments (ESM, new Article 136(3) TFEU and the fiscal compact) needed, in order to enter into force, to be ratified by the participating Member States according to their [national constitutional requirements](#). Both the amended Article 136 TFEU and the fiscal compact entered into force on 1 January 2013, whereas the ESM's entry into force was [brought forward](#) to 1 July 2012.

ESM

The [ESM treaty](#) was signed by the euro area Member States on 2 February 2012. The ESM, based in Luxembourg, can provide financial assistance to its members with financing problems. In contrast to the EFSF, it may purchase state bonds on secondary markets as well as on primary markets. Its lending capacity is set at €500 billion.

German participation

On 29 June 2012, the Bundestag and the Bundesrat approved the ESM, the amendment of Article 136 TFEU and the TSCG with the necessary two-thirds majority.

However, several constitutional complaints and disputes lodged with the German Federal Constitutional Court (BVerfG) against the German act of ratification sought to prevent Germany participating in the permanent crisis and fiscal stability mechanisms. Although the BVerfG finally refused to grant a temporary injunction of the ratification, so that the contested measures entered into force, doubts remained regarding the potential use of ESM instruments, as well as on the scope of appreciation that politicians should enjoy within anti-crisis decision making.

Conditions for further EU integration

The BVerfG and international treaties

Remedy can only be sought before the BVerfG – whether a [constitutional complaint](#) or a [constitutional dispute](#) between state organs – against acts of the German public authority.¹ The BVerfG cannot hear a case directly against an international treaty signed by the German government or against an EU act as such. The basis for a BVerfG ruling is therefore necessarily a German ratifying act (in the case of international treaties) or an implementing act (in the case of secondary EU law). The BVerfG examines such acts from three perspectives:

- Compliance with fundamental rights established in the [German Basic Law](#),
- Control over "further" EU integration, and
- Whether acts over-step EU competences (*ultra vires* review).

The BVerfG bases its power to examine German ratifying as well as implementing acts on the premise that integration in the EU can occur only within the scope of the empowerment for constitutional integration provided by the Basic Law, in Article 23(1). EU integration is thus rooted not exclusively in the EU Treaties but in the German constitution itself too.²

According to the BVerfG in its 2009 landmark [Lisbon ruling](#), Germany's participation in the European integration process is not at the discretion of German political elites and constitutional bodies, but is a commitment under the Basic Law. The Court also held that this constitutional "integration mandate" limits national judicial power – and thus also the power of the BVerfG itself – so as not to hinder the integration process.

Constitutional identity review

The BVerfG's scrutiny of transfers of state powers to international organisations is based on the question whether such a transfer observes the German "constitutional identity". In the Court's opinion, the Basic Law does not allow any transfer of powers that would affect the identity of that same Basic Law. Part of this very constitutional identity is the sovereign statehood of Germany, preserved amongst others by the EU principle of conferral. German sovereignty may not be relinquished by the creation of a European federal state, unless the German people so decide by adopting a new constitution.

This "identity review" is based on one side on the democratic legitimacy of the transfer of powers and on the other on the retention of specific powers that are essential to preserve constitutional identity.

Democratic legitimacy

The BVerfG held in its [Maastricht](#) (1993) and Lisbon rulings that the **individual right to vote**, and thus to participate in democratic self-determination, is a fundamental element of the principle of democracy. Democracy for its part is one of the structural principles protected by the so called "eternity guarantee" of the Basic Law (Article 79(3)), which means that it cannot be modified, even by a constitutional amendment, due to its relevance for constitutional identity. The BVerfG held in this context that the right to vote in elections to the Bundestag would be violated if the rights of the Bundestag to shape substantive political and social living conditions and to decide on further integration are considerably curtailed. According to the Court, such a gap in democratic legitimation cannot be bridged at EU level by the European Parliament since it is, according to the Court, not a representation of European people but of the Member States' peoples.

According to the Court, this European "integration responsibility" rests with the German government and the Bundestag. In order not to undermine people's right to political participation, the Bundestag may not waive this responsibility and must, where necessary, take precautions to ensure its **participation rights** in the German legislation related to approval of international treaties, even if the treaty in question does not explicitly provide for such rights for national parliaments.

Subjects not amenable to transfer

Beside the procedural rights of the Bundestag to be informed and to approve further integration steps, the BVerfG requires the assurance that Germany still has sufficient scope for substantial political self-determination in any further transfer of sovereign powers.

