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Federal Constitutional Court - Press office -
Press release no. 9/2014 of 7 February 2014
Orders of 17 December 2013 and of 14 January 2014
2 BvR 1390/12 (partly separated as 2 BvR 2728/13)
2 BvR 1421/12 (partly separated as 2 BvR 2729/13)
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Principal Proceedings ESM/ECB: Pronouncement of the Judgment and Referral for a Preliminary Ruling to the Court of Justice of the European Union

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Based on the oral hearing of 11 and 12 June 2013 (see press releases no. 29/2013 of 19 April 2013 and no. 36/2013 of 14 May 2013), on

Tuesday 18 March 2014, 10:00 am, in the Courtroom of the Federal Constitutional Court, Waldstadt" seat, Rintheimer Querallee 11, 76131 Karlsruhe the Second Senate of the Federal Constitutional Court will pronounce its judgment on the subjects of the proceedings that relate to the establishment of the European Stability Mechanism (ESM) and the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact). The conditions for accreditation will be announced at a later stage; currently, no accreditations are possible.

The Senate has separated the matters that relate to the OMT Decision of the Governing Council of the European Central Bank of 6 September 2012, stayed these proceedings and referred several questions to the Court of Justice of the European Union for a preliminary ruling. The subject of the questions referred for a preliminary ruling is in particular whether the OMT Decision is compatible with the primary law of the European Union. In the view of the Senate, there are important reasons to assume that it exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the Member States, and that it violates the prohibition of monetary financing of the budget. While the Senate is thus inclined to regard the OMT Decision as an ultra vires act, it also considers it possible that if the OMT Decision were interpreted restrictively in the light of the Treaties, conformity with primary law could be achieved. The Senate decided with 6:2 votes; Justice Lübbe-Wolff and Justice Gerhardt both delivered a separate opinion.

Facts of the Cases:

In a reasonable assessment of their applications, the complainants and the applicant challenge, first, the participation of the German Bundesbank in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (OMT Decision), and secondly, that the German Federal Government and the German Bundestag failed to act regarding this Decision. The OMT Decision envisages that the European System of Central Banks can purchase government bonds of selected Member States up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the European Stability Mechanism. The stated aim

of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or "singleness" of the monetary policy. The OMT Decision has not yet been put into effect.

Essential Considerations of the Senate:

1. According to the established case-law of the Federal Constitutional Court, the Court's powers of review cover the examination of whether acts of European institutions and agencies are based on manifest transgressions of powers or affect the area of constitutional identity of the Basic Law, which cannot be transferred and is protected by Art. 79 sec. 3 of the Basic Law (Grundgesetz – GG).

2. If the OMT Decision violated the European Central Bank's monetary policy mandate or the prohibition of monetary financing of the budget, this would have to be considered an ultra vires act.

a) Pursuant to the Federal Constitutional Court's Honeywell decision (BVerfGE 126, 286), such an ultra vires act requires a sufficiently qualified violation. This means that the act of authority of the European Union must be manifestly in violation of powers, and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States.

b) The mandate of the European Central Bank is limited in the Treaties to the field of monetary policy (Art. 119 and 127 et seq. TFEU, Art. 17 et seq. ESCB Statute). It is not authorised to pursue its own economic policy but may only support the general economic policies in the Union (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU; Art. 2 sentence 2 ESCB Statute). If one assumes – subject to the interpretation by the Court of Justice of the European Union – that the OMT Decision is to be qualified as an independent act of economic policy, it clearly violates this distribution of powers. Such a shifting of powers would also be structurally significant, because the OMT Decision could be superimposed onto assistance measures which are part of the "Euro rescue policy" and which belong to the core aspects of the Member States' economic policy responsibilities (cf. Art. 136 sec. 3 TFEU). Moreover, the Outright Monetary Transactions can lead to a considerable redistribution between the Member States, and can thus gain effects of a system of fiscal redistribution, which is not entailed by the European Treaties.

c) Should the OMT Decision violate the prohibition of monetary financing of the budget (Art. 123 TFEU), this, too, would have to be considered a manifest and structurally significant transgression of powers. The violation would be manifest because primary law stipulates an explicit prohibition of monetary financing of the budget and thus unequivocally excludes such powers of the European Central Bank. The violation would also be structurally significant, because the prohibition of monetary financing of the budget is one of the fundamental rules for the design of the Monetary Union as a "community of stability". Apart from this, it safeguards the overall budgetary responsibility of the German Bundestag.

