

Approval of Article 136 TFEU Amendment in Poland: The Perspective of the Constitutional Court on Eurozone crisis law

Katarzyna Granat*

1. INTRODUCTION

On 26 June 2013, the Polish Constitutional Court declared the Ratification Act¹ of the amendment of Article 136 TFEU constitutional.² The Court found that the Ratification Act did not confer competences vested in Polish organs of state authority upon an international organization and it did not violate Article 48(6) TEU.³ In particular, the Ratification Act did not create legal and treaty bases for conferring state competences upon the European Stability Mechanism (ESM).

The judgement presents the first assessment by a non-Eurozone member state court of the legal measures adopted to tackle the Euro-crisis. The review of the Treaty amendment Ratification Act provides a ‘sneak preview’ for the upcoming assessment of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), which is still pending in Warsaw, and of the Treaty Establishing the European Stability Mechanism (ESM Treaty), once Poland ratifies it following accession to EMU.

This article analyzes the judgement with regard to the links between Article 136 TFEU and the ESM Treaty, as well as to the notion of conferral of competence in the meaning of Article 90 Polish Constitution. The analysis of the judgement provides the setting for a discussion of possible implications for future decisions.

2. RATIFICATION OF THE COUNCIL DECISION 2011/199 IN POLAND

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* PhD Researcher, Law Department, European University Institute, Italy.

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Ustawa o ratyfikacji decyzji Rady Europejskiej 2011/199/UE z dnia 25 marca 2011 r. w sprawie zmiany art. 136 Traktatu o funkcjonowaniu Unii Europejskiej w odniesieniu do mechanizmu stabilności dla państw członkowskich, których walutą jest euro [*Act on ratification of the European Council Decision 2011/199/EU of 25 March 2011 amending Art. 136 TFEU with regard to stability mechanism for Member States whose currency is the euro*], Dz.U. 2012 nr 0 poz. 748.

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K 33/12, Judgement of 26 June 2013, <www.trybunal.gov.pl/OTK/otk_odp.asp?sygnatura=K%2033/12>, visited 28 December 2013. Only excerpts from the statement of reasons were translated into English, see <www.trybunal.gov.pl/eng/summaries/documents/K_33_12_en.pdf>, visited 28 December 2013.

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However, five dissenting opinions were issued.

The case before the Constitutional Court centred on Article 136 TFEU, amended by Council Decision 2011/199 in the simplified revision procedure according to Article 48(6) TEU.⁴ The newly inserted paragraph 3 states that ‘Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality’. Following Article 48(6) TEU, the Council decision required approval by member states ‘in accordance with their respective constitutional requirements’ in order to enter into force.

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On the background of the Council Decision 2011/199, see B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, 6 SIEPS Eur. Pol. Analysis (2011), 1.

2.1. RATIFICATION OF INTERNATIONAL TREATIES IN POLISH LAW

In Poland, the ‘Ustawa o umowach międzynarodowych’ [*Act on International Agreements*] stipulates that EU acts referred to in Article 48(6) TEU require ratification by the president.⁵ The Polish Constitution provides for three types of ratification procedure: two demanding the prior agreement of the parliament expressed in a statute and one which does not require such approval.⁶ It was the first two types which were at stake here.

Article 89(1) and Article 90 Polish Constitution regulate the ratification of international agreements for which the prior agreement of parliament is a prerequisite. Article 89(1) Polish Constitution calls for the consent of parliament granted by statute if an international treaty concerns *inter alia* Poland’s membership of an international organization. The approval of ratification of international agreements according to Article 89(1) requires a simple majority vote in the presence of at least half of the statutory number of members in both chambers of the Polish parliament, the *Sejm* and the *Senat*.⁷

Article 90 Polish Constitution is applicable to the ratification of international treaties which confer to an international organization or its institutions competences vested in the organs of state authority in relation to certain matters. According to Article 90(2) the ratification of such an agreement requires a two-thirds majority vote taken in the presence of at least half of the statutory number of members in the *Sejm* and the *Senat*.⁸ Moreover, in contrast to Article 89(1), Article 90(3) states that citizens may consent to such international agreements in a national referendum. The *Sejm* decides on the procedure to be followed by an absolute majority vote taken in the presence of at least half of the statutory number of deputies.⁹ The Polish parliament has thus far only twice consented to the ratification of an international treaty under Article 90 Polish Constitution, namely, for the approval of the Accession Treaty (referendum) and the Lisbon Treaty (two-thirds majority vote).

