Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty

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> The Supreme Court en banc was forced to make a rushed judgment in a situation of confusion, uncertainty and absence of legal certainty prevailing in the Estonian and the EU legal environment.
>
> *Dissenting justice Jaak Luik*

Introduction

On 12 September 2012 the *Bundesverfassungsgericht* gave the green light for Germany to ratify the Treaty Establishing the European Stability Mechanism (ESM Treaty), but made ratification conditional upon international law arrangements to be made to guarantee an interpretation of the ESM Treaty which would be in line with the German *Grundgesetz.*[1] Although the constitutional challenge in Germany, which is the largest 'donor' to the ESM, was certainly of core importance as to whether the member states would be able to launch the mechanism at all, the constitutional challenges in other member states also deserve academic attention. The reference for a preliminary ruling by the Supreme Court of Ireland raised serious questions concerning the conformity of the ESM Treaty with EU law.[2] In

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[1] BVerfG, 2 BvR 1390/12 vom 12 Sept. 2012, Absatz-Nr. (1-319), <www.bverfg.de/entscheidungen/rs20120912_2bvr139012.html>, visited 7 April 2013.

[2] *Thomas Pringle* v. *The Government of Ireland, Ireland and the Attorney General.* Reference by the Supreme Court to the Court of Justice on the question of the validity of European Council Decision 2011/199/EU and the question of the entitlement of a member state to enter into an international agreement such as the Treaty establishing the European Stability Mechanism. Neutral Citation: [2012] IESC 47 Supreme Court Record No. 339/2012, <www.supremecourt.ie/Judg

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its *Pringle* decision the Court of Justice dismissed the concerns raised in the reference as being unfounded.[3]

This article focuses on the compatibility of the 'emergency voting' mechanism set out in Article 4(4) ESM Treaty with the principles of democracy, the rule of law and sovereignty raised before the Supreme Court of Estonia. The Constitution of the Republic of Estonia [*Eesti Vabariigi põhiseadus*] (henceforth: the Constitution) and the Acts of the Republic of Estonia do not foresee a separate constitutional court or the possibility of an individual constitutional petition.[4] Thus, the issue of the constitutionality of the emergency voting procedure contained in the ESM Treaty was raised *ex officio* in abstract constitutional review proceedings by the Estonian Chancellor of Justice [*Óiguskantsler*], which 'in Estonia combines the function of the general body of petition and the guardian of constitutionality.'[5] The petition for review focused on the fact that substantial budgetary decisions could be made in the future under the emergency voting procedure without the involvement of the Estonian parliament. According to the petition, '[w]ith accession to the Treaty the budgetary policy choices of the Riigikogu will diminish.'[6]

The decision of the Supreme Court *en banc* (full court) of 12 July 2012 dismissed the petition of the Chancellor of Justice by an extremely narrow majority of ten votes to nine.[7] Most remarkably, a majority of ten judges, including Justice Kõve who voted in favour of the decision, wrote dissenting opinions. The justices were mostly critical towards the time pressure surrounding the making of the decision. Six justices stated that 'the Supreme Court *en banc* has obviously made its decision in a rush.'[8] In a dissenting opinion, six justices proclaimed that '[t]his is the most important case in the history of [Estonian] constitutional review.'[9]

ments.nsf/1b0757edc371032e802572ea0061450e/e44922f2b6dbed2f80257a4c00570284?OpenDocument>, visited 7 April 2013.

[3] ECJ 27 Nov. 2012, Case C-370/12, *Thomas Pringle* v. *Ireland*.

[4] The Chancellor of Justice Act [*Óiguskantsleri seadus*], published in the *State Gazette* RT I 1999, 29, 406. Unofficial translation available online at <www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30041K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%D5iguskantsleri+seadus>, visited 7 April 2013.

[5] <http://oiguskantsler.ee/en/estonian-model-of-the-institution-of-the-chancellor-of-justice>, visited 7 April 2013.

[6] Judgment of the Supreme Court *En Banc* of July 12, 2012 in Case No. 3-4-1-6-12. An English translation of the decision and the dissenting opinions can be found at <www.riigikohus.ee/?id=1347&print=1>, visited 7 April 2013.

[7] *Supra* n. 6, para. 10.

[8] Dissenting Opinion of Supreme Court Justices Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa regarding the Judgment of the Supreme Court *En Banc* of July 12, 2012 in Case No. 3-4-1-6-12, available online at <www.riigikohus.ee/?id=1347>, visited 7 April 2013.

[9] *Supra* n. 8.

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This article analyses the reasoning of the Supreme Court with the focus on the 'emergency voting' mechanism set out in Article 4(4) of the ESM Treaty. Substantial differences between the reasoning of the Estonian, German and the European Courts are identified. As a key factor, the application of the principle of proportionality to justify the limitation of the budgetary powers of parliament is addressed.

The substance of the constitutional debate

The ESM has been created by the members of the euro area in order to finance loans and provide financial assistance to them in times of difficulty. It was placed outside EU law by the drafters; it however utilized the competence of the institutions of the EU. The member states undertook to make substantial financial contributions thereto and to provide securities to an extent, which if materialized, could upset the balance of the national budgets to an appreciable extent. Against this background questions were raised Europe-wide as to whether the set-up of the ESM Treaty is indeed legal, whether sufficient democratic control and judicial review exists over its workings and whether the national governments have consented to a too great a risk to the national budgets. In Estonia the constitutional discussion focused on whether the majority-based voting system for emergencies was in line with the Estonian Constitution.