By interlinking sovereignty and democracy the Court defined several subjects of state responsibility which as part of German constitutional identity cannot be encroached upon by European integration.³ These are: citizenship, the state's monopoly on the use of force, overall fiscal decision-making, external financing, and criminal law, as well as cultural and social issues.

Requirements for bail-outs and fiscal stability mechanisms

The Court based itself on these general conditions for German participation in further European integration, in considering the cases related to the response to the financial crisis. In its [7 September 2011](#) ruling on the financial aid to Greece and the EFSF, and its ruling of [28 February 2012](#) on participation of the Bundestag in decisions taken by the EFSF, the BVerfG developed specific requirements for German participation in euro rescue packages and fiscal stability mechanisms.

Budgetary autonomy of the Bundestag

The Court held that the Bundestag cannot transfer its own powers to control the budget to a permanent international mechanism which could lead to liability for decisions taken by other states. As established in the Lisbon ruling, a fundamental principle of democracy requires that the Bundestag decides independently on revenue and spending, even in a system of intergovernmental coordination, under one of the state powers inherent to German constitutional identity.

Prior consent of the Bundestag to large-scale rescue packages

The government has to obtain the approval of the Bundestag prior to participating in every large-scale rescue measure, so that the legislature can effectively control budget decisions. Large-scale aid measures mean those which, due to their size, may have structural consequences for the German budget.

No approval of excessively large rescue packages

The Court also held that the Bundestag must not approve too large a rescue package, capable due to its size of undermining the legislature's freedom to take budgetary decisions. However, the Court acknowledged the government has a margin of appreciation as to the maximum amount of guarantees that can be given, and said it would restrict itself to examining only manifest violations of budgetary responsibility.

Bundestag's influence on spending of funds

Furthermore, the BVerfG found that the Bundestag should be involved not only in the decision on *if* financial aid is granted, but it should also have influence on *how* the funds are used by the beneficiaries.

Positions on BVerfG "bail-out" rulings

Some [commentators](#) have found a contradiction in the Court's attempt to defend the autonomy of the Bundestag by determining what the parliament can and what it cannot do. Furthermore, many [academics](#) found that the approach of the BVerfG to the lack of sovereignty at EU level disregards the *sui generis* nature of the Union - somewhere between a traditional national state and a federation.

Also the fact that the BVerfG denies the European Parliament its character as a democratically elected parliament in terms of traditional parliamentarism has been [criticised](#), with the counter-view that a parliamentary representation must not necessarily be elected by a sovereign nation.

Other [academics](#) welcomed the rulings as an "emergency brake" for the incremental stretching of EU competences into areas which are reserved for national democratic decision-making.

The criticism triggered by the Lisbon ruling, above all, prompted the [President of the BVerfG](#), Andreas Vosskuhle, to explain this verdict and to clarify that the Court "is not pursuing European politics". At the same time, Vosskuhle [stated](#) that space in the Basic Law for further EU integration is almost exhausted, such that further integration would need the Basic Law to be amended.

A call for a German [referendum](#) on further EU integration has been made both by conservative politicians such as Bavaria's Minister-President [Horst Seehofer](#) as well as by the Social Democrat (SPD) leader [Siegmar Gabriel](#). Philosopher [Jürgen Habermas](#) has also argued for a referendum on a new Basic Law along with a constitutional convention at EU level discussing the different possibilities for "collective government without assuming the form of a federal state".

No possibilities for a referendum exist at federal level under the Basic Law except for the reorganisation of the federal territory and for the adoption of a new constitution (Article 146).

Interim ruling on ESM and fiscal compact

Procedure

On the same day, 29 June 2012, as the Bundestag and Bundesrat adopted the Acts ratifying the ESM, the fiscal compact, and the new Article 136(3) TFEU, as well as an ESM Financing Act, six constitutional complaints, accompanied by an application for a temporary injunction, were lodged with the BVerfG.

The most prominent applicants were the Bavarian conservative politician, [Peter Gauweiler](#), the parliamentary group of the left-wing political party [Die Linke](#), the only parliamentary group that opposed approval of the Acts in the Bundestag, as well as the former Justice Minister, Herta Daübler-Gmelin representing the association "[More Democracy eV](#)". This last complaint was supported by more than 37 000 citizens, making it the largest collective constitutional complaint filed with the BVerfG. Drawing on the BVerfG's previous case law regarding participation in bail-outs and fiscal stability mechanisms, the applicants invoked their right to vote and the principle of democracy. As a consequence, President Joachim Gauck [was asked](#) by the Constitutional Court to postpone his signature of the Acts.

