

CONSTITUTIONAL COURT

SV 2/12-18

16 March 2013

Translation in excerpts

**IN THE NAME OF THE REPUBLIC**

The Constitutional Court,  
chaired by President  
Gerhart HOLZINGER,

in the presence of Vice-President  
Brigitte BIERLEIN

and its members  
Markus ACHATZ,  
Eleonore BERCHTOLD-OSTERMANN,  
Sieglinde GAHLEITNER,  
Christoph GRABENWARTER,  
Christoph HERBST,  
Michael HOLOUBEK,  
Helmut HÖRTENHUBER,  
Claudia KAHR,  
Georg LIENBACHER,  
Rudolf MÜLLER and  
Johannes SCHNIZER

and the substitute member  
Nikolaus BACHLER

as voting judges, in the presence of the recording clerk  
Elisabeth FEKETE-WIMMER,

has decided after a public oral hearing on 6 March 2013, after listening to the presentation given by the judge rapporteur and to the statements of the representative of the Carinthian Provincial Government (*Kärntner Landesregierung*), Edmund Primosch, and the representatives of the Federal Government, Ronald Faber, Ambassador Helmut Tichy, and Director General for Economic Policy and Financial Markets at the Ministry of Finance, Harald Waiglein, pursuant to Article 140a in conjunction with Article 139 paragraph 1 and Article 140 paragraph 1 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the applications submitted by the Carinthian Provincial Government of 22 October 2012 for the Court to find that the entire Treaty Establishing the European Stability Mechanism, Federal Law Gazette No *BGBl. III 138/2012*, including the Interpretative Declaration by the representatives of the contracting Parties of 27 September 2012, Federal Law Gazette No *BGBl. III 138/2012*, is unlawful and/or unconstitutional *in eventu*, that some of its individual provisions are unlawful and/or unconstitutional *in eventu*, that the Interpretative Declaration by the representatives of the contracting Parties of 27 September 2012, Federal Law Gazette No *BGBl. III 138/2012*, is unlawful and/or unconstitutional:

The applications are dismissed.

## Reasoning

### I. Application, Preliminary Proceedings and Hearing

1. The Carinthian Provincial Government filed an application for a ruling pursuant to Article 140a of the Constitution for the Constitutional Court to find

"that

1. the Treaty Establishing the European Stability Mechanism concluded between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, and the

Republic of Finland, Federal Law Gazette No. BGBl. III. 138/2012, including the 'Interpretative Declaration' by the representatives of the contracting Parties of 27 September 2012, Federal Law Gazette No. BGBl. III. 138/2012, is unlawful and/or unconstitutional in its entirety,

2. *in eventu* that

a) Article 5(6)(b) and the wording '..., unless the Board of Governors decides to issue them in special circumstances on other terms' in Article 8(2) final sentence of the Treaty Establishing the European Stability Mechanism

and/or

b) Article 9(2) and (3) and the wording '..., which shall be called in accordance with Article 9(3)' in Article 25(1)(c) as well as Article 25(2) and (3) of the Treaty Establishing the European Stability Mechanism

*in eventu:*

Article 9(2) and the wording '(2) or' in Article 25(2) first sentence of the Treaty Establishing the European Stability Mechanism

*in eventu:*

Article 9(3) and the wording '..., which shall be called in accordance with Article 9(3)' in Article 25(1)(c) and the wording 'or (3)' in Article 25(2) first sentence of the Treaty Establishing the European Stability Mechanism

and/or

c) the wording 'and decide to make changes to it' in Article 19 of the Treaty Establishing the European Stability Mechanism

and/or

d) Article 25(2) and (3) [...] of the Treaty Establishing the European Stability Mechanism

and/or

e) the wording 'the Chairperson of the Board of Governors, Governors' in Article 35(1) and the wording 'Chairperson of the Board of Governors, a Governor' in Article 35(2) of the Treaty Establishing the European Stability Mechanism

and/or

f) the wording 'and all documents belonging to the ESM or held by it' in Article 32(5) of the Treaty Establishing the European Stability Mechanism

and/or

g) the wording 'Members or' in Article 34 first sentence of the Treaty Establishing the European Stability Mechanism

and/or

h) the 'Interpretative Declaration' by the representatives of the contracting Parties of 27 September 2012, Federal Law Gazette No *BGBI. III. 138/2012*,

is unlawful and/or unconstitutional."

...

4. The Federal Government submitted a written statement claiming to either reject the applications of the Carinthian Provincial Government on formal grounds or to dismiss them on the merits.

...

5. On 6 March 2013 the Constitutional Court held a public hearing. ...

## **II. The Law**

1. The Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the

Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, and the Republic of Finland (Treaty Establishing the European Stability Mechanism — ESM Treaty) has been promulgated in the Federal Law Gazette No *BGBI. III 138/2012* as follows (...):

"The National Council has decided:

1. Pursuant to Article 50 paragraph 1 subparagraph 1 of the Constitution, the conclusion of the said State Treaty is authorized.
2. Pursuant to Article 49 paragraph 2 of the Constitution, the English, Estonian, Finnish, French, Greek, Irish, Italian, Maltese, Dutch, Portuguese, Swedish, Slovak, Slovenian, and Spanish versions of this State Treaty are to be promulgated by being made accessible for public inspection at the Federal Ministry of European and International Affairs.

Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, and the Republic of Finland

[For the text of the Treaty in the German language refer to the Annexes].

The instrument of ratification signed by the Federal President and countersigned by the Federal Chancellor was deposited on 30 July 2012 with the Secretary General of the Council of the European Union; pursuant to its Article 48(1) the Treaty hence entered into force on 27 September 2012.

According to a communication by the Secretary General of the Council of the European Union, the following other states have ratified, adopted or authorized the Treaty:

Belgium, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Spain.

Moreover, the representatives of the contracting Parties meeting on 27 September 2012 in Brussels agreed on the following Interpretative Declaration:

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 authorised 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 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."

