Bundesverfassungsgericht

Constitutional complaint challenging the acts of approval of amendments to the European Stability Mechanism and to the Intergovernmental Agreement unsuccessful

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Order of 13 October 2022
2 BvR 1111/21

Act of approval of ESM amendments

In an order published today, the Second Senate of the Federal Constitutional Court dismissed as inadmissible a constitutional complaint challenging the domestic acts of approval of the Agreement of 27 January 2021 Amending the Treaty Establishing the European Stability Mechanism and the Agreement of 27 January 2021 Amending the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund.

In 2021, the Member States of the euro area agreed to implement certain reforms to the European Stability Mechanism (ESM) and the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (Intergovernmental Agreement). The changes are intended to strengthen the effectiveness of the precautionary financial assistance instruments used by the ESM and to introduce a common backstop to the Single Resolution Fund.

The constitutional complaint challenging the acts of approval of both amending agreements is inadmissible, as the complainants have not sufficiently demonstrated and substantiated the possibility that these acts violate their right to democratic self-determination derived from Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG). They have failed to demonstrate that either of the amending agreements might lead to a transfer of sovereign powers to the ESM or to the European Union or that a (de facto) change of the framework of the EU integration agenda (*Integrationsprogramm*) that might violate their rights under Art. 38(1) first sentence GG is at issue.

Facts of the case:

The ESM was established by the Member States of the euro area in 2012. The ESM serves to mobilise funding and to provide stability support under strict conditionality to the benefit of ESM members which are experiencing, or are threatened by, severe financing problems. With the Agreement of 27 January 2021 Amending the Treaty Establishing the European Stability Mechanism (Agreement Amending the ESM Treaty), the ESM members agreed to implement reforms to strengthen the effectiveness of the precautionary financial assistance instruments used by the ESM and to enhance its role by introducing new modalities of cooperation with the European Commission. The reforms also establish a common backstop to the Single Resolution Fund. Moreover, they revise the emergency procedure already contained in the ESM Treaty, which is to be extended to the common backstop.

The Intergovernmental Agreement forms part of the framework on the European Banking Union (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 151, 202 <244 para. 28> – European Banking Union). The purpose of this framework is to maintain financial stability in the euro area. In the Agreement of 27 January 2021 Amending the Intergovernmental Agreement (Agreement Amending the Intergovernmental Agreement), the contracting parties agreed to change the rules for the mutualisation of ex post contributions. Under the proposed changes, ex post contributions from all contracting parties will only be transferred to the fund if other means are not sufficient; there is a cap on the maximum amount to be transferred.

In May 2021, the Federal Government proposed to the *Bundestag* a draft act of approval of the Agreement Amending the

ESM Treaty and a draft act of approval of the Agreement Amending the Intergovernmental Agreement. On 11 June 2021, the *Bundestag* adopted both acts of approval without changes. The *Bundesrat* gave its consent to the acts of approval on 25 June 2021. Following a request by the Federal Constitutional Court, the Federal President suspended the certification of the act of approval of the Agreement Amending the ESM Treaty pending a decision in this case.

With their constitutional complaint, the complainants seek a review of the formal lawfulness of a transfer of sovereign powers (*formelle Übertragungskontrolle*). They assert that the act of approval of the Agreement Amending the ESM Treaty and the act of approval of the Agreement Amending the Intergovernmental Agreement, which were adopted by simple majority in the *Bundestag* and the *Bundesrat,* violate their rights under Art. 38(1) first sentence and Art. 20(1) and (2) in conjunction with Art. 79(3) GG. The complainants contend that a two-thirds majority was required because the emergency procedure established by the Agreement Amending the ESM Treaty in the context of the common backstop would lead to a transfer of sovereign powers and because the amendment results in a de facto amendment of the legal framework of the European Union in a structurally significant manner.

Key considerations of the Senate:

The constitutional complaint is inadmissible, as the complainants have failed to sufficiently demonstrate and substantiate the possibility of a violation of their right to democratic self-determination derived from Art. 38(1) first sentence GG.