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Art. 12(2a) ustawy z dnia 14 kwietnia 2000 r. o umowach międzynarodowych [*Law on International Treaties*], Dz. U. Nr 39, poz. 443, ze zm.

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Art. 89(2) PC. In case of ratification without the approval of the parliament, the Council of Ministers only informs the *Sejm* about a planned ratification by the president.

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Cf. Art. 120 and Art. 124 PC.

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These thresholds are equal to the constitutional change threshold contained in Art. 235(4) PC.

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Art. 90(4) PC.

2.2. RATIFICATION OF THE AMENDMENT OF ARTICLE 136(3) TFEU IN POLAND

In the case at hand, both chambers of the Polish parliament approved the Council decision on the basis of Article 89(1) Polish Constitution.¹⁰ Shortly afterwards, the president signed the approved Ratification Act, without requesting the Constitutional Court to adjudicate on its conformity to the Constitution. Whereas constitutional review of international treaties before ratification (*ex ante*) is possible only at the request of the President,¹¹ an *ex post* review can be triggered in other ways, including by the request of 50 members of the *Sejm* or of 30 Senators.¹² Such a request was made for the case in question.

In general, the Polish Constitutional Court has competence to review the conformity of statutes and international agreements to the Constitution.¹³ In its jurisprudence, the Court has treated ratification acts as regular statutes falling under its review.¹⁴

3. THE APPLICATION FOR CONSTITUTIONAL REVIEW

On 26 July 2012, a group of *Sejm* deputies requested a constitutional review of the Ratification Act (and not the Treaty amendment itself).¹⁵ The concerns advanced in the request related to the correct ratification procedure at the national level on the one hand, and the lawfulness of the Council decision on the other hand.

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The Sejm voted on 11 May 2012. Out of 460 deputies, 294 voted in favour of the Ratification Act and 155 voted against, 1 abstained and 10 were absent, <www.sejm.gov.pl/sejm7.nsf/agent.xsp?symbol=glosowaniaNrKadencji=7NrPosiedzenia=14NrGlosowania=68>, visited 28 December 2013. The Senat voted on 30 May 2012, and of 100 senators, 55 voted in favour of and 30 against the Ratification Act, while 15 were absent, <www.senat.gov.pl/prace/senat/posiedzenia/przebieg,22,1,glosowania.html>, visited 28 December 2013.

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Art. 133(2) PC.

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50 deputies or 30 senators may request a constitutional review of international treaties. Cf. Art. 191(1)(1) PC.

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Art. 188, point 1.

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K 33/12, *supra* n.2, para. III 2.1.

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The Marshall of the Sejm, the Attorney General and the Minister of Foreign Affairs did not share the view of the applicants, stating that the Ratification Act had been correctly approved.

First, the applicants questioned whether the Ratification Act was compatible with Article 90 Polish Constitution in connection with Article 120 *first sentence* Polish Constitution. In the view of the applicants, a two-thirds majority vote in the Polish parliament would have been necessary to approve ratification of the Council decision. The core of the argument was that the Ratification Act creates a legal and treaty basis for the conferral of state competences upon the ESM. The approval of the Treaty amendment ‘creates a special situation in which [Poland becomes] *de facto* bound by an international agreement (...) with a simultaneous deferral of its entry into force’.¹⁶ In the view of the applicants, the competences under conferral included deciding on the terms of Poland’s participation in the monetary union and the extension of the jurisdiction of the Court of Justice of the European Union and the Court of Auditors with regard to Poland. Additionally, the applicants put forward that the Ratification Act constitutes a legal basis allowing for limitation of the competences of the *Sejm* and the Council of Ministers. Namely, the ratification of the Treaty amendment will allow the European Commission ‘to specify the terms of a mechanism correcting the financial economy of the state’ at the expense of the competence of the *Sejm* to exercise budgetary policy and the competence of the Council of Ministers to conduct economic policy.¹⁷