2. The provisions of the Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, and the Republic of Finland (Treaty on the Establishment of the European Stability Mechanism – ESM Treaty) Federal Law Gazette No *BGBI. III 138/2012*, to which the concerns of the Carinthian Provincial Government essentially refer, read as follows:

### “ARTICLE 3

#### Purpose

The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.

## CHAPTER 2

### GOVERNANCE

#### ARTICLE 4

##### Structure and voting rules

1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.

2. The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. In respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.

4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85 % of the votes cast.

[...]

5. The adoption of a decision by qualified majority requires 80 % of the votes cast.

6. The adoption of a decision by simple majority requires a majority of the votes cast.

7. The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be

equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.

8. If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

## ARTICLE 5

### Board of Governors

1. Each ESM Member shall appoint a Governor and an alternate Governor. Such appointments are revocable at any time. The Governor shall be a member of the government of that ESM Member who has responsibility for finance. [...]

2. The Board of Governors shall decide either to be chaired by the President of the Euro Group, as referred to in Protocol (No 14) on the Euro Group annexed to the Treaty on the European Union and to the TFEU or to elect a Chairperson and a Vice-Chairperson from among its members for a term of two years. [...]

3. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors as observers.

4. Representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a stability support operation for a euro area Member State shall also be invited to participate, as observers, in the meetings of the Board of Governors when this stability support and its monitoring will be discussed.

[...]

6. The Board of Governors shall take the following decisions by mutual agreement:

[...]

(b) to issue new shares on terms other than at par, in accordance with Article 8(2);

(c) to make the capital calls, in accordance with Article 9(1);



(d) to change the authorised capital stock and adapt the maximum lending volume of the ESM, in accordance with Article 10(1);

[...]

(f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18;

[...]

(i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19;

[...]

(m) to delegate to the Board of Directors the tasks listed in this Article.

7. The Board of Governors shall take the following decisions by qualified majority:

[...]

(c) to set out by-laws of the ESM and the rules of procedure applicable to the Board of Governors and Board of Directors (including the right to establish committees and subsidiary bodies), in accordance with paragraph 9;

[...]

(k) to waive the immunity of the Chairperson of the Board of Governors, a Governor, alternate Governor, Director, alternate Director or the Managing Director, in accordance with Article 35(2);

[...]

[...]

## ARTICLE 6

### Board of Directors

1. Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. Such appointments shall be revocable at any time. [...]

2. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB may appoint one observer each.

3. Representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a financial assistance operation for a euro area Member State shall also be invited to participate, as observers, in the meetings

of the Board of Directors when this financial assistance and its monitoring will be discussed.

[...]

5. The Board of Directors shall take decisions by qualified majority, unless otherwise stated in this Treaty. Decisions to be taken on the basis of powers delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5(6) and (7).

[...]

## ARTICLE 7

### Managing Director

1. The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, relevant international experience and a high level of competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either.

[...]

5. The Managing Director shall be the legal representative of the ESM and shall conduct, under the direction of the Board of Directors, the current business of the ESM.

## CHAPTER 3

### CAPITAL

## ARTICLE 8

### Authorised capital stock

1. The authorised capital stock shall be EUR 700 000 million. [...]

2. The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be

issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms.

[...]

4. ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.

5. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

## ARTICLE 9

### Capital calls

1. The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

2. The Board of Directors may call in authorised unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8(2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

3. The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt.

4. The Board of Directors shall adopt the detailed terms and conditions which shall apply to calls on capital pursuant to this Article.

## ARTICLE 10

### Changes in authorised capital stock

1. The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I.

2. The Board of Directors shall adopt the detailed terms and conditions which shall apply to all or any capital changes made under paragraph 1.

3. Upon a Member State of the European Union becoming a new ESM Member, the authorised capital stock of the ESM shall be automatically increased by multiplying the respective amounts then prevailing by the ratio, within the adjusted contribution key provided for in Article 11, between the weighting of the new ESM Member and the weighting of the existing ESM Members.

## ARTICLE 11

### Contribution key

1. The contribution key for subscribing to ESM authorised capital stock shall, subject to paragraphs 2 and 3, be based on the key for subscription, by the national central banks of ESM Members, of the ECB's capital pursuant to Article 29 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (the "ESCB Statute") annexed to the Treaty on European Union and to the TFEU.

2. The contribution key for the subscription of the ESM authorised capital stock is specified in Annex I.

3. The contribution key for the subscription of the ESM authorised capital stock shall be adjusted when:

(a) a Member State of the European Union becomes a new ESM Member and the ESM's authorised capital stock automatically increases, as specified in Article 10(3); or

(b) the twelve year temporary correction applicable to an ESM Member established in accordance with Article 42 ends.

4. The Board of Governors may decide to take into account possible updates to the key for the subscription of the ECB's capital referred to in paragraph 1 when the contribution key is adjusted in accordance with paragraph 3 or when there is a change in the authorised capital stock, as specified in Article 10(1).

5. When the contribution key for the subscription of the ESM authorised capital stock is adjusted, the ESM Members shall transfer among themselves authorised capital stock to the extent necessary to ensure that the distribution of authorised capital stock corresponds to the adjusted key.

6. Annex I shall be amended upon decision by the Board of Governors upon any adjustment referred to in this Article.

7. The Board of Directors shall take all other measures necessary for the application of this Article.

[...]

## ARTICLE 12

### Principles

1. If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

[...]

## ARTICLE 13

### Procedure for granting stability support

1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial

assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

- (a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);
- (b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;
- (c) to assess the actual or potential financing needs of the ESM Member concerned.

2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding ("MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

[...]

7. The European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.

## ARTICLE 14

### ESM precautionary financial assistance

1. The Board of Governors may decide to grant precautionary financial assistance in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line in accordance with Article 12(1).

2. The conditionality attached to the ESM precautionary financial assistance shall be detailed in the MoU, in accordance with Article 13(3).

3. The financial terms and conditions of the ESM precautionary financial assistance shall be specified in a precautionary financial assistance facility agreement, to be signed by the Managing Director.