In a standard situation the ESM Treaty foresees that disbursement decisions are passed by the 17 signatory states jointly. Estonia or Luxembourg, for example, could prevent the granting of any ESM funds. Article 4(4) however foresees a bypass procedure for 'emergencies':

> 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.[10]

Thus in case of such an emergency only an 85% qualified majority is needed for disbursements, whereby the percentage of the votes a state may cast is based on

[10] A significant error in translation surfaced in Art. 4(4) of the Estonian version of the Treaty text, which contained a further precondition for the use of the emergency procedure: it could only be used if not acting swiftly 'would endanger to a significant extent the economic and financial sustainability of the euro area.' The condition 'to a significant extent' is not found in other language versions: the English text simply states 'would threaten', the equivalent of 'bedrohen würde' in the German version.

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the percentage of the total ESM capital that the state contributes. This way of calculating the qualified majority, which is unprecedented in EU law, gives Italy, France and Germany, who all contribute more than 15% of the capital, an absolute veto power and, in turn, reduces the significance of the votes of majority of other member states. As an example, the contribution of Estonia is limited to 0.1860%. Under the emergency procedure of Article 4(4) of the ESM Treaty the significance of the vote of this small country is thus reduced.

The petition for constitutional review relied on the fact that by ratifying the ESM Treaty Estonia is assuming an extraordinarily large financial obligation: it runs the risk of having to pay 1.302 billion euros, which constitutes approximately 8.5% of its GDP. It was argued that the emergency voting provisions render this contrary to the principle of parliamentary democracy, the principle of parliamentary prerogatives, parliamentary control over public finances and the principle of a democratic state subject to the rule of law. More generally, the delegation of responsibility over public finances from parliament to the executive branch would, according to the petition, break the chain of legitimatisation and political responsibility. The potential risk of having to pay 1.302 billion euros would greatly impact the budgetary powers of parliament and its ability to use funds to guarantee the rights and liberties of the people.[11] The emergency voting procedure further intensifies this breach as it enables decision making without the participation of Estonia.

The petition of the Chancellor of Justice met fierce resistance by the Estonian government. The Minister of Finance was quoted as saying that it would be 'very embarrassing' if Estonia were to stay outside the ESM because Estonia has been a net recipient of EU aid for a long time.[12] At the time the challenge was lodged the ratification act was being debated in parliament but had not yet been voted upon. Thus the government questioned the competence of the Chancellor of Justice to file a petition before the treaty was approved by parliament.[13] This objection was criticized in a dissenting opinion, in which six justices stated that the government's position 'significantly complicates the constitutional review of international agreements as a whole.'[14] The government also opposed the substance of the petition.

[11] According to the treaty framework after the 'temporary correction period' the contribution of Estonia will be 1.79 billion euros. See Art. 42 of the ESM Treaty.

[12] *See* 15 March 2012 news online at <www.balticbusinessnews.com/Print.aspx?PublicationId=0a3e4075-786f-4ded-865e-dc8c8fcc7a8e>, visited 7 April 2013.

[13] *See*, e.g., the summary of the positions of the Ministry of Finance (in Estonian) at <https://valitsus.ee/UserFiles/valitsus/et/uudised/taustamaterjalid/2012/ESM/%28ESMALl%C3%BChi_RaM%29.pdf>, visited 7 April 2013 and the position of the Ministry of Justice (in Estonian) at <https://valitsus.ee/UserFiles/valitsus/et/uudised/taustamaterjalid/2012/ESM/Justiitsministeerium.pdf>, visited 7 April 2013.

[14] *Supra* n. 6, para. 1.

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It argued that it was highly improbable that Estonia would actually have to pay 1.3 billion euros. Moreover, it considered that parliament would have a sufficient opportunity to exercise its right to decide over the budget when it makes the initial decision on the maximum amount to be contributed to the ESM. More specifically, the executive approached the Article 4(4) from the angle of the need for international cooperation and the argument that a unanimity-based system had already shown its downside in the European Financial Stability Facility (EFSF) framework.

Differentiation between EU and other integration

When it acceded to the EU, Estonia adopted a very short constitutional amendment, the Constitution of the Republic of Estonia Amendment Act (henceforth: the Third Act).[15] It consists of only four articles, of which only two have a substantive nature. According to

> Article 1: Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected
>
> Article 2: When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia shall be applied without prejudice to the rights and obligations arising from the Accession Treaty.

At the time, this was considered to be a clever solution to overcome the need for a full review of the text of the Constitution. Instead of a long list of detailed amendments, which would have arguably contributed to somewhat greater legal certainty, a more general exception was chosen and a possible contradiction between EU law and the Constitution would be remedied with reference to Article 2, with a possible limitation consisting in 'fundamental principles of the Constitution.' Accordingly, at a later point the Supreme Court took Article 2 as a basis to decide that a thorough amendment of the provisions of the Constitution in favour of EU law had taken place in an opinion on 11 May 2006 regarding the transition of Estonia to the Euro.[16] The Supreme Court stated that the entire Constitution must be interpreted in conformity with EU law. According to the opinion:

[15] Constitution of the Republic of Estonia Amendment Act [*Eesti Vabariigi põhiseaduse täiendamise seadus*], published in the *State Gazette*, RT I 2003, 64, 429, unofficial translation available online at <www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X70050K1.htm&query=põhiseadus&tyyp=X&ptyyp=RT&pg=1&fr=no>, visited 7 April 2013.