The applicants argued also that the Court should look beyond Article 136(3) TFEU in its interpretation of the Council decision and also consider the ESM Treaty. In the view of the applicants, the ratification of the Article 136 TFEU amendment was a legal and treaty basis for the ESM Treaty that created an obligation for Poland to participate in the ESM upon its accession to the euro area. In the same vein, the applicants advocated the inclusion of the TSCG in the Court’s review. Namely, that the TSCG referred to the ESM Treaty directly, as well as to regulated matters subject to the TFEU, such as the jurisdiction of the Court of Justice.

Second, the applicants asked the Court to review whether the Ratification Act was compatible with Article 48(6) TEU. According to the applicants, the Council decision did not have a sound legal basis, in that the amendment of Article 136 TFEU ‘unlawfully increased the competences of the EU by allowing for the creation of a new international organization, broadening the jurisdiction of the ECJ and the Court of Auditors and significantly changing the decision-making procedure (so-called reversed qualified majority)’.¹⁸ In consequence, the ratification of the Council decision allowed for legal provisions incompatible with EU law to flow into the Polish legal system thus violating the Polish Constitution.

4. JUDGEMENT OF THE POLISH CONSTITUTIONAL COURT

The Court stated that the essence of the applicants’ first question was whether

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K 33/12, *supra* n.2, para. I 1.1.1. (own translation).

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Ibid., para III 1.2.1.

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Ibid., para. I 1.2 (own translation).

the Ratification Act “provides” a basis for conferring competences, and not that such conferral took place at the moment of ratifying the European Council Decision 2011/199/EU’.¹⁹ This is why, in the view of the Court, the applicants insisted on an interpretation of the Treaty amendment together with the ESM Treaty and TSCG. With regard to Article 48(6) TEU, the Court declared its lack of competence to tackle the second question, which this article elaborates upon briefly below. The main elements of the decision concern the links between Article 136(3) TFEU and the ESM Treaty and the notion of conferral of competence.

4.1. LINKS BETWEEN ARTICLE 136(3) TFEU AND THE ESM TREATY

The Constitutional Court first set out the subject of its review. Since ratification acts were ‘specific’ legislative acts due to the scarcity of text, the Court decided that an examination of the applicable ratification procedure should be read in light of the content of the Council decision under ratification. However, the character of the Ratification Act and the applicants’ request necessitated looking beyond the text of the Council decision and analyzing its broader normative context. In the view of the Court, this implied a constitutional review of neither Article 136(3) TFEU itself, nor the ESM Treaty, nor the TSCG.

In the course of the examination of the Council decision, the Court looked first at the amended Article 136 TFEU. The Court indicated that Article 136(3) TFEU ‘neither independently create[d] a stability mechanism under EU law, nor impose[d] on the Member States an obligation to create such a mechanism’. Instead it simply ‘acknowledge[d] the competence of the member states to create such a mechanism through the international law instruments’.²⁰ Moreover, the Treaty amendment, drafted in general terms, neither designated the legal form and construction of the stability mechanism, nor obliged EU institutions to participate in the stability mechanism specifying competences in this regard.²¹ Finally, concerning the interdependence between the entry into force of the Council decision and the effectiveness of the ESM Treaty, the Court reiterated the conclusions of the ECJ in the *Pringle* case, which explicitly denied such a link.²²

Despite the legal autonomy of the ESM Treaty and the Treaty amendment confirmed by the ECJ in *Pringle*, the Constitutional Court found it necessary to analyze the ESM Treaty to establish whether the approval of the Council decision

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Ibid., para. III 1.2.2.

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Ibid., para. III 3.2.1. (own translation)

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Ibid.