[...]

## ARTICLE 15

### Financial assistance for the re-capitalisation of financial institutions of an ESM Member

1. The Board of Governors may decide to grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalising the financial institutions of that ESM Member.

2. The conditionality attached to financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be detailed in the MoU, in accordance with Article 13(3).

3. Without prejudice to Articles 107 and 108 TFEU, the financial terms and conditions of financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

[...]

## ARTICLE 16

### ESM loans

1. The Board of Governors may decide to grant financial assistance in the form of a loan to an ESM Member, in accordance with Article 12.

[...]

3. The financial terms and conditions of each ESM loan shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

[...]

## ARTICLE 17

### Primary market support facility

1. The Board of Governors may decide to arrange for the purchase of bonds of an ESM Member on the primary market, in accordance with Article 12 and with the objective of maximising the cost efficiency of the financial assistance.

[...]

3. The financial terms and conditions under which the bond purchase is conducted shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the primary market support facility.

[...]

## ARTICLE 18

### Secondary market support facility

1. The Board of Governors may decide to arrange for operations on the secondary market in relation to the bonds of an ESM Member in accordance with Article 12(1).

[...]

5. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the secondary market support facility.

[...]

## ARTICLE 19

### Review of the list of financial assistance instruments

The Board of Governors may review the list of financial assistance instruments provided for in Articles 14 to 18 and decide to make changes to it.

[...]



## ARTICLE 25

### Coverage of losses

1. Losses arising in the ESM operations shall be charged:
  - (a) firstly, against the reserve fund;
  - (b) secondly, against the paid-in capital; and
  - (c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9(3).
  
2. If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.
  
3. When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members in accordance with rules to be adopted by the Board of Governors.

[...]

## ARTICLE 32

### Legal status, privileges and immunities

[...]

5. The archives of the ESM and all documents belonging to the ESM or held by it, shall be inviolable.

[...]

## ARTICLE 34

### Professional secrecy

The Members or former Members of the Board of Governors and of the Board of Directors and any other persons who work or have worked for or in connection

with the ESM shall not disclose information that is subject to professional secrecy. They shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

## ARTICLE 35

### Immunities of persons

1. In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.

2. The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.

[...]

4. Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly.

[...]

## ARTICLE 37

### Interpretation and dispute settlement

1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the

voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.

[...]

ANNEX I

Contribution Key of the ESM

ESM Member	ESM key (%)
[...]	
Republic of Austria	2,7834
[...]	

ANNEX II

Subscriptions to the authorised capital stock

ESM member	Number of shares	Capital subscription (EUR)
[...]		
Republic of Austria	194 838	19 483 800 000
[...]"		
[...]		

### III. Considerations

#### A. On the admissibility of the applications

...

#### B. On the merits

1. In proceedings for a review of the constitutionality of a law instituted by application pursuant to Article 140 of the Constitution, the Constitutional Court must limit itself to deliberating the issues raised (*cf. VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003*) as in proceedings for a review of the legality of an ordinance according to Article 139 of the Constitution. Hence, it must limit itself to assessing whether the provisions challenged are unconstitutional or unlawful for the reasons set out in the reasoning of an application (*VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*).

Articles 139 and 140 of the Constitution are to be applied to these proceedings accordingly. Thus, when reviewing the motions submitted by the Carinthian Provincial Government to assess the unlawfulness (of specified provisions) of the ESM Treaty and/or the Interpretative Declaration, the Constitutional Court must limit itself to the reservations put forward by the applicant Provincial Government.

2. ...

3. The main claim submitted by the Carinthian Provincial Government, asking the Court to find that the ESM Treaty including the Interpretative Declaration are unlawful and/or unconstitutional, is unfounded:

3.1. First, the Carinthian Provincial Government maintains that the Interpretative Declaration requires approval by Parliament according to Article 50 paragraph 1 subparagraph 1 of the Constitution, and that the Interpretative Declaration was unlawful because such approval had not been sought. As the Interpretative Declaration "[constitutes] an essential basis for the consent of the contracting

States to be bound by the provisions of the Treaty", this would in consequence result in the unlawfulness of the "entire legislation enacted for the purpose of national implementation" (ESM Treaty and Interpretative Declaration).

This reservation by the Carinthian Provincial Government is unfounded, if only for the fact that, even if it were founded, it would not in consequence lead to the unlawfulness of the "ESM Treaty and the Interpretative Declaration" as maintained by the Provincial Government. For its unlawfulness would then result from the fact that the procedure required under Article 50 of the Constitution would not have been complied with when the Interpretative Declaration was concluded. Pursuant to Article 140a of the Constitution, any such unlawfulness would nationally reside in the Interpretative Declaration itself, which could only be challenged separately.

3.2. Any unlawful promulgation of the Interpretative Declaration would therefore not impact the lawfulness of the promulgation of the ESM Treaty, which has not even been contested by the Carinthian Provincial Government. Equally, the reservations of the applicant Provincial Government, based on Article 49 paragraph 2 of the Constitution against the promulgation of the Interpretative Declaration as regards its language versions claiming the subsequent unlawfulness of the ESM Treaty are unfounded. In this respect as well, the reservations maintained by the Carinthian Provincial Government against the "ESM Treaty and the Interpretative Declaration" in its principal application are without merit.

3.3. As far as the application of the Carinthian Provincial Government contains details on the ratification of the ESM Treaty by the Federal President under the heading "Reservations concerning the content of the State Treaty as such" , the applicant Government did not base any reservations as regards the lawfulness of the ESM Treaty on this fact. The Government does not give specific reasons why, pursuant to Article 65 paragraph 1, first sentence of the Constitution (or Article 67 paragraph 1 of the Constitution), the Federal President would have been barred from ratifying the ESM Treaty and why this, consequently, would have made the concluded State Treaty unlawful.