I. Pursuant to § 92 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), a constitutional complaint must set out which constitutional requirements the challenged measure fails to meet. Complainants must therefore state the extent to which a measure is considered to violate the fundamental rights or rights equivalent to fundamental rights specified in the complaint. If the issues raised by the complainants have already been addressed in the existing case-law of the Federal Constitutional Court, the violation of asserted rights must be substantiated by the complainants in accordance with the constitutional standards developed by the Court.

II. The complainants' submissions regarding the possibility that the challenged acts of approval violate their right to democratic self-determination following from Art. 38(1) first sentence GG do not satisfy these requirements.

1. The domestic act of approval of an international treaty may be challenged via constitutional complaint – in certain cases even before the treaty comes into force – if the treaty contains provisions that directly affect the legal sphere of the individual complainant. This also applies to international treaties for the further development of the European Union and establishing or changing intergovernmental institutions that supplement or are otherwise closely aligned with the European Union.

Complainants may also have standing to lodge a constitutional complaint against an act of approval on the grounds of a possible violation of the right to democratic self-determination following from Art. 38(1) first sentence GG. However, the Federal Constitutional Court only reviews an act of approval of an international treaty on the basis of Art. 23(1) second and third sentence GG if a transfer of sovereign powers to the European Union or to an intergovernmental institution that supplements or is otherwise closely aligned with the European Union is at stake. This is the case when the European Union or an intergovernmental institution is authorised to implement measures with direct consequences for legal subjects in Germany. By contrast, mere de facto changes of the EU integration agenda or its legal framework brought about by the conclusion of international treaties that do not involve changes of primary law generally do not amount to a transfer of sovereign powers.

2. In light of the foregoing, the complainants have failed to sufficiently demonstrate and substantiate a violation of Art. 38(1) first sentence GG. They did not demonstrate that the Agreement Amending the ESM Treaty might lead to a transfer of sovereign powers to the ESM or to the EU or that a (de facto) change in the framework of the EU integration agenda that might violate their rights under Art. 38(1) first sentence GG is at issue. The same applies to the Agreement Amending the Intergovernmental Agreement.

a) The complainants have failed to substantiate that the Agreement Amending the ESM Treaty leads to a transfer of sovereign powers to the ESM. They did not address the express findings of the Federal Constitutional Court, according to which the ESM Treaty does not lead to a transfer of sovereign powers (cf., e.g., BVerfGE 153, 74 <145 para. 123> – Unified Patent Court). They have also failed to demonstrate that a de facto change in the framework of the EU integration agenda might violate their rights under Art. 38(1) first sentence GG.

aa) With regard to the revision of the emergency voting procedure applicable to the common backstop (Art. 18a(6) of the Agreement Amending the ESM Treaty), the complainants assert that the design of this procedure shifts political

ownership of the activation of the common backstop to the European Commission and the European Central Bank. However, the decision-making process in the ESM's bodies regarding the granting of financial assistance does not, as such, constitute an exercise of sovereign powers. Rather, it only concerns payment transactions between the ESM, the Single Resolution Board and individual members of the ESM, which do not directly affect the legal sphere of citizens. Given that the ESM does not exercise sovereign powers when deciding whether to grant financial assistance and performing related functions, a procedural provision concerning such decision-making and relating to the ESM's tasks, such as Art. 18a(6) of the Agreement Amending the ESM Treaty, does not amount to an authorisation to exercise sovereign powers.

The complainants have also failed to demonstrate that other provisions of the Agreement Amending the ESM Treaty transfer sovereign powers to the ESM; in particular, this concerns the establishment of a common backstop to the Single Resolution Fund in Art. 18a of the Agreement Amending the ESM Treaty. The current legal framework also allows the ESM to provide assistance to contracting parties if they can no longer meet their obligation to grant credit lines to the Single Resolution Board in order to ensure that it has sufficient financing.