[16] Judgment of the Supreme Court *En Banc* of May 11, 2006 in Case No. 3-4-1-3-06. Justice Laffranque sees the opinion as a 'turning point' in explaining the Third Act. J. Laffranque, '*Pilk Eesti õigusmaastikule põhiseaduse täiendamise seaduse valguses. Euroopa Liidu õigusega seotud võtmeküsimused põhiseaduslikkuse järelevalves*' [A Look at the Estonian Legal Landscape in the Light of the

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> [O]nly that part of the Constitution is applicable, which is in conformity with European Union law or which regulates relationships that are not regulated by European Union law. The effect of those provisions of the Constitution that are not compatible with European Union law and thus inapplicable is suspended.[17]

The Europe-friendly approach of the Court to constitutional interpretation is hard to miss. In fact, to this day the Court has not seen it fit to provide guidance as to when Article 1 of the Third Act ('provided the fundamental principles of the Constitution of the Republic of Estonia are respected') might become invokable. In practice this has led to a reading of the Constitution where if in *inter partes* litigation a constitutional provision is found to be in conflict with EU law, the Constitution will be disapplied.

The 'Third Act' could only be of significance, for the purposes of the review of the ESM Treaty, in two situations. Firstly, if according to it only those provisions of the Constitution can be applied, which do not contradict EU law, one must determine beforehand if a certain provision has not become inapplicable. If it is to be disapplied due to a contradiction with a third provision of EU law, a contradiction with a new convention should no longer be possible.

The second alternative relates to a different precedent of the Supreme Court, where it decided that in initiating a constitutional review, the Chancellor of Justice can only rely on national constitutional law and not on EU law.[18] This would have been relevant if the Chancellor of Justice had argued that the ESM Treaty violated EU law (in which case he could have lacked *locus standi*).

Instead a third scenario regarding whether or not the 'Third Act' is relevant in a constitutional review seems to have been developed by the Court. It is clear that the 'Third Act' becomes relevant *vis-à-vis* existing EU law. As the ESM Treaty had not yet been ratified, so it could not be existing EU law. If it would have been existing EU law, it would have been subject to a Europe-friendly reading of the Constitution.

In its reasoning the Court seems to make the applicability of the Third Act conditional upon the type of the analysed *lex ferenda* – treaty amendments within the EU legal framework and integration agreements via other international treaties. The Court established that the ESM Treaty is of the latter group and not EU law. The Court concluded that since the Treaty is not EU law 'the Third Act'

Constitution of the Republic of Estonia Amendment Act. Key Issues Related to European Union Law in Constitutional Review], Juridica VIII/2007 at p. 524.

[17] *Supra* n. 16, para. 12. *See also* the discussion in C. Ginter 'Application of Principles of European Law in the Supreme Court of Estonia', <http://dspace.utlib.ee/dspace/bitstream/handle/10062/6494/gintercarri.pdf?sequence=3>, visited 7 April 2013, p. 19-24.

[18] C. Ginter, 'Constitutional Review and EC Law in Estonia', 31 *E.L.REV.* (2006) p. 912-924, at p. 919-920.

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does not need to be applied in the adjudication of this case.'[19] The Court did not provide further clarification on this point, while for the purposes of the proper placement of EU law and the system of national constitutional review this issue is indeed crucial.

This mechanism of when the 'Third Act' is to be applied seems flawed. The Third Act does not make EU law a part of the national constitution. It does however introduce a new step in the process of determining whether or not a contradiction with the Constitution exists. In simple terms, if provision A of the Constitution is contrary to any provision of EU law, provision A becomes inapplicable. This is so due to the existence of the Third Act. Thus, before determining if a new treaty could be contrary to provision A, one would have to establish whether or not a contradiction with EU law exists. If provision A contradicts EU law, it cannot be applied and accordingly a new international agreement (e.g., the ESM Treaty) cannot be declared contrary thereto. Would the Third Act not exist, provision A would still be relevant and a treaty could be declared contrary to it. In effect one would encounter two parallel texts of the Constitution.

The above effect of the Third Act is similar irrespective of whether the constitutionality of a EU Treaty change or any third international agreement is tested. Accordingly the fact that the ESM Treaty was considered outside the EU framework bears no significance as to whether or not it should be applied. The logic of the Court becomes even more difficult to accept as the application or disapplication of the Third Act should be independent of whether one is considering the constitutionality of a new treaty within or outside EU law. A non-ratified treaty could not be considered as part of EU law within the meaning of the Third Act.

Determination of the extent of the countries' obligations

In order to properly measure the implications of the ratification of the ESM Treaty one has to focus on the financial scale of the matter. First of all, it is evident that the effect on the rights of parliament varies greatly depending on whether a) one discusses a predetermined and budgeted payment of a limited amount or b) an unforeseeable but relatively small payment obligation or c) an unforeseeable, significant but capped obligation or d) an unforeseeable and uncapped payment obligation. At one end of the scale parliament is able to make a one-off decision and does not face the risk of having to amend its budgetary decisions. At the other end, parliament may well be placed in a situation where it would have to re-examine its earlier budgetary decisions to a significant extent upon the receipt of an international notification. One must recall that a state budget often consists

[19] *Supra* n. 6, para. 110.