3.4. Moreover, the Carinthian Provincial Government claims by presenting a more detailed reasoning that the ESM Treaty would modify Article 125(1) TFEU, so that the ESM Treaty would have had to be subjected to the parliamentary approval procedure set out in Article 50 paragraph 1 subparagraph 2 read in conjunction with Article 50 paragraph 4 of the Constitution.

In its decision of 27 November 2012, C-370/12, *Thomas Pringle*, the Court of Justice of the European Union (CJEU) ruled that Articles 125-127 TFEU, amongst others, do not prevent Member States whose currency is the euro to conclude and ratify an agreement such as the ESM Treaty. The reservations by the Carinthian Provincial Government are therefore unfounded.

Where, in addition, the applicant Provincial Government raises "a number of issues of Union law" of the "ESM Treaty in the light of the future Article 136(3) TFEU", it does not touch upon any issues to be assessed by the Constitutional Court pursuant to Article 140a in conjunction with Article 140 of the Constitution (on Article 140 of the Constitution see *VfSlg. 19.496/2011*).

3.5.1. Furthermore, the Carinthian Provincial Government has raised concerns that the ESM Treaty was non-objective and therefore violating the principle of equality, and inconsistent with the principle of economic, efficient and effective government management (Article 126b paragraph 5 of the Constitution), and contrary to the state aim of sustainable balanced budgets as stipulated by Article 13 paragraph 2 of the Constitution. The capital subscription by the Republic of Austria under the ESM Treaty in the amount of approx. EUR 19.5 billion (Annex II ESM Treaty) had, it is maintained, been made without any fundamental macro-economic research. The ESM Treaty would allow granting financial assistance to states which had unlawfully failed to properly meet their obligations under Union law to prevent excessive public deficits, even if these states had a lower tax ratio than the Republic of Austria. It is further alleged that the fact that only the Euro states would take part in the ESM, but no other EU Members, even if they could potentially benefit from the ESM, was non-objective. Entering into obligations under the ESM Treaty would also violate the state aim defined in Article 13 paragraph 2 of the Constitution to strive for sustainable balanced budgets, since it is incalculable how much in terms of supplementary payments

the Republic of Austria would be required to contribute pursuant to Article 8(4), final sentence of the ESM Treaty, and because entering into these obligations required wide-ranging austerity measures in Austria, which however is – it is maintained – inadmissible under Article 13 paragraph 2 of the Constitution, since the precept of sustainably sound public finances calls for financial management which is sustainable in the medium and long term without there being a need for extensive counter-measures.

3.5.2. ...

3.5.3. ...

The question whether or not the Republic of Austria should participate in measures such as the ESM Treaty depends on a wide range of general political and complex financial, monetary and economic policy assessments and considerations (also in terms of possible alternatives), just as much as it is determined by the position of the Republic of Austria in international relations and as a member of the euro area of the European Union. If, in exercising their constitutional power and responsibilities, the Federal Government and the National Council decided that the Republic of Austria should accede to the ESM Treaty and therefore assume obligations which are defined and limited by way of contractual agreement in order to avoid potential unpredictable economic and social losses, neither the principle of equality nor the standard of Article 13 paragraph 2 of the Constitution or of Article 126 paragraph 5 of the Constitution can be held against them. The reservations maintained by the Carinthian Provincial Government which in essence oppose the fact that the Republic of Austria has entered into obligations as a contracting State to the ESM Treaty, do not demonstrate a violation of the said constitutional provisions. These reservations in one way or other always imply that another policy option other than the one adopted by the Federal Government and the National Council would have been more obvious or more reasonable. This is a question of legal policy which is not for the Constitutional Court to assess.

3.6.1. Finally, the applicant Government put forward reservations against the fact that the ESM Treaty would transfer "individual" sovereign rights to

international bodies to a degree which would exceed the terms of Article 9 paragraph 2 of the Constitution, which would make the ESM Treaty in its entirety unconstitutional for violation of Article 9 paragraph 2 of the Constitution because these sovereign rights cannot be separated from the Treaty. Specifically, the Carinthian Provincial Government refers to the following measures:

- "Calling of authorised unpaid capital pursuant to Article 9 paragraphs 1-3 ESM Treaty (on sanctions see Article 4(8) ESM Treaty);
- Increases in authorised capital stock pursuant to Article 10 ESM Treaty and the related amendment of Article 8 and Annex II ESM Treaty;
- Entrusting of tasks to the European Commission in liaison with the ECB (Articles 13(1) and (3) ESM Treaty);
- Dispositions over capital contributions equally made available by the Republic of Austria (passim; see in particular Article 13(2) and Article 14 et seqq. ESM Treaty);
- Adoption of guidelines on the modalities of the different financial assistance facilities (see Articles 14(4), 15(4), 16(4), 17(4) and 18(5) ESM Treaty);
- Review of the list of financial assistance instruments set out in Articles 14 to 18 ESM Treaty (addition of further, unspecified instruments) by decision of the Board of Governors (see Article 19 ESM Treaty);
- Monitoring of compliance with the conditionality attached to the financial assistance facility (see Article 13(7) ESM Treaty);
- Revised increased capital call which can be made any time and is mandatory according to Article 25(2) ESM Treaty;
- The decision on all questions of interpretation and disputes arising from the contractual relation under international law. Here, the following powers have been delegated to (non-Austrian) intergovernmental institutions:
  - o Any question on the interpretation or application of the ESM Treaty and the ESM by-laws arising between Austria and the ESM,



or between ESM Members shall be submitted to the Board of Directors of the ESM for its decision (Article 37(1)).

o The Board of Governors shall decide on any dispute arising between Austria and the ESM and/or other Members in connection with the interpretation and application of the Treaty (Article 37(2); this also applies to disputes on the compatibility of decisions adopted by ESM bodies with the ESM Treaty. If such decisions were to concern Austria, Austria would not have a right to vote in the Board of Governors (Article 37(2) final sentence, ESM Treaty).

o The legality of decisions adopted by the Board of Governors shall be decided upon by the Court of Justice of the European Union and its judgment shall be final and 'binding' on the parties in the procedure which shall take all necessary measure to comply. (Article 37(3) ESM Treaty).