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Case C-370/12, *Thomas Pringle v Ireland* [2012], Judgment of 27 Nov. 2012. On this case, cf. P. Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, 9 Eur. Const. L. Rev. (2013), 263.

conferred state competences upon the ESM. The Court took into account the formal aspects of the ESM Treaty, such as the reference to the Treaty amendment in the ESM Treaty text, but also its merits. Concerning the latter, the Court highlighted that Article 136(3) TFEU allowed for creation of a stability mechanism without deciding ‘neither on its legal form, nor on the degree of connection to EU law’, yet ‘the ESM Treaty - an international treaty closed outside of EU law – provides for participation of Union institutions, especially of the Commission and the ECB’.²³ In consequence, the Court elaborated on the links between the ESM Treaty and the European Commission, expressed in Article 13 ESM Treaty, concluding that the Commission acts only when ‘ordered’ to do so by the ESM.²⁴ Concerning the role allocated to the ECJ, the Court stated that the ECJ acted under the ESM Treaty ‘as an international court and not a Union court’.²⁵

The Court also inquired into the situation of EU member states that join the ESM after the abrogation of the derogation to adopt the euro. Even though the new euro area member states ‘*should* become [...] ESM member[s] with full rights and obligations’,²⁶ in the view of the Court, this did not imply an automatic procedure. Conversely, it demanded initiative on the part of the interested member states to apply to the ESM.²⁷ Finally, the Court supported its view with the fact that the ESM did not condition its entry into force on the participation of *all* euro area members; instead only an initial subscription of no less than 90% of the total subscribed capital was necessary.²⁸

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K 33/12, *supra* n.2, para. III 4 (own translation)

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Ibid., para. III 4.1.2. In fact, the Court could have relied on the issue that the competences of the European Commission under Art. 13 ESM Treaty are currently embedded in the so-called ‘Two-Pack’. These two directly applicable EU regulations entered into force on 23 May 2013, hence before the Constitutional Court’s judgement.

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Ibid., para. III 4.1.2. Even though both courts relied on Art. 273 TFEU, the view of the Constitutional Court presents a different vision of the role of the ECJ than that expressed directly by that court in the *Pringle* decision. The ECJ concluded that ‘the disputes submitted to the jurisdiction of the Court are related to the subject matter of Article 273 TFEU’, which means that they are ‘likely also to concern the interpretation or application of the provisions of European Union law.’ The ECJ was hence far from taking the role of an international court under the ESM Treaty. Cf. *Pringle*, *supra* n.22, paras 173-174.

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Recital 7 of the ESM Treaty preamble [*emphasis added*].

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K 33/12, *supra* n.2, para. III 4.2. Moreover, the Court excluded an automatic accession to the ESM, in cases of ad hoc participation in a stability support operation for euro area member states.

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Ibid.

4.2. DECONSTRUCTION OF ARTICLE 90 POLISH CONSTITUTION

Having reviewed the Council decision in the broader context of Article 136(3) TFEU and the ESM Treaty, the Court devoted the remainder of the judgement to the notion of conferral of competence referred to in Article 90 Polish Constitution to decide on the constitutionality of the Ratification Act. The Court distinguished a narrow and a broad understanding of that notion.²⁹ It stated that, in a narrow understanding, Article 90 Polish Constitution would apply only if Poland, by virtue of an international treaty, directly conferred to an international organization or its institutions competences of state organs in relation to certain matters, as was the case with the Accession Treaty and the Lisbon Treaty. A broadly interpreted Article 90 Polish Constitution would imply that a two-thirds majority vote was also necessary for the approval of treaties that resulted in changes to the scope of competences *already* conferred or changes to the way such competences are exercised. The Court applied both the narrow and the broad interpretations in its reasoning.

Adopting first the narrow notion of conferral of competences, the Court identified three components in the application of Article 90 Polish Constitution. First, the legal basis for conferral must be an international treaty; second, a conferral of state competences in relation to certain matters must occur; third, these competences must be conferred upon an international organization or its institutions.