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to a large extent of extremely inflexible costs, and thus the effects of cost cutting may indeed very gravely affect the certain limited areas in which cost cutting is actually possible. Thus the considerations relating to the proper application of the principle of proportionality should have been a core part of the reasoning behind the setting up of the rules of the ESM Treaty.

Interestingly enough, the Supreme Court was confident in deciding that the amount set in the Treaty 'is the maximum limit of the obligations of Estonia, which cannot be changed without its consent and without amending the Treaty.'[20] Here a divergence arises with the reasoning of the *Bundesverfassungsgericht,* which expressly admitted that interpretations of the decision-making rules of the ESM Treaty exist, which may be used to go beyond the seemingly upper limits for individual member states. According to the German court, 'in view of conceivable other interpretations it is required here as well to ensure under international law an interpretation that is compatible with the Basic Law.'[21] Interestingly, Justice Kõve, one of the dissenting justices, argued in Estonia along the same lines and stated,

> I deem it necessary to note that I am not convinced that the opinions of the Supreme Court *en banc* on the interpretation of the Treaty are correct. Namely, I am not convinced that the maximum limit of the possible obligations of Estonia according to the Treaty does not in any case exceed 1 302 000 million euros and that obligations larger than that may arise for Estonia only through amendment of the Treaty.[22]

This is evidence of the fact that the existence or absence of an upper limit was discussed in the deliberation room.

The parliamentary debate following the positive decision of the Supreme Court illustrated the *de facto* absence of a clear understanding of the actual extent of the obligations of the member states and whether or not the obligations could be increased without further approval by parliament. When the head of the parliamentary Finance Committee was asked whether the maximum amount of the contribution could be increased under the emergency procedure, the answer was less than comforting. The chairperson responded that, '[t]his is the information I have at the moment and what I will base my decisions on in today's voting. Should you have different information be sure to let me (…) know ... I suppose it is so.'[23]

[20] *Supra* n. 6, para. 144.

[21] Para. 254 of the English translation available at <www.bverfg.de/en/decisions/rs20120912_2bvr139012en.html>, visited 29 March 2013.

[22] Dissenting Opinion of Supreme Court Justice Villu Kõve regarding the Judgment of the Supreme Court *En Banc* of July 12, 2012 in Case No. 3-4-1-6-12, para. 2, available at <www.riigikohus.ee/?id=1347&print=1>, visited 7 April 2013.

[23] A full transcript of the reading is available in Estonian online at <www.riigikogu.ee/?op=steno&stcommand=stenogramm>, visited 7 April 2013. Quoted text by MP Sven Sester. The final comment by MP Sester was edited out of the revised version of the official transcript.

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The limited understanding of the implications of ratifying the ESM Treaty during ratification is illustrated by the fact that the words 'I suppose' were used 25 times in the responses to the questions of members of parliament during the first reading of the ratification act.

Determining the nature of the interference

Quite naturally to a court of a small state on the eastern border of the EU, the Court applied a 'modern' approach to the notion of sovereignty, stating that if the Constitution permits Estonia to enter into international agreements, sovereignty *per se* cannot be interpreted as absolute. Participation in international organizations and the EU has become a 'natural part' of sovereignty.[24]

The Court recognized that the constitutional principles relied upon by the Chancellor of Justice – parliamentary democracy, the budgetary powers of the *Riigikogu* and the competence of the *Riigikogu* to decide on the assumption of financial obligations for the state – were indeed relevant for the case.[25] Thus the nature of the limitations to the rights of parliament to make budgetary decisions and whether these limitations are permissible were questions of central importance.

The Court confirmed that the ESM Treaty affected the financial competences of parliament, including those of future parliaments and thereby also the financial sovereignty of the state. The Court recognized that budgetary powers are one of the core competences of parliament. The essence of this competence is the right and duty of parliament to decide on the revenue and expenditure of the state. It added that, 'the state must use public assets in a manner which enables the performance of the duty (…) to guarantee the protection of fundamental rights and freedoms.'[26] It admitted that parliament has the sole competence to decide on the financial sovereignty of the state in the form of the assumption of financial obligations. The Court did not address the question of whether this competence is also untouchable, where the decision would by its impact effectively remove the possibility of future parliaments to decide over the national budgets. Instead of confirming that this sovereignty was not harmed by the ESM Treaty, the Court decided that an interference with parliamentary powers is justified.

An analysis of the reasoning of the Supreme Court exposes very interesting differences with those of the *Bundesverfassungsgericht*. In its analysis of the impact of the Treaty provisions, in several respects the Supreme Court adopted a more liberal approach than its German counterpart. Most significantly, the German

[24] In para. 130 of the decision the Court agreed with the position of Anneli Albi, Professor of Law at Kent Law School, University of Kent.

[25] *Supra* n. 6, para. 143.

[26] *Supra* n. 6, para. 139.