3. The existence of an ultra vires act as understood above creates an obligation of German authorities to refrain from implementing it and a duty to challenge it. These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs.

a) It is derived from the responsibility with respect to integration that the German Bundestag and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest and structurally significant transgressions of powers by European Union organs, to actively pursue the goal to reach compliance with the integration programme. They can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law, and by formally transferring the exercised sovereign powers in proceedings pursuant to Art. 23 sec. 1 sentences 2 and 3 GG. However, insofar as this is not feasible or wanted, they are generally obliged within their respective powers, to pursue the reversal of acts that are not covered by the integration programme, with legal or

political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible.

b) A violation of these duties violates individual rights of the voters that can be asserted with a constitutional complaint. According to the established case-law of the Senate, Art. 38 sec. 1 sentence 1 GG is violated if the right to vote is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people. On the other hand, Art. 38 sec. 1 sentence 1 GG does not entail a right to have the legality of decisions taken by a democratic majority reviewed by the Federal Constitutional Court.

Vis-à-vis manifest and structurally significant transgressions of the mandate by the European institutions, the safeguard provided by Art. 38 sec. 1 sentence 1 GG also consists of a procedural element: In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right to have a transfer of sovereign powers only take place in the ways envisaged, which are undermined when there is a unilateral usurpation of powers. A citizen can therefore demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers can be restored, and that they decide which options they want to use to pursue this goal. An ultra vires act can further be the object of Organstreit proceedings [proceedings relating to disputes between constitutional organs].

4. Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with primary law; another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law.

a) The OMT Decision does not appear to be covered by the mandate of the European Central Bank. The monetary policy is to be distinguished according to the wording, structure, and purpose of the Treaties from (in particular) the economic policy, which primarily falls into the responsibility of the Member States. Relevant to the delimitation are the immediate objective of an act, which is to be determined objectively, the instruments envisaged to achieve the objective, and its link to other provisions.

The classification of the OMT Decision as an act of economic policy is supported by its immediate objective, which is to neutralise spreads on government bonds of selected Member States of the euro currency area. According to the European Central Bank, these spreads are partly based on fear of investors of a reversibility of the euro; however, according to the Bundesbank, such interest rate spreads only reflect the scepticism of market participants that individual Member States will show sufficient budgetary discipline to stay permanently solvent.

The purchase of government bonds from selected Member States only is a further indication of the OMT Decision being an act of economic policy because the monetary policy framework of the European System of Central Banks does generally not have an approach which would differentiate between individual Member States. The parallelism of the OMT with assistance programmes of the EFSF or the ESM and the risk of undermining their objectives and requirements confirm this assessment. The purchase of government bonds to provide relief to individual Member States that is envisaged by the OMT Decision appears, in this context, as the functional equivalent to an assistance measure of the above-mentioned institutions – albeit without their parliamentary legitimation and monitoring.

b) Art. 123 sec. 1 TFEU prohibits the European Central Bank from purchasing government bonds directly from the emitting Member States. It seems obvious that this prohibition may not be circumvented by functionally equivalent measures. The above-mentioned aspects, namely the neutralisation of interest rate spreads, selectivity of purchases, and the parallelism with EFSF and ESM assistance programmes indicate that the OMT Decision aims at a prohibited circumvention of Art. 123 sec. 1 TFEU. The following aspects can be added: The willingness to participate in a debt cut with regard to the bonds to be purchased; the increased risk; the option to keep the purchased government bonds to maturity; the interference with the price formation on the market, and the encouragement, coming from the ECB's Governing Council, of market participants to purchase the bonds in question on the primary market.

c) In the view of the Federal Constitutional Court, the objective mentioned by the European Central Bank to justify the OMT Decision, namely to correct a disruption to the monetary policy transmission mechanism, cannot change this assessment. The fact that the purchase of government bonds can, under certain conditions, also help to support the monetary policy objectives of the European System of Central Banks does not turn the OMT Decision itself into an act of monetary policy. If purchasing of government bonds were admissible every time the monetary policy transmission mechanism is disrupted, it would amount to granting the European Central Bank the power to remedy any deterioration of the credit rating of a euro Member State through the purchase of that state's government bonds. This would largely suspend the prohibition of monetary financing of the budget.