The Court confirmed the applicability of the first component by stating that the Council decision was ‘an equivalent act’ to an international agreement.³⁰

Next, the Court elaborated on the notion of state competences and their conferral. In the view of the Court, ‘competence’ should be understood as ‘authorising a given organ of public authority to take certain actions’, which ‘have legal effects and are related to issuing legally binding acts (...) [which] may interfere with the realm of the legally protected personal interests of the individual.’³¹ The Court specified that a ‘competence’ must ‘indicate an organ of state authority in which the competence is vested, entities or individuals that are governed by that competence, the content of the rights of the said organ and the obligations of subordinate entities or individuals which correspond to the said rights’. ‘[A] generally formulated right to regulate a given category of matters’ did not constitute a competence’.³²

The Court then found that Article 136(3) TFEU ‘mentions neither an international organization nor any competence of an organ of state authority which is to be conferred’, implying that the relevant components of Article 90 Polish Constitution

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Ibid., para. III 6.1.2.

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Ibid., para. III 6.5.3.

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Ibid., para. III 6.5.3.

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Ibid.

were not satisfied.³³ Thereby, the new treaty provision did not create a relation of subordination between state entities and an international organization and the Court refrained from reviewing whether the Council decision contained any further elements demanded by Article 90 Polish Constitution.

Nonetheless, the Court also applied its broad interpretation of Article 90 Polish Constitution concerning powers already conferred. In the view of the Court, '[i]t may not be ruled out that, as a result of an amendment to an international agreement, the way of exercising competence will change so considerably that the exercise thereof by an international organization will mean granting it new competence'.³⁴ Yet, one could not argue that every amendment of a treaty ratified in accordance with Article 90 Polish Constitution will automatically demand a two-thirds majority vote in the Polish parliament. The Court maintained that to prove their case the applicants would have to indicate 'the competence vested in the organs of state authority and the rules of interpretation that justify an assertion about the said conferral'.³⁵ However, as stated earlier, Article 136(3) TFEU did not contain these elements.

4.3. CONFERRAL OF COMPETENCE TO THE ESM

Whereas the Court stated earlier that Article 136(3) TFEU did not transfer any state competences within the meaning of Article 90 Polish Constitution, it was still necessary to check the applicants' claim that the new provision created a legal and treaty basis for a future conferral to the ESM. Here again, the Court repeated the same arguments on the lack of indication of an international organization and a state competence under conferral.³⁶

Moreover, the Court found the applicants' arguments concerning the need of interpretation of Article 136(3) TFEU 'in the light of' the ESM Treaty as based on an 'erroneous assumption',³⁷ namely, that it implied the obligation to ratify the ESM at the moment of Poland joining the euro area. The Court repeated that the Treaty amendment did not contain such an obligation.³⁸ Moreover, the Court rejected the applicants' argument concerning the modification of the Eurozone accession rules.

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Ibid., para. III 6.5.4.

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Ibid., para. III 6.6.1.

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Ibid.

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Ibid., para. III 7.3.2, 7.3.3.

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Ibid., para. III 7.3.4.

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Ibid.

The Court underlined that the Treaty amendment did not alter these rules.³⁹ Possibly to reassure the applicants, the Court emphasised that even if an obligation to become an ESM member state at the moment of joining the euro area existed, international law or EU law could not force Poland to follow ESM rules as long as Poland was not a party to this treaty. Article 136(3) TFEU itself could not impose such a legal obligation.

In sum, the Court declared that the ratification of the Treaty amendment according to Article 89(1) Polish Constitution was constitutional as no transfer of competence was at stake.

5. COMMENTS

Looking at the reasoning of the Court, it is not clear why the judges delved into the ESM Treaty, but in the end took a formal approach stating that Article 136(3) TFEU did not contain the necessary elements of the notion of competence and denying an automatic obligation to join the ESM. Nonetheless, the judgement raises a number of interesting issues, which I will examine in turn. The analysis starts with the alleged obligation to join the ESM when acceding to the euro area. The focus then shifts to the decision on the TSCG still pending before the Constitutional Court and its relation to the decision analyzed here. The following section discusses the impact of the ECJ *Pringle* case and of the German Court *ESM* case on the Polish decision.⁴⁰ The concluding remark voices warnings from the Court regarding the future accession of Poland to the euro area and the ESM.