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court held that the principle of democracy could prevent measures which would for a significant period of time completely empty the budgetary autonomy of parliament of its substance.[27] The Estonian court made no such reservation and indeed refrained from any discussion on the significance of the effects of the final sum on the budget. The Court expressly excluded the possibility that the seriousness of the interference could be derived from the fact that it constitutes a vast financial obligation.[28] It seems that the issue of the Treaty's impact on the *Haushaltsautonomie* was analysed by the German court from the perspective of the severity of the impact on the ability of parliament to make significant budgetary choices. According to the German decision:

> An upper limit following directly from the principle of democracy could only be overstepped if in the case where they are called upon the payment obligations and commitments to accept liability took effect in such a way that budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed.[29]

It appears that the risk of the impact of the potential alternative of not ratifying the ESM Treaty was analysed from the same perspective. The *Bundestag* and the Federal government had argued that the risks involved with the ESM were manageable, 'while without the granting of financial facilities by the ESM the entire economic and social system was under the threat of unforeseeable, serious consequences.' The *Bundesverfassungsgericht* accepted this reasoning stating that: '[e]ven though these assumptions are the subject of great controversy among economic experts, they are at any rate not evidently erroneous.'[30]

The Estonian court actually refused to check the ability of the country to pay, as the case was heard in the time period before the ratification of the ESM Treaty by parliament. The Court, perhaps justifiably, referred to the fact that parliament had not yet exercised its right of discretion and thus it was premature for it to intervene. In addition, the Court emphasized the crucial role of the ECB and the Commission in the process of decision making and the fact that payments are to be made in instalments as mitigating factors. Accordingly, the Court stated that:

> The intensity of the infringement also depends on how the *Riigikogu* organises the future fulfilment of the obligations arising from the Treaty. To date the *Riigikogu* has not made those choices, and, based on the principle of separation of powers, the Supreme Court cannot assess the constitutionality of the fulfilment of the obligations in advance.[31]

[27] *Supra* n. 1, para. 216.
[28] *Supra* n. 6, para. 190.
[29] *Supra* n. 21, para. 216.
[30] *Supra* n. 21, para. 271.
[31] *Supra* n. 6, para. 202.

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It is appropriate to return to the difference between the situation of a parliament of a large member state which has a *de facto* veto on any decision and that of the parliament of a small member state. One has but to agree with the firm statements of the *Bundesverfassungsericht* about the central budgetary responsibility of parliaments: the (German) parliament must be able to maintain control over fundamental budgetary decisions:[32]

> the relevant factor for adherence to the principles of democracy is whether the German Bundestag remains the place in which autonomous decisions on revenue and expenditure are made, including those with regard to international and European liabilities.[33]

If important budgetary decisions or international obligations could be taken without parliament then parliament would no longer be responsible for the budget and would become merely a follower.[34] The German court even stated that there is a prohibition on international agreements which would bind Germany to the will of foreign states. These justifiably strict criteria are not met for those member states which do not possess a veto power in the emergency procedure.

Applying proportionality to sovereignty

The Supreme Court did not, however, focus on the measurability and foreseeability of the potential payments. Neither did it focus on the existence or absence of the influence of parliament over the future payments or decisions of the ESM. Instead, the Court decided that the limitations on the competences of the national parliament are justified because they are in line with the principle of proportionality and are necessary for goals of equal value. The Court admitted that the Constitution does not expressly provide grounds for restricting its core principles such as sovereignty and Estonia being a democratic state subject to the rule of law. Nevertheless, it considered it to be possible that other important constitutional values could outweigh the impact of the interference.

Thus the Court applied a proportionality test to the financial sovereignty of the state. Where the German decision focused on the importance of maintaining and reinforcing the role of the parliament in decision making, the Estonian decision accepted that the role of parliament will be reduced. The proportionality test would have to show whether such limitations are acceptable taking into account the upsides of this shift. Why the significance of parliament making the budgetary

[32] *Supra* n. 21, para. 211 and following.
[33] *Supra* n. 21, para. 211.
[34] *Supra* n. 21, para. 211.

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decisions would be so different in the German and Estonian constitutional framework escapes the reasoning of the Court.

As to the substance of the other 'substantial constitutional values' against which to measure the interference with the rights of parliament the Court decided that 'the economic and financial sustainability of the euro area is included in the constitutional values of Estonia as of the time Estonia become a euro area member state'. It tied this constitutional principle to the 2003 EU accession referendum[35] and in this way interconnected the three systems involved – the ESM, EU and constitutional law:[36] According to the Court, the majority voting rules provide an effective tool for situations where the member states are 'unable to make a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area.'[37]

> Estonia is a euro area Member State and therefore a threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia. The economy and finance of Estonia are closely related to the rest of the euro area and if there are economic and financial problems in the euro area, then it inevitably affects Estonia – export and import of goods and services, state budget and thereby also social and other fields. Problems in the euro area harm also Estonia's competitiveness and reliability. The ESM as a financial assistance system may help to ensure that the euro area as a whole as well as a part of it, Estonia, would be economically and financially competitive. It is necessary to guarantee people's income, quality of life and social security. In a situation where the rest of the euro area would be in difficulties it is not probable that Estonia would be financially or economically successful, including in the field of people's income, quality of life and social security.
>
> Economic stability and success ensure the planned receipt of state budget revenue. Incurring necessary expenditure ensures constitutional values. The obligation to guarantee fundamental rights arises from § 14 of the Constitution. An extensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment.[38]

In broad terms the court relied on the fact that the commitments of Estonia to cooperate with our Euro-partners in securing the financial stability of the Euro and the economic stability in the euro area are the key-factors in considering the ESM Treaty to be constitutional. As the country is bound to the euro area, the ability of Estonia to guarantee fundamental rights and liberties has been made

[35] *Supra* n. 6, para. 163. For more details in English about the facts surrounding the referendum, *see* <http://web-static.vm.ee/static/failid/060/rahvahaaletus.pdf>, visited 7 April 2013.