Interpretation and dispute settlement procedures cover central issues of the ESM Treaty, such as the obligation to comply with revised increased capital calls in the event of non-payment by some Members (Article 25(2) ESM Treaty) or the change (extension) of the financial assistance instruments of the ESM (Article 19 ESM Treaty)."

3.6.2. ...

3.6.3. According to Article 3 ESM Treaty, the purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties. For this purpose, the authorised capital stock defined in Article 8(1) ESM Treaty is at the disposal of the ESM and the ESM Members irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I.

The provisions of the ESM Treaty specified by the Carinthian Provincial Government do not exceed the extent of rights which can admissibly be transferred under the terms of Article 9 paragraph 2 of the Constitution – even assuming that all of these rights were sovereign rights within the meaning of this constitutional provision (which is not to be assessed individually for the purposes of these proceedings). This is determined by the fact that ... the notion of "individual sovereign rights" must not be interpreted too narrowly (...). Conversely, the transfer of sovereign rights as delegated to the European Communities in 1981 would no longer be covered by Article 9 paragraph 2 of the Constitution. Considering the limited purpose of the ESM and the fact that the provisions set forth by the applicant Government contain powers which are limited to the implementation of this objective (regulating issues such as the raising of funds by the ESM Treaty, decision-making, the implementation of those measures for which the ESM Treaty was established, as well as interpretation and dispute settlement procedures arising from the contractual relation and/or the assessment of the lawfulness of the acts of given bodies), they remain within what is admissible under Article 9 paragraph 2 of the Constitution in terms of their contents as well as in their totality.

The reservations by the Carinthian Provincial Government regarding Article 9 paragraph 2 of the Constitution against the lawfulness of the ESM Treaty are therefore unfounded.

3.7. The concerns raised by the applicant Provincial Government regarding the unlawfulness of the ESM Treaty including the Interpretative Declaration are without merit, both regarding the "reservations on the transformation of the Interpretative Declaration" (...) as well as the "reservations concerning the content of the Treaty as such" (...). "The ESM Treaty including the Interpretative Declaration" is not unlawful on the reasons put forward. Therefore, the main claim of the Carinthian Provincial Government's application is dismissed.

4. The alternative claims put forward by the Carinthian Provincial Government are equally unfounded:

4.1.1. The Carinthian Provincial Government seeks a ruling declaring Article 5(6)(b) ESM Treaty and the wording "unless the Board of Governors decides to issue them in special circumstances on other terms" of Article 8(2) last sentence, ESM Treaty, to be unconstitutional. Article 8(2) last sentence of the ESM Treaty would offer the possibility of issuing shares in the ESM other than at par, but at their issue price. This could be decided by the Board of Governors by mutual agreement (Article 5(6)(b) ESM Treaty). For such a decision, it is argued, Article 50b of the Constitution does not provide for powers of cooperation, and therefore be in contrast with Article 50a of the Constitution. Moreover, the wording "in special circumstances" in Article 8(2) last sentence ESM Treaty would appear questionable under constitutional law and its principle of legal certainty.

4.1.2. Articles 50a to 50d were inserted into the Constitution by way of amendment to implement the ESM, Federal Law Gazette No *BGBI. I 65/2012*. They govern the participation of the National Council in ESM matters and entered into force concurrently with the ESM Treaty pursuant to Article 151 paragraph 52 of the Constitution as amended by the said ESM amendment. Given this legislative context, it is out of question that the fact that Article 50b of the Constitution does not subject a certain decision adopted by an ESM body to the need for approval stipulated in this constitutional provision, would give rise to a conflict with Article 50a of the Constitution. Article 50a of the Constitution does not require a more extensive level of involvement of the National Council than that granted in terms of participation and information by the following Articles 50b and 50c of the Constitution (as can be clearly seen from Article 50d paragraph 2 of the Constitution, this does not prevent the legislator from laying down additional participation rights in the National Council's Rules of Procedure, yet Article 50a of the Constitution does not require such steps). Therefore, the reservations expressed by the Carinthian Provincial Government are unfounded.

Equally, the fact that the Board of Governors may "in special circumstances" decide on the issue of shares other than at par according to Article 8(2) last sentence, ESM Treaty, does not – in the light of Article 9 paragraph 2 of the Constitution – give rise to concerns that the delegation of sovereign rights would not be sufficiently determinate. In terms of procedure, reference is made to Article 5(6)(b) ESM Treaty according to which the "the issue of new shares other

than at par according to Article 8(2) ESM Treaty" shall be decided by mutual agreement. Given the fact that the ESM was established as an international financial institution (Article 1 ESM Treaty) for financial support instruments with a specific purpose (Article 3 ESM Treaty) and in view of the procedural precautions mentioned, the authorisation given to the Board of Governors, when issuing new shares in special circumstances, to take account of general economic developments as well as the economic development of the ESM and the related implications, is determined in legal terms on a substantive level.

These reservations maintained by the Carinthian Provincial Government are therefore equally unfounded, so that the entire (alternative) claim is without merits.

4.2. The Carinthian Provincial Government has asked the Court to find that Article 9(2) and (3) of the ESM Treaty and the related wordings in Article 25(1)(c), in Article 25(2) and in Article 25(3) ESM Treaty are unconstitutional.

4.2.1. According to Articles 9(2) and (3) ESM Treaty, the Board of Directors and/or the Managing Director may be authorised in addition to the Board of Governors to call in authorised unpaid capital. The Board of Directors is authorised to make such a capital call in the event that the amount of paid-in capital is reduced by the absorption of losses below the level determined in Article 8(2) ESM Treaty. The Managing Director is granted this authorisation if needed to avoid the ESM being in default of any scheduled or other payment obligations due to ESM creditors. Such capital calls may also be made against the will of an ESM Member (Article 9(2) ESM Treaty) and/or participation of the ESM Members is not foreseen at all (Article 9(3) ESM Treaty). It follows, it is argued, that – if a capital call is made against the will of the Republic of Austria – the powers of cooperation of the National Council in ESM matters would be thwarted. Articles 9(2) and (3) ESM Treaty are therefore claimed to be inconsistent with Article 50a of the Constitution.