On 12 September 2012, the BVerfG delivered its [decision](#) on the application for a temporary injunction preventing Federal President Joachim Gauck from signing the three German Acts into law. The BVerfG stated that its decision, although provisional, would be indicative of the decision to be expected in the main proceedings, due to the significant consequences of the legal instruments at stake.

The interim ruling

As starting point, the Court clarified that it took no decision on the economic and political expediency of the instruments, which remain the responsibility of the politicians.

The BVerfG refused to grant a temporary injunction against the signing into law of the German acts ratifying the ESM and the fiscal compact, stating that they were not likely to violate the Basic Law.

However, while the Acts approving the fiscal compact and the new Article 136(3) TFEU could be signed into law immediately, the Court held that the German Act approving the ESM is only in line with the Basic Law under two conditions.

Liability limits

First, the first sentence of [Article 8\(5\) of the ESM Treaty](#) shall be interpreted in conjunction with Annex II, limiting the liability of Germany to its portion of the authorised capital stock of approximately €190 billion. The BVerfG clarified that this maximum limit in liability cannot be increased without the approval of the Bundestag. The complainants had drawn attention to an "automatic" revised increased capital call without new national parliamentary approval if an ESM member fails to meet the required payment under a capital call, made e.g. in order to restore the level of paid-in capital (Article 25(2) ESM Treaty). The Court clarified that the capital call can be made only within the limits of the authorised capital stock and thus the liability limits of Article 8 apply.

Article 8(5) ESM Treaty

The liability of each ESM member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price.

Information rights of the Bundestag

Second, the BVerfG held that the German ESM ratifying act would be in line with the Basic Law provided that Articles 32(5), 34 and 35(1) ESM regarding professional secrecy and immunities do not prevent the Bundestag from being informed of all relevant measures undertaken by the ESM.

"Preventive statements"

The ruling also contains some "preventive statements",⁴ not directly related to the issues at stake but rather anticipating further steps in integration. The Court stated that the ban on monetary financing, as established in Article 123 TFEU, is an important element for safeguarding the constitutional requirements for democracy in view of the transfer of monetary sovereignty to the European System of Central Banks. Therefore, both borrowing by the ESM from the European Central Bank (ECB) and acquisition of government bonds on the secondary markets by the ECB aimed at financing MS budgets would circumvent the prohibition of monetary financing, and are therefore prohibited by Union law. In February 2014, the Court [separated](#) the ESM case from the complaint relating to [ECB bond-buying decisions](#), and referred the question on the latter's compatibility with EU law to the Court of Justice of the EU.⁵

Ratification of the ESM after the ruling

After the ruling, President Joachim Gauck signed the ratification acts for the TSCG and the new Article 136(3) TFEU. The clarifications required by the BVerfG on the interpretation of the ESM Treaty however needed to be set out in binding international law. At an informal Eurogroup [meeting in Nicosia](#) on 14 September 2012, the ESM members endorsed the interpretation of the ESM Treaty further to the BVerfG's ruling, and stated that they are willing to give this interpretation legally binding status. On 27 September 2012, the ESM members agreed a joint [interpretative declaration](#) clarifying the upper ceiling of payment liabilities as well as the information rights of national parliaments.

Reactions

The ruling was welcomed by many politicians and commentators as paving the way for the entry into force of the ESM and the "reservations" established have been widely regarded as mere clarifications and thus easy to overcome.⁶

Some commentators ascribe some adverse effects to the ruling. Academic Ognian Hishow [argues](#) that because the ESM is not able to raise the liability limits of its members without the prior consent of the Bundestag, the possibilities for the ESM to react swiftly to financial shortages are considerably diminished. [Open Europe](#) saw the ruling as opening the floodgates to more court cases, due to the expected pressure for more EU integration through banking union and debt-pooling mechanisms.

Final judgment on ESM

On 18 March 2014, the BVerfG pronounced its [final judgment](#) in the ESM case. It confirmed the findings of its 2012 interim ruling.