5.1. AUTOMATIC ESM ACCESSION OF NEW EUROZONE MEMBERS

Will Poland be required to ratify the ESM Treaty when joining the Economic and Monetary Union (EMU)? The legal links between the ratification of the Council decision and the Treaty amendment, which the Court mentioned, seem to point to a negative answer. The EMU admission criteria for EU member states with a derogation provided in Article 140 TFEU do not include any indication or obligation for a member state joining the euro area to also become an ESM member. Additionally, neither the text of the TFEU nor the ESM Treaty can be interpreted as containing an obligation of ESM accession. Nonetheless, there may be reasons why the existing Eurozone member states might be reluctant to allow the EMU accession of a new state without the ratification of the ESM Treaty.

First, both Article 136(3) TFEU and the ESM Treaty refer to safeguarding ‘the stability of the euro area as a whole’,⁴¹ apparently without envisaging an instance

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Ibid., para. III 7.3.6.

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2 BvR 1390/12 vom 12 Sept. 2012,
<www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html>, visited 28 December 2013.

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Art. 3 ESM Treaty.

whereby member states join one but not the other. Second, the ESM seeks to address an evident deficiency in the ability to deal with asymmetric shocks to member state economies in the EMU, brought into stark focus by the experience in the aftermath of the 2008 financial crisis.⁴² Admitting new members to the EMU without them also joining the ESM would recreate this vulnerability, for example, if these new members were to experience problems in the future. As such, the overall effectiveness of the ESM would arguably be impacted. Third, current member states that did join the ESM might perceive the abstention of new members as an attempt to free ride on the overall improvement in EMU stability provided by the ESM without accepting concomitant responsibilities.

Article 140(2) TFEU provides for a blocking minority of Eurozone member states on the issue of satisfying conditions for the abrogation of the derogation by acceding states. Eurozone members may hence try to use the lack of willingness to ratify the ESM Treaty as such a condition. But again, Article 140(2) TFEU speaks of the admission of member states to the EMU that meet conditions for participation indicated (only) in that provision.⁴³

5.2. THE PENDING DECISION ON THE TSCG

As the first judgment of a constitutional court of a member state not in the Eurozone on the issue of crisis law, the case serves as an indicator of the attitude of such courts towards the ESM Treaty and the TSCG. With regard to the latter, the applicants insisted that the ratification of the Treaty amendment and the potential transfer of competences should also be interpreted in light of the TSCG. The Court rejected these claims, underlining that the Council decision did not mention the TSCG. The Court concluded that only the ESM Treaty referred to the TSCG, but due to the legal independence between the ESM Treaty and the Council decision, the TSCG could not influence the assessment of the Ratification Act.

However, the Court may soon take up the TSCG independently, with the question of the constitutionality of its ratification procedure already pending in the Court.⁴⁴ As in the case of the ratification of the Treaty amendment, according to a group of deputies and senators the TSCG should be approved in accordance with Article 90 Polish Constitution.⁴⁵ Moreover, the applicants demanded a constitutional

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See P. De Grauwe, *Economics of the Monetary Union* (OUP 2012).

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Peers puts forward this argument with relation to the TSCG. See S. Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics?* 8 Eur. Const. L. Rev (2012) 404, 437.

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Case is being deliberated under the signature K 11/13. On the merits of the TSCG see C. M. Cantore, G. Martinico. *Asymmetry or Dis-integration? A Few Considerations on the New 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union'*. 19 Eur. Pub. L. (2013) 463–480.

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Application of 21.03.2013, www.trybunal.gov.pl/index2.htm, visited 4 September 2013.

review of the TSCG itself. Among other claims, the application highlighted the incompatibility of the so-called golden rule expressed in Article 3 TSCG with the Polish Constitution.