4.2.2. ... [A]rticles 50a et seqq. of the Constitution [regulate] the participation of the National Council in ESM matters. The fact that Article 50b paragraph 2 of the Constitution cannot generate a right of approval regarding decisions under

Article 9(2) ESM Treaty for the National Council by way of authorisation of the Austrian representative, does not violate one of the said constitutional provisions, if only because of the contextual interrelation of Article 50a and Article 50b of the Constitution. The same holds true for the fact that Article 50b of the Constitution does not cover capital calls under Article 9(3) ESM Treaty.

Contrary to the view held by the applicant Provincial Government that the constitutional legislator apparently made an erroneous assumption, Article 50b of the Constitution does not contain an unintended regulatory gap which would have to be systematically closed in the light of Article 50a of the Constitution, since neither Article 50a of the Constitution nor any other provision of the Constitution require every act of ESM bodies to be subject to any influence by the National Council which would, in effect, amount to a power of approval. This already follows from Article 9 paragraph 2 of the Constitution. In this context there is merit to point out that the fundamental basis for any later capital calls according to Article 9(2) ESM Treaty is the granting of stability support under Article 13 ESM Treaty. According to Article 50b paragraph 1 of the Constitution, the National Council may considerably influence such capital calls (on the mutual agreement required for decisions under Article 50b paragraph 1 of the Constitution and, generally, on the further main procedural steps to reach that purpose, see Article 5(6)(f) ESM Treaty). Besides, the National Council participates in various ways in ESM matters according to Article 50a et seqq. of the Constitution, and not only by approvals according to Article 50b of the Constitution. Article 50c of the Constitution, for instance, stipulates that the competent Federal Minister shall have a duty of information. The ESM Information Rules (Annex 2 to the Federal Law on the Rules of Procedure of the National Council, *Geschäftsordnungsgesetz 1975, GOG*), which were enacted specifically to implement this constitutional provision, provide for a reporting obligation by providing information, documents and draft decisions on capital calls according to Article 9(1) and (2) ESM Treaty as well as on those "rules for capital calls" pursuant to Article 9(4) ESM Treaty which govern the acts of the Managing Director according to Article 9(3) ESM Treaty. According to the provisions of the ESM Information Rules such information, documents, and draft decisions are deliberated on by the Parliamentary Standing Sub-Committee on ESM Affairs (section 74e paragraph 1 subparagraph 3 GOG 1975) and can

therefore – section 32i paragraph 1 GOG 1975 – be the subject of (even repeated) comments by the National Council pursuant to Article 50c paragraph 1 of the Constitution.

Thus, the reservations maintained by the Carinthian Provincial Government are unfounded.

4.3. The Carinthian Provincial Government has asked the Court to find that the wording "and decide to make changes to it" in Article 19 ESM Treaty was unconstitutional.

4.3.1. In its reasoning, the applicant Government states that Article 19 ESM Treaty authorises the Board of Governors to review and decide to change the list of financial support instruments provided for in Articles 14 to 18 ESM Treaty. Article 19 ESM Treaty, it is argued, does not contain any further requirements, so that this provision is in violation of Article 9 paragraph 2 of the Constitution for not being specifically determined.

4.3.2. ...

4.3.3. According to Article 12(1) ESM Treaty, the ESM may provide stability support to an ESM Member under strict conditionality appropriate to the financial assistance instrument chosen, if this is indispensable to safeguard the financial stability of the euro area as a whole or of its Member States. Such ESM stability support may be granted by way of the instruments set out in Articles 14 to 18 ESM Treaty (ESM precautionary financial assistance, financial assistance for the re-capitalisation of financial institutions, ESM loans, primary market support facility and secondary market support facility), but also – in view of the fact that the ESM is a permanent stability mechanism – by a financial instrument that is newly adopted pursuant to Article 19 ESM Treaty. Decisions by the Board of Governors to change the list of financial support instruments provided for in Articles 14 to 18 ESM Treaty require mutual agreement (Article 5(6)(i) ESM Treaty; see in this context also Article 50b paragraph 3 of the Constitution).

State treaties concluded according to Article 50 paragraph 1 subparagraph 1 of the Constitution are acts of parliamentary legislation which are from a national perspective generally equivalent to formal laws (...). Pursuant to Article 18 of the Constitution provisions of state treaties must meet an appropriate degree of determination inasmuch as they are to form the basis for national implementing acts within the meaning of that constitutional provision. (...). Article 19 ESM Treaty in fact is not such a case. As regards the requirement resulting from Article 9 paragraph 2 subparagraph 2 of the Constitution that the individual sovereign rights delegated by way of state treaty must be accordingly determined – without requiring the same degree of determination set out in Article 18 of the Constitution (in fact, Article 9 paragraph 2 subparagraph 2 of the Constitution allows to delegate powers to international bodies which would have to be exercised by the national legislator) – Article 19 ESM Treaty is not in breach of this constitutional requirement. Given the specific purpose of the ESM, the regulatory context defined by the existing list of financial instruments, and the procedure to change this list of financial instruments, the said power of the Board of Governors is sufficiently specified as regards Article 9 paragraph 2 of the Constitution.

These reservations of the Carinthian Provincial Government are therefore equally unfounded.