d) In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could be interpreted or limited in its validity in conformity with primary law in such a way that it would not undermine the conditionality of the assistance programmes of the EFSF and the ESM, and would indeed only be of a supportive nature with regard to the economic policies in the Union. In light of Art. 123 TFEU, this would probably require that the acceptance of a debt cut must be excluded, that government bonds of selected Member States are not purchased up to unlimited amounts, and that interferences with price formation on the market are to be avoided where possible. Statements by the representatives of the European Central Bank in the course of the proceedings and the oral hearing before the Senate suggest that such an interpretation in conformity with primary law would most likely be compatible with the meaning and purpose of the OMT Decision.

5. Whether the OMT Decision and its implementation could also violate the constitutional identity of the Basic Law is currently not clearly foreseeable and depends, among other factors, on the content and scope of the OMT Decision as interpreted in conformity with primary law.

Separate Opinion of Justice Lübbe-Wolff:

In an effort to secure the rule of law, a court may happen to exceed judicial competence. In my view, this has occurred here. The motions should have been rejected as inadmissible. How Bundestag and Federal Government are to react to a violation, martial or non-martial, of German sovereign rights is a question that cannot reasonably be answered by rules making certain predetermined positive actions mandatory. Selecting from the variety of possible reactions, which range from expressions of disapproval to an exit from the Monetary Union, can only be a matter of political discretion. Accordingly, it comes as no surprise that no such rules are detectable either in the text of the Constitution or in the case-law interpreting it. The assumption that under specified conditions not only acts of German federal organs which positively restrict sovereign rights, but also mere inaction in the face of qualified transgressions on the part of the European Union can be challenged on the basis of Art. 38 sec. 1 GG departs from earlier case-law, just recently corroborated, according to which parliamentary or governmental inaction

is contestable in constitutional complaint proceedings only if the complainant can rely on an explicit constitutional mandate substantially specifying the content and reach of the alleged duty to act. With respect to Organstreit challenges of inaction, too, the Senate has just recently repeated that they are admissible only if directed against a specific omission, i.e. against the omission of a specific action which can arguably be presented as constitutionally imperative. Moreover, the notion that a mere omission of certain governmental behaviour on the Union level can be a proper object of constitutional complaint would seem to stand in contrast to recent case-law according to which even positive acts of governmental cooperation in EU decisions or in intergovernmental decisions related to the Union will not be examined.

Separate Opinion of Justice Gerhardt:

I hold that the constitutional complaints and the application in the Organstreit proceedings, in so far as they relate to the OMT Decision, are inadmissible. The Senate's decision extends the possibilities of the individual to initiate via Art. 38 sec. 1 GG – without connection to a substantive fundamental right – a review of the acts of Union institutions by the Constitutional Court. By admitting such an ultra vires review, the door is opened to a general right to have the laws enforced (allgemeiner Gesetzesvollziehungsanspruch), which the Basic Law does not contain. The responsibility with respect to integration (Integrationsverantwortung) of the German constitutional organs exists vis-à-vis the general public, and yields nothing for the construction of a subjective right of any person entitled to vote to have constitutional organs take action. With regard to the question of whether there exists a qualified ultra vires act, the Federal Government and the Bundestag must have a margin of appreciation and discretion, which the citizen needs to accept. The decision is based on the assumption that a transgression of powers can also be manifest if it is preceded by a lengthy clarification process. This case shows in abundant clarity how difficult it is to handle the criterion "manifest". Monetary and economic policies relate to each other and cannot be strictly separated. In an overall assessment, it seems to me that the claim, that the objective of the OMT Decision is first and foremost the re-establishment of the monetary transmission mechanism, cannot be contradicted with the unequivocalness to be required. That, with the help of the Federal Constitutional Court, an individual may steer the Bundestag's right of initiative into a specific direction, does not fit into the constitutional framework of parliamentary work. The citizens can influence the way and objectives of the political process through petitions, the political parties and Members of Parliament, and in particular through the media. The Bundestag could readily have criticised the OMT Decision by political means, threatened, if necessary, to bring proceedings for annulment before the Court of Justice of the European Union, waited for the reactions of the European Central Bank and the financial markets and then taken further steps. The fact that it did none of this does not indicate a democratic deficit, but is an expression of its majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area.