The starting point in this ruling too is that in order for people's right to vote, and thus the principle of democracy, not to be breached, the Bundestag may not transfer its overall budgetary responsibility to an international body. As a consequence, the legitimising relationship between the ESM and the Bundestag must not be interrupted. To this end, the Court asks the German legislator to ensure that no decision may be taken in the ESM's governing bodies without the participation of the German representatives. According to [Article 4\(8\) ESM Treaty](#), this would be the case if Germany had no veto rights. Germany's voting rights (27.0716%) amount to a blocking minority, since decisions of the ESM bodies are taken either unanimously or with at least 80% of the voting rights (e.g. emergency procedure). The Court pointed to the German government's obligation to prevent changes in voting weights in the ESM bodies, as a consequence of the accession of new members, eliminating Germany's blocking minority. Germany could lose its voting rights as a consequence of not being able to meet a capital call to increase the ESM's capital (Article 9 ESM Treaty). Therefore, the German legislature must, according to the Court, ensure that Germany is in a position to meet any capital calls, regardless of their justification, to prevent loss of its blocking minority.

Moreover, the Court held that the bail-out clause of Article 136(3) TFEU does not lead to a loss of the Bundestag's budget autonomy, but merely opens the possibility to Member States to establish a stability mechanism, which according to the Court ensures that Member States remain masters of the Treaties.

The Court repeated several times that decisions on the measures to be taken to stabilise the monetary union are reserved to the political institutions, and that politicians enjoy a margin of appreciation exempt from control by the BVerfG.

Reactions

This prudent stance of the Court has been assessed by some [commentators](#) as an attempt to seek reconciliation with the political institutions. Many politicians, but also [experts](#), had criticised the BVerfG in the run-up to the ESM judgment for systematically exceeding its competences. The Court has repeatedly been accused of legislating in place of the legislator, by not respecting the power of the legislature to decide between different political options. This criticism has [sharpened](#) since the BVerfG's February 2014 judgment invalidating the 3% threshold for European elections in Germany.⁷

Consequences

The BVerfG's rulings on German participation in anti-crisis measures have established general principles, which, in the Court's opinion, need to be respected in a system of multilevel decision-making such as that of the EU. This is in order to ensure the democratic legitimacy of decision-making, particularly within the framework of economic governance which combines supranational and intergovernmental decision-making. In this context, the principles established by the BVerfG should be taken into account, for instance in implementing the [single bank resolution mechanism](#) – adopted at first reading by Council on 15 July following a trilogue agreement with the outgoing Parliament – under which ESM funds may be used to recapitalise banks that need rescuing if neither investors nor the Single Resolution Fund are able to provide funds.

Main references

[European Democracy, Constitutional Identity and Sovereignty: Some Repercussions of the German Constitutional Court's Lisbon Judgment](#) / W Lehmann, European Parliament, Policy Department C, Citizens' Rights and Constitutional Affairs, May 2010.

[The Future of the Eurozone and the Role of the German Constitutional Court](#) / C Calliess, European Legal Studies, College of Europe, 2012.

[The continuing myth of euro-scepticism? The German Federal Constitutional Court two years after Lisbon](#) / B Zwingmann, International & Comparative Law Quarterly 2012, 61(3), pp. 665-695.

Endnotes

¹ Article 19(4) Basic Law: "Should any person's rights be violated by public authority, he may have recourse to the courts".

² Decision of the BVerfG in the case Kloppenburg of 08.04.1987, BVerfGE 75, 223; STREINZ, R., Europarecht, München 2010, p. 79.

³ [The Future of the Eurozone and the Role of the German Constitutional Court](#) / C Calliess, European Legal Studies, College of Europe, 2012, p. 5.

⁴ See on the practice of the BVerfG to establish basic principles for further integration, [Defending sovereign statehood transforming the European Union into a state](#), D Grimm, European Constitutional Law Review 2009, 5(3), pp. 353-373.

⁵ [The German Constitutional Court's ruling on the ECB's bond-buying decision](#) / E M Poptcheva, European Parliamentary Research Service, 2014.

⁶ [ESM-Urteil ohne Folgen für EZB-Anleihenkauf](#) / K-H Lehne MEP (EPP), then Chair of the EP Committee on Legal Affairs, Euractiv.de, 14 September 2012.

⁷ [Electoral thresholds. Developments in Germany](#) / E M Poptcheva, European Parliamentary Research Service, 2014.

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