However, the Constitutional Court refused to review the constitutionality of the TSCG on formal grounds.⁴⁶ At the time when the parliamentarians lodged the application, the president had not yet ratified the TSCG, which, in consequence, had not become part of the Polish legal system. Therefore, the Court will only decide on the constitutionality of the procedure of parliament's approval of the TSCG, unless the applicants again request the constitutional review of the merits of the TSCG, which in the meantime has been ratified by the president.⁴⁷

Drawing on the Council decision case, the Court will likely look at the contents of the TSCG and decide whether a transfer of competence is at stake, as the choice of the ratification procedure has to be seen in light of the treaty under ratification. The Court perceives such a control as an indirect review of the content of an international agreement, which is however not decisive for the constitutionality of such an agreement; this review aims at clarifying whether the procedure for its approval has been correctly chosen.⁴⁸ With respect to the TSCG, which is a complex treaty, the Court will probably not be able to take a formalist approach, as it did in the Council decision case. In contrast to Article 136 TFEU amendment, in the case of the TSCG Ratification Act a clear link between that act and the TSCG exists. Hence, the inquiry into the TSCG will be also more profound. However, a more vital issue concerns whether the Court will limit itself to an analysis of Title V of the TSCG, which is the only legally binding part for non-Eurozone Member States, or whether it will explore all of the TSCG provisions.⁴⁹

5.3. INFLUENCE OF THE LUXEMBOURG AND THE GERMAN COURTS

In its reasoning, the Constitutional Court devoted considerable attention to the *Pringle* case of the ECJ and the ESM case of the German Constitutional Court. With regard to the former, the Court positioned its views as 'corresponding' to the judgement of the ECJ.⁵⁰ The focus of the ECJ was on the question of whether the

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Trybunał Konstytucyjny, decision of 21 May 2013, K 11/13.

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24 July 2013, <www.prezydent.pl/aktualnosci/wydarzenia/art,2636,pakt-fiskalny-ratyfikowany.html>, visited 28 December 2013.

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Cf. K 33/12, *supra* n.2, para. III 2.3.

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Title V TSCG allows non-Eurozone members which have ratified the TSCG to participate in Euro Summits (Art. 12) and parliamentary cooperation (Art. 13).

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K 33/12, *supra* n.2, para. III 7.4.1.

Council decision was valid in so far as it amended Article 136 TFEU on the basis of the simplified revision procedure under Article 48(6) TEU. The ECJ sustained that the amendment did not confer or increase any competence of the EU.⁵¹ The Constitutional Court declared this outcome as binding for its own constitutional review of the Treaty amendment Ratification Act.

Obviously, the outcome of the *Pringle* case cannot replace the judgment of the Polish Court as the subjects of the proceedings were different. Whereas the *Pringle* ruling concerned reviewing the consistency of the Council decision with EU Treaties,⁵² the Polish proceedings aimed to determine the compatibility of the Ratification Act of the Council decision with the Polish Constitution. Thus, to answer the applicants' question of whether the Ratification Act was compatible with Article 48(6) TEU, the Court drew a line between the ECJ and its own jurisdiction. The Constitutional Court declared itself not competent to judge upon the legality of EU legal acts: the ECJ, acting within its competence, had already confirmed the legality of the Council decision. In consequence, the Court did not find Article 48(6) TEU to be an adequate benchmark for control and declared the Ratification Act not incompatible with Article 48(6) TEU.⁵³

Nonetheless, despite of the findings of the ECJ in the *Pringle* judgement, the Constitutional Court still analyzed some of the provisions of the ESM Treaty, in order to establish whether the approval of the Council decision could be a legal and treaty basis to confer state competences upon the ESM.⁵⁴ This approach of the Court is hard to understand. On the one hand the Court maintained that it was bound by the ECJ's finding that Article 136(3) TFEU did not confer any new competence on the Union.⁵⁵ On the other hand the Court stated that it could not 'completely disregard' the ESM Treaty in order to find out whether the Council decision conferred competences of state organs.⁵⁶ Especially, the Court underlined that the ESM Treaty involved the participation of EU institutions.