4.4. The Carinthian Provincial Government has asked the Court to declare Article 25(2) and (3) ESM Treaty as unconstitutional:

4.4.1. Article 25(2), first sentence, ESM Treaty stipulates that if an ESM Member fails to meet the required payments under a capital call made pursuant to Article 9(2) or (3) ESM Treaty, a revised increased capital call will be made to all ESM Members with a view to ensuring that the ESM receives the total amount of capital needed. In the opinion of the applicant Government, this "obligation to make supplementary payments" is a *lex specialis* to limit the liability set out in Article 8(5), first sentence, ESM Treaty. Since (at least) the scope of the obligation to make supplementary payments would be doubtful, Article 25(2), first sentence, ESM Treaty would be in breach of the principle of sufficient determination and legal certainty. The Interpretative Declaration, it is argued,

did not clear those doubts, with respect to the reservations asserted by the Carinthian Provincial Government regarding its transformation.

#### 4.4.2. ...

4.4.3. Based on the understanding which both the Federal Government (Explanatory Notes to Government Bill *RV 1731 BlgNR 24. GP, 7*) and also the National Council had when authorising the conclusion of the ESM Treaty, and which was ensured by the following Interpretative Declaration, it suffices to point out that according to the Interpretative Declaration, Article 8(5) ESM 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 authorised 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 procedures." This overrides the concerns of the applicant Government maintaining that Article 25(2) first sentence, ESM Treaty, would set out an unlimited liability for making supplementary payments.

Therefore, the reservations alleged by the Carinthian Provincial Government against Article 25(2) and (3) ESM Treaty are likewise unfounded.

4.5. The Carinthian Provincial Government has asked the Constitutional Court to find that the wordings "the Chairperson of the Board of Governors, Governors" in Article 35(1) ESM Treaty and "the Chairperson of the Board of Governors, a Governor," in Article 35(2) ESM Treaty were unconstitutional.

4.5.1. In its reasoning, the applicant Government maintains that the application of Article 35(1) ESM Treaty would give the Federal Minister of Finance representing Austria as an ESM Member in the Board of Governors personal immunity before the Constitutional Court as State Court pursuant to Article 142 paragraph 2 point (b) of the Federal Constitution, arguing that Art 35(1) ESM Treaty is therefore inconsistent with Article 76 paragraph 1 of the Constitution. The Carinthian Provincial Government would uphold these reservations even if



the Federal Minister of Finance concerned were to be appointed as chairperson of the Board of Governors.

4.5.2. ...

4.5.3. According to Article 35(1) ESM Treaty, Governors (including the Chairperson of the Board of Governors) amongst others are immune from legal proceedings with respect to acts performed by them in their official capacity. Paragraph 2 of this provision stipulates that the Board of Governors may waive to such extent and upon such conditions as it determines any of these immunities.

The (professional) immunity of appointed officials such as governors of international financial institutions is an indispensable requirement for the viability of these institutions and therefore ... common practice under international law. However, this immunity does not rule out national accountability under Article 142 paragraph 2 point (b) of the Constitution for a violation of reporting and information duties according to Article 50c of the Constitution in conjunction with the relevant provisions of the Federal Law on the Rules of Procedure of the National Council (GOG 1975) or for failure to comply with an authorisation under Article 50b of the Constitution, or for an infringement of any other national legal provision.

The wording in Article 35(1) and (2) ESM Treaty challenged by the Carinthian Provincial Government is therefore not in violation of Article 76 paragraph 1 of the Constitution. The reservations made by the applicant Government are thus unfounded.

4.6. The Carinthian Provincial Government has asked the Constitutional Court to find that the wordings "and all documents belonging to the ESM or held by it" in Article 32(5) ESM Treaty and "Members or" in Article 34 ESM Treaty were unconstitutional.

4.6.1. These (alternative) claims relate to Article 32(5) ESM Treaty according to which all documents belonging or held by the ESM are inviolable, and to Article

34 ESM Treaty, according to which Members of the Board of Governors shall not disclose information that is subject to professional secrecy. The Carinthian Provincial Government considers these provisions to be inconsistent with the National Council's right of information and participation pursuant to Article 50a et seqq. of the Constitution.

#### 4.6.2. ...

4.6.3. Articles 50a to 50d of the Constitution, inserted into the Constitution by the Amendment accompanying the ESM (*ESM-Begleitnovelle*), Federal Law Gazette No *BGBI. I 65/2012*, stipulate the participation of the National Council in ESM matters. These constitutional provisions entered into force concurrently with the ESM Treaty pursuant to Article 151 paragraph 52 of the Constitution, in the version of the said ESM amendment. According to Article 50c paragraph 1 of the Constitution, the competent federal minister must inform the National Council on ESM matters without delay. In the context of the Amendment accompanying ESM new provisions were added also to the Federal Law on the Rules of Procedure of the National Council (*GOG 1975*) and in particular paragraphs 74c to 74g specify these reporting obligations in greater detail. This regulatory context shows that the said constitutional provisions define the National Council's information and participation rights in consideration of individual provisions of the ESM Treaty, and therefore also of its Article 32(5) and Article 34. The constitutional legislator cannot be alleged of having stipulated, by adopting Articles 50a et seqq. of the Constitution in the ESM accompanying Amendment, constitutional obligations on the information and participation rights of the National Council compliance with which would conflict with Article 32(5) and Article 34 of the ESM Treaty.

Besides, reference is made to the fact that the Interpretative Declaration ... in fact ensures the understanding that Article 32(5) and Article 34 of the ESM Treaty "do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation".

The reservations of the Carinthian Provincial Government based on a conflict of Article 32(5) and Article 34 ESM Treaty with Article 50a of the Constitution are therefore unfounded.

4.7. In its last (alternative) claim the Carinthian Provincial Government ultimately asks the Constitutional Court to find that the Interpretative Declaration by the representatives of the contracting States of 27 September 2012 is unlawful and/or unconstitutional.

4.7.1. In its reasoning, the Carinthian Provincial Government refers to the reservations it had already put forward in the context of its main claim on the "transformation" of the Interpretative Declaration, arguing that the Interpretative Declaration would have to be subjected to parliamentary approval according to Article 50 paragraph 1 subparagraph 1 of the Constitution. Since such approval had not been sought, the Interpretative Declaration was, in its opinion, unlawful.

4.7.2. ...