[36] *Supra* n. 6, paras. 165-166.

[37] *Supra* n. 6, para. 158.

[38] *Supra* n. 6, para 165-166.

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dependent on the economic success of the area. The difference in the reasoning between the Estonian Supreme Court and the German *Bundesverfassungsgericht* is striking. Where the German court relied on the fact that the *Bundestag* remains in control of decision making, the Estonian court accepted the need for financial stability as good grounds for reducing the control of parliament.

The choice of the Court to apply a proportionality test to measure sovereignty and democracy against the duty to guarantee fundamental rights and liberties was heavily challenged by the dissenting judges. As an example, Justice Ilvest stated that

> Sovereignty is not an object of trade, something that one composition of the Riigikogu (albeit maybe in the interests of Estonia) can bargain away 'a bit', in the hope that the next composition might perhaps bargain something back. Reading Article 4(4) of the Treaty it is very clear that what is gone is gone.[39]

Justice Tampuu excluded the very possibility of applying the proportionality test to sovereignty:

> The so-called proportionality test is suitable for assessing the constitutionality of a provision of legislation in cases where the permissibility of an infringement of a person's fundamental rights is being adjudicated. This present case does not constitute a dispute of such type.[40]

Justices Jõks et al. added that even if one were to apply the proportionality test to determine whether the benefits of leaving Estonia out of the emergency decision making outweigh the importance of the sovereignty of the state including the financial competence of parliament, '[t]he answer to that question is negative in our opinion.'[41]

The absence of an appropriate analysis of the economic consequences of the decision

A difference in the reasoning of the Estonian and German courts is evident with regard to the credibility of the economic analysis underlying the decision of each court to confirm the effectiveness of the ESM Treaty. According to the *Bundesver-*

[39] Dissenting Opinion of Supreme Court Justice Jüri Ilvest regarding the Judgment of the Supreme Court *En Banc* of July 12, 2012 in Case No. 3-4-1-6-12, available at <www.riigikohus.ee/?id=1347>, visited 7 April 2013.

[40] Dissenting Opinion of Supreme Court Justice Tambet Tampuu regarding the Judgment of the Supreme Court *En Banc* of July 12, 2012 in Case No. 3-4-1-6-12 at para. 2, available at <www.riigikohus.ee/?id=1347>, visited 7 April 2013.

[41] *Supra* n. 8, para. 8.

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fassungsgericht, the economic arguments used by the German government and the *Bundestag* were very controversial, but not 'evidently erroneous', and therefore it was in no position to 'replace the legislature's assessment by its own'.[42] In contrast, the Estonian court accepted that the approval of the ESM Treaty would be an appropriate measure for achieving the economic and financial stability of Estonia and Europe without further scrutiny.

According to the dissenting opinion of Justice Jõks et al., no adequate economic analysis to show that the ESM Treaty would contribute to solving the debt crisis was ever presented to the Supreme Court, nor was any adequate economic analysis of the potential negative economic consequences of a denial of ratification (either by Estonia or by all parties). Neither was there any analysis of whether the ESM Treaty would be sufficiently effective without the challenged emergency voting provision. According to the dissenting opinion

> [i]t is unclear how the Supreme Court *en banc* could assess the suitability and necessity of the infringement in a situation where the Supreme Court *en banc* lacked a certain analysis of how great the benefit of the emergency procedure provided for in Article 4(4) of the Treaty would be in practice for safeguarding the stability of the euro area.[43]

Justice Luik concurred, stating that

> I find that without having a clear overview of the situation and without thoroughly knowing the facts of the financial and economic crisis it was not possible for the Supreme Court *en banc* to make a thoroughly deliberated and reasoned judgment.[44]

His inner conviction was expressed by his statement

> [t]hus I find that the belief of the Supreme Court *en banc* in the mystical efficacy of the ESM in safeguarding the prosperity of the euro area Member States, including Estonia, does not fit into the boundaries of intelligent probability.'[45]

One must agree that a decision confirming that a certain mechanism is suitable within the meaning of the test of proportionality and indeed serves as a justification for limiting the powers of parliament should be based on at least some documented economic analysis. The absence in the case file of any academic studies confirming the positive economic effects of the ESM or the effect of the existence or absence of the emergency voting provision makes the decision of the Estonian

[42] *Supra* n. 21, para. 271.
[43] *Supra* n. 8.
[44] *Supra* n. 8.
[45] *Supra* n. 8.

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Court by which it found that the measure was in accordance with the principle of proportionality less convincing.

The absence of an analysis of potential alternative decision-making mechanisms

Considering that the petition in Estonia was not focused on the ESM Treaty as a whole, but only on the emergency voting mechanism, the core of the discussion should indeed have been focused on whether this mechanism meets the standards of proportionality.