How can we explain this tension inherent in the approach taken by the Court?

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Pringle, *supra* n. 22, paras 73 and 75.

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On the competence of the ECJ to review treaty amendments, see B. de Witte, T. Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, 50 Com. Mkt. L. Rev. (2013) 805, 825-828.

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K 33/12, *supra* n.2, para. III 8.3.

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See section 4.1. above.

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See K 33/12, *supra* n.2, para III 7.4.1 and 8.2.

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Ibid., para. III 4. (own translation).

First explanation could be that the Court was bound by the application for review. Yet, it might not be a convincing justification, because in contrast to the question whether the Ratification Act was compatible with Article 48(6) TEU, the Court never declared the arguments concerning the ESM Treaty inadmissible. In fact, only after a thorough analysis, including inquiry into the competences of the Commission and the ECJ under the ESM Treaty and the conditions of accession to the ESM, did the Court rebut the argument that the Ratification Act could constitute a basis for a conferral of competence to the ESM and the need for reading of the Ratification Act ‘in the light’ of the ESM Treaty. Hence, a more convincing reason for the Court’s examination of the ESM Treaty could have been an attempt to satisfy the public’s concern in the case at hand. Leaving the ESM Treaty aside could have been perceived as not sufficiently engaging in the protection of Polish Constitution.

The German *ESM* ruling has also visibly influenced the decision of its Polish counterpart.⁵⁷ In a brief summary of the *ESM* case, the Court invoked parts of the judgement in which the German Court declared the ratification act of the Treaty amendment compatible with German Basic Law, namely that Article 136(3) TFEU did not transfer any sovereign competences and only provided the possibility for the member states to create a stability mechanism. The Court seemed, however, to draw only upon the ‘positive’ side of the argument of its German counterpart.⁵⁸ Namely, as Wendel explains in his note on the German Constitutional Court’s decision, ‘according to the Court, the insertion of Article 136(3) TFEU amounts to a “significant reconfiguration” (*grundlegende Umgestaltung*) of the present design of the EMU, “moving away from the principle of the independence of the national budgets.”’⁵⁹ Whereas the Polish Constitutional Court ‘noted that the establishment of the ESM has actually changed the architecture of the Economic and Monetary Union,’ it did not elaborate on the consequences for the independence of national budgets.⁶⁰ This might be explained on the one hand by the fact that Poland is not (yet) an EMU or ESM member and on the other hand by an attempt to draw a line, albeit not always successfully, between the Treaty amendment and the ESM Treaty in its judgment.

6. CONCLUSION: A WARNING FOR THE FUTURE

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On the influence of the German Federal Constitutional Court’s case law on the Constitutional Court’s approach to European integration, see A.F. Tatham, *Central European constitutional courts in the face of EU membership: the influence of the German model in Hungary and Poland* (Nijhoff 2013).

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M. Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, 14 Ger. L. J. (2013) 21, 28. Wendel cites from 2 BvR 1390/12, *supra* n. 40, para. 232 [English version].

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K 33/12, *supra* n. 2, para. III 7.6.1.

The Court pronounced that the Ratification Act does not violate the Constitution, because no transfer of competences of state organs to the ESM has taken place. As Closa explains, high courts, including constitutional courts, are very cautious with regard to declaring the ratification of EU reform treaties unconstitutional.⁶¹ In fact, judges are aware of the costs of the implementation of their judgments under unanimity requirements, in that a negative decision of a single court on constitutionality may halt ratification for the whole EU. The latest judgment of the Polish Constitutional Court and its warning about the need for a two-thirds majority and necessary constitutional amendments (on the position of the National Bank of Poland and the Tribunal of State) for the prospective ratification of the ESM Treaty seems to confirm this thesis.

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C. Closa, *National Higher Courts and the Ratification of EU Treaties*, 36 West Eur. Pol. (2013) 97.