Insofar as the complainants contend that the Agreement Amending the ESM Treaty increases the scope of functions to be carried out by the European Commission and the European Central Bank on the part of the ESM as 'commissioned administrative agents' (*Organleihe*), the complainants have failed to substantiate that sovereign powers are transferred to the ESM or to the EU. The new functions of the European Commission serve to ensure that the measures taken by the ESM are in keeping with EU law, in particular, with the framework for coordinating economic policy. This is congruent with the functions conferred on the European Commission by EU law. The complainants have failed to demonstrate that this could amount to a (further) transfer of sovereign powers.

The extension of the conferral of functions on EU institutions as 'commissioned administrative agents' does not transfer decision-making powers to the European Commission. The functions conferred on the European Commission and on the European Central Bank as 'commissioned administrative agents' are limited to preparatory and supporting activities. Since the ESM is not authorised to exercise sovereign powers, it is, in principle, irrelevant whether it performs its functions through its own institutions or through the institutions of other intergovernmental or international organisations as agents.

bb) The complainants have also failed to demonstrate that the Agreement Amending the ESM Treaty creates de facto changes to the EU integration agenda. The agreement contains merely minor modifications of the existing integration agenda of the ESM. As such, the question of whether de facto changes in the integration agenda might transfer sovereign powers to the European Union does not arise in the first place.

The ability to carry out functions of the ESM conferred on the European Commission and the European Central Banks as agents is not new, but is already part of the EU integration agenda.

The complainants have also failed to demonstrate that the reorganisation of precautionary conditioned credit lines (PCCL) in the context of the Agreement Amending the ESM Treaty replaces or changes the primary law basis of the ESM. It is not ascertainable that the design of the PCCL, especially as regards conditionality, is no longer in keeping with Art. 136(3) of the Treaty on the Functioning of the European Union (TFEU), according to which the granting of financial assistance under the ESM will be made subject to strict conditionality, including ensuring that the Member States pursue sound budgetary policies. The new provision specifies more clearly that access to a PCCL may only be granted insofar as the eligibility criteria applicable to the respective type of financial assistance have been met; these criteria have also become stricter in certain respects.

The revisions to the PCCL and the introduction of a common backstop also do not lead to de facto changes of Art. 125 TFEU (no bail out clause). It is not evident why the realignment of the PCCL should be less effective than before in prompting Member States to pursue sound budgetary policies. The common backstop does not constitute financial assistance to a contracting party, but financial assistance to an agency of the European Union, in order to bolster the resolution mechanisms and powers of the Single Resolution Board. This eases pressures on national public finances only in an indirect manner. The principle of national budget autonomy is not affected.

The complainants likewise did not demonstrate a de facto change in Art. 126 TFEU. Given that the excessive deficit procedure under Art. 126 TFEU also forms part of the coordination of economic policy, the economic policy conditions under the ESM or the obligation to comply with the previously determined criteria for the PCCL may not contradict the requirements arising from the excessive deficit procedure.

The complainants also did not demonstrate that the Agreement Amending the ESM Treaty leads to de facto changes in

Art. 114 TFEU. The provision of a common backstop does not result in changes to the concept of the internal market, regardless of the fact that the Single Resolution Mechanism also involves the participation of states that are not part of the euro area. There are a number of areas in which even states that are not members of the European Union participate in the EU integration agenda. It is therefore not ascertainable how or why the participation of states that are not members of the euro area, and therefore also not members of the ESM, would lead to de facto changes in Art. 114 TFEU.

The common backstop also does not affect the prohibition of monetary financing of Member State budgets. Following the adoption of the Agreement Amending the ESM Treaty, the ESM will still fall within the category of institutions set out in Art. 123(1) TFEU as to which lending by the European Central Bank is prohibited.

b) Finally, the complainants have failed to sufficiently demonstrate and substantiate that the Agreement Amending the Intergovernmental Agreement leads to a transfer of sovereign powers or that it could result in de facto changes to EU primary law.