The discussion regarding potential alternatives was centred on whether or not unanimity (and the resulting overall veto right) would have been an appropriate alternative. The mind-set of the drafters of the clause was communicated in Court by the Minister of Finance, who stated that nowhere in the financial world do pennies decide over millions. The Court agreed with the minister and held that the emergency decision-making process was justified by the need to eliminate a threat to the economic and financial sustainability of the euro area. The Court decided that the emergency voting procedure was necessary as 'there is no other decision-making mechanism that would ensure as efficiently the sustainability of the euro area for countering a threat thereto but would infringe the Estonian Constitution less.'[46]

In order for the measure to be considered proportionate, it would have to be suitable for ensuring the attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective. In order to evaluate the suitability of the solution, one would first have to establish the increase in the ability of the ESM to ensure the financial stability of the euro area that is caused by the very existence of this emergency voting mechanism. The impact of the reduction in the ability of a particular member state to influence the decisions is to be identified. Potential alternatives, which would equally be able to contribute to the objective but keep the negative impact to the voting rights to a minimum, have to be identified and considered. This process of elimination would lead to the selection of a voting mechanism that meets the requirements of proportionality. The Supreme Court was not provided with any insight into the choices relating to the creation of the Article 4(4) voting mechanism.

The description of the emergency voting procedure as a move away from unanimity is at least deceptive. Equally deceptive is the description as if opponents of the voting mechanism would be advocating a veto-based system, which has already proven ineffective. The argument that a distribution of votes on the basis of the

[46] *Supra* n. 6, para. 182.

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financial contributions of the member states is the only possible alternative for the purposes of testing the proportionality of the emergency voting mechanism is flawed. The context of the discussion supports the argument that EU decision-making processes should have been the starting point. The Estonian Minister of Finance stated before parliament (*Riigikogu*) that the 'ESM is a missing stone from the European foundation. A missing stone, a forgotten stone, something which was necessary already ten years ago', implying that it constitutes something inherent to the EU.[47] The head of the parliamentary Finance Committee expressed the official position of the government even more clearly by stating that the 'ESM is one part of the European Union financial stability protection package.'[48] Considering that the government relied heavily on the ratification of the ESM Treaty as an expression of the loyalty and appreciation of the state towards the EU, the alternative of using the voting mechanisms that already exist in the EU was unjustifiably ignored. Justice Jõks et al. stated in their dissenting opinion, 'unlike decision-making processes in the European Union, the decision-making mechanism of the ESM is based on the fact that the amount of money contributed determines the voting rights.'[49] This indicates that the alternative form of majority voting, that of the EU, was indeed discussed.

Instead of a purely capital-based procedure, the more refined qualified majority decision-making process set out in Article 16 TEU could have been considered. According to Article 16 TEU, in addition to the support of states representing a percentage of the population (or the economy), the support of the simple majority of the member states is needed to validate the political choice reflected in the decision. This ensures that the interests common to the smaller economies are taken into account. Although Article 4(4) ESM Treaty requires an 85% majority of the votes, this majority can in fact be reached by the votes of a mere six member states. In theory a negative or positive decision could be made, where 11 of the euro area member states are fiercely opposed to it. In turn, under the EU qualified majority system France, Germany and Italy have not been given the individual veto right they have under the ESM Treaty. It would have been preferable for such changes in the balance of voting powers to have been subject to a public debate. It is not easy to see why the drafters of the ESM Treaty, or for that matter the

[47] The transcript of the first reading of the ESM ratification act is available in Estonian at <www.riigikogu.ee/index.php?op=steno&stcommand=stenogramm&day=13&date=1344415985&op2=print>, visited 7 April 2013.

[48] The transcript of the second reading of the ESM ratification act is available in Estonian at <www.riigikogu.ee/index.php?op=steno&stcommand=stenogramm&day=13&date=1346335687&op2=print>, visited 7 April 2013.

[49] *Supra* n. 8, para. 13. with reference to R. Narits and C. Ginter, 'ESM lepingu põhiseaduslikkus kui demokraatliku protsessi defitsiidi küsimus' [Constitutionality of the Treaty Establishing the ESM as a Matter of Deficit of Democratic Proce*ss*] 5 *Juridica* (2012) p. 343-358.

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Estonian Court, considered the decision-making processes of the EU as being ill-fitted for the new form of integration. Thus, the acceptance of an absence of less infringing alternatives is premature.[50]

Obiter dictum concerning future integration

In stark contrast to many member states, there have yet to be any constitutional challenges to the foundational EU treaties in Estonia.[51] While the ESM Treaty is not considered to be EU law,[52] it was widely promoted in Estonia as the next step in EU integration. In Estonia the government relied heavily on Estonia being a net recipient from the EU budget and its moral duty of solidarity arising from that fact. This view was stated repeatedly in the Supreme Court, in tarliament and in governmental press releases. References to the 'Russian threat' were also repeated to persuade the judges and the public to visualize the decision as a choice between belonging to the family of Europe and returning to the sphere of influence of Russia. Not participating in the ESM was portrayed as a road to isolation. This is best illustrated by a quote from the Prime Minister: '[o]ur goal has been never to stand alone again.'[53] The same view was voiced by the Minister of Justice at the hearing. This is in stark contrast with the *Pringle* decision, where the Court of Justice drew a strong line between EU law and the ESM framework. It described the Treaty as an economic policy measure, which cannot be treated as equivalent to a monetary policy measure 'for the sole reason that it may have indirect effects on the stability of the euro.'[54] Possibly due to this uncertainty about the forms and impact of future integration, although the ESM Treaty was confirmed as being outside the EU legal framework, the Court still considered it appropriate to indicate that a line has been reached where further integration might require a stronger mandate from the people. The court built a bridge between the ESM Treaty and the future of EU integration referring to the possibility that the ESM Treaty 'in the future […] may be integrated into the primary or secondary law of the

[50] For a discussion about the shift in the decision-making procedures, *see* R. Narits and C. Ginter, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM', 38 *Review of Central and East European Law* (2013) p. 89.