4.7.3.1. From a national perspective, the Interpretative Declaration is a legal act which ensures a certain meaning of provisions of the ESM Treaty, which had been authorised nationally according to Article 50 paragraph 1 subparagraph 1 of the Constitution. Like the ESM Treaty, the Interpretative Declaration would require approval according to Article 50 paragraph 1 subparagraph 1 of the Constitution if it were to change – by amending or supplementing the law – the relevant provisions of the ESM Treaty in a manner that would no longer be covered by the possible understanding of those provisions in the way they had been submitted to the National Council for approval. Similar to ex-post amendments of an international treaty, the National Council's power of authorisation according to Article 50 in conjunction with Article 140a of the Constitution must be maintained at national level also in a case like the present one where the meaning of the international treaty submitted to the National Council for adoption is determined by an agreement concluded for the Republic of Austria by administrative bodies at a time after the National Council agreed to its conclusion.

Following a judgment rendered by the Federal Constitutional Court of Germany on 12 September 2012, 2 BvR 1390/12, the Interpretative Declaration deals *inter alia* with the substance of the provisions laid down in the ESM Treaty in two respects: Firstly, it addresses the question whether the limitation of liability "in all circumstances" specified in Article 8(5) first sentence ESM Treaty for each ESM Member to its own portion in the authorised capital stock at its issue price pertains, even if the provisions on revised higher capital calls under Article 9(2) and (3) ESM Treaty in conjunction with Article 25(2) ESM Treaty apply. Secondly, it deals with the question whether Article 32(5), Article 34 and Article 35(1) ESM Treaty prevent national parliaments from being comprehensively informed.

4.7.3.2. Article 8(5), first sentence, ESM Treaty explicitly stipulates that "the liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price".

This at first allows for an interpretation of the ESM Treaty which does not relate the liability limit of Article 8(5), first sentence, ESM Treaty to the case of revised increased capital calls under Article 9(2) and (3) in conjunction with Article 25(2) ESM Treaty (as this sentence provides for a temporary assumption of liabilities of other ESM Members to ensure that the ESM receives the total amount of paid-in capital needed). The Interpretative Declaration now states that Article 8(5) "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 authorised 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 procedures".

Thus, the Interpretative Declaration confirms the meaning of the ESM Treaty – to the exclusion of any other meaning – in particular of Article 8(5) which is a (potentially) lesser budgetary burden and therefore transfers fewer powers to the ESM. Such an understanding becomes manifest in the explanatory notes to the government bill which state: "The liability of each ESM Member remains in all circumstances limited to its portion in the authorised capital stock at the issue

price. Any capital calls would therefore be limited by the amount shown in Annex II (after deduction of the paid in capital)." (Explanatory Notes on Government Bill RV 1731 BlgNR, 24. GP, 7).

The Interpretative Declaration therefore does not exceed the scope and meaning of the ESM Treaty as adopted by the National Council. At the national level, the Interpretative Declaration therefore, as regards its paragraph 1, does not amend or supplement the law in the sense of Article 50 of the Constitution.

4.7.3.3. Article 32(5) ESM Treaty stipulates that the archives of the ESM and all documents belonging to the ESM or held by it shall be inviolable. According to Article 34 ESM Treaty, the members of the Board of Governors and of the Board of Directors and any other persons working for the ESM are subject to professional secrecy. In the interest of the ESM, Article 35(1) ESM Treaty grants these persons immunity from legal proceedings with respect to acts performed by them in their official capacity and inviolability in respect of their official papers and documents. Against this backdrop, paragraph 2 of the Interpretative Declaration stipulates that "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 (constitutional) legislator has made extensive arrangements to ensure the participation of the National Council in ESM matters, e.g. by the insertion of Articles 50a to 50d into the Constitution via the Amendment accompanying the ESM, Federal Law Gazette No *BGBL. I 65/2012*, according to which the National Council participates in ESM matters, and via the amendments of the Law on the Rules of Procedure of the National Council (*GOG 1975*), Federal Law Gazette No *BGBL. I 66/2012*, enacted in this context. The Rules of Procedure of the National Council (*GOG 1975*), in particular paragraphs 74c to 74g and the ESM Information Rules, which are referred and enclosed to these provisions as Annex 2, address safety classifications of the ESM bodies in terms of an enhanced confidentiality of submissions, documents, reports and draft decisions. This participation of the National Council in ESM matters which is regulated by (constitutional) law presupposes information flows and thus an understanding of the provisions of the ESM Treaty referred to here. Clearly, the National Council, when approving the ESM Treaty, was under the assumption that the confidentiality and secrecy obligations laid down in the ESM Treaty do not run counter the powers of

participation and cooperation procedures of the National Council which were enacted as part of the Amendment accompanying the ESM and the amendments of the Rules of Procedure of the National Council (*GOG 1975*). If this is emphasised in paragraph 2 of the Interpretative Declaration, the latter remains within the remit of the parliamentary approval of the ESM Treaty granted by the National Council. With regard to its paragraph 2 as well, the Interpretative Declaration therefore does not require separate approval on the national level as one that amends or supplements the law within the meaning of Article 50 paragraph 1 subparagraph 1 of the Constitution.

4.7.3.4. With the Interpretative Declaration – in paragraphs 1 and 2 – remaining within the scope of approval given to the ESM Treaty by the National Council and, therefore, within the limits set by Article 50 paragraph 1 subparagraph 1 of the Constitution, it does not exceed those limits by specially emphasizing in paragraph 3 the fact that the meanings defined in paragraphs 1 and 2 are binding according to international law.

4.7.4. The reservations by the Carinthian Provincial Government that the conclusion of the Interpretative Declaration of 27 September 2012 would have required approval according to Article 50 paragraph 1 subparagraph 1 of the Constitution, to the review of which the Constitutional Court had to limit itself, are therefore unfounded.

#### **IV. Result**

The applications of the Carinthian Provincial Government are dismissed in their entirety.

Vienna, 16 March 2013

The President  
HOLZINGER

Recording clerk:  
FEKETE-WIMMER