[51] For a discussion about the interaction between EU law and the constitution in Estonia, *see* C. Ginter, 'Constitutional Review and EC Law in Estonia', 31 *E.L.REV.* (2006) p. 912-924, at p. 920.

[52] As was confirmed later by the Court of Justice in *Pringle*.

[53] *See* the *Wall Street Journal*, 12 July 2012, 'Estonia Rules in Favor of European Stability Mechanism', <http://online.wsj.com/article/SB1000142405270230364400457752310198708616 4.html>, visited 7 April 2013.

[54] Para. 56 of the decision.

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European Union.'[55] The Court referred to the 2003 pro-EU accession referendum and indicated that although the referendum provided for a basis for the accession of the country to the EU, it did not aim to legitimise the integration process of the European Union or the delegation of the competences of Estonia to the European Union to an unlimited extent.

> Therefore, it is primarily the [parliament] that must, upon an amendment to any of the founding treaties of the European Union and also upon entry into a new treaty separately deliberate and decide whether the amendment to a founding treaty of the European Union or the new treaty brings about a deeper integration process in the European Union and, as a result, a more extensive delegation of the competence of Estonia to the European Union and a more extensive infringement of the principles of the Constitution. [If this is the case], it will be necessary to ask for the approval of the holder of supreme power, i.e. the people, and, probably, to amend the Constitution once again. These requirements must be considered also if the ESM Treaty brings about amendments to the TFEU and TEU.[56]

The briefness of the Court's wording does not allow for any firm conclusions. Yet it can be seen as a clear warning in case of any reforms to come and may possibly signal an expectation of higher transparency in the future. It will remain to be seen whether the Court has drawn a firm line or if the line has been drawn in the sand.

Summary conclusions

The decision of the Estonian Court raises very interesting questions regarding constitutional interpretation. The main question arises out of the fact that the integration of Estonia into the ESM was deemed permissible although it constitutes a form of integration unprecedented in and different from those of the EU so far and although it lay outside the framework of EU law and the mandate obtained in the 2003 referendum.

It may be considered a broad leap to interpret the intentional consent of the people to an already existing, transparent system as consent to transformation into a system of which the democratic legitimacy is different in substance. Drawing obligations to cooperate in a less-democratic and less-transparent new international organization from a people's consent to cooperate in the EU with high standards of democracy and judicial review is bold to say the least. If one argues that the ESM Treaty is and should be based on a fundamentally different philosophy and rules than the EU, then its acceptance or rejection should be clearly differentiated from the rights, obligations and loyalty of the state *vis-à-vis* the EU.

[55] *Supra* n. 6, para. 220.
[56] *Supra* n. 6 para. 223.

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If one contends that the mechanism is a missing stone from the existing foundation of the EU, the fundamental values represented in its voting mechanisms should be similar. Indeed, there has undeniably been a shift away from the principles underlying the EU method of decision making (the former *Community method*). A move away from the balanced and combined role of the Commission, the European parliament, the Council and the national parliaments with a strict review by the Court of Justice as basic preconditions for further European integration is alarming. The promotion by the German Chancellor of a redefinition of the *Unionsmethode* as a mixture of governmental coordination and the Community method may indicate a desire to move in a different direction.[57]

As stated above, Estonia has not witnessed any constitutional challenges to its accession to the EU or to amendments of the founding treaties of the EU. In the case at hand, which formally does not deal with EU law, the Court accepted that the Treaty is an integral part of the EU due to its potential ability to support the stability of the euro zone. This contrasts with the position of the Court of Justice in *Pringle,* which emphasized the indirect nature of the effects of the ESM Treaty to the stability of the Euro. This illustrates the fact that different judicial instances have a different understanding of the Treaty framework and a very different perspective of how it should be applied.

It is illustrative of the legal puzzle we are faced with that a constitutional review decision concerning an international agreement outside the framework of EU law contains a section bearing the title 'On the Membership of Estonia in the European Union.' It remains to be seen whether we will witness a different application of the Constitution to integration in and outside the EU framework in the future. The *obiter dictum* discussed above is very likely a result of the division within the Court and of a perceived need to give guidance on the significance of the referendum as well as of its internal conviction about what is appropriate for EU integration in the future. The hopes of the Court are revealed in its statement that the future integration of ESM into the EU 'cannot be precluded'. Whilst the substance of the decision can be seen as a sign of the acceptance of the inevitable, the final words of the decision make it clear that constitutional amendments may be needed in the future: The Court has emphasised the responsibility of parliament to deliberate on future treaties and consider if they bring along further integration. If this is the case, according to the Court, it would be necessary to ask for the ap-

[57] 'Rede von Bundeskanzlerin Merkel anlässlich der Eröffnung des 61. akademischen Jahres des Europakollegs Brügge' [Speech by Chancellor Merkel on the Occasion of the Opening of the 61st Academic Year of the College of Europe in Bruges], 2 Nov. 2010, <www.bundesregierung.de/Content/DE/Rede/2010/11/2010-11-02-merkel-bruegge.html>, visited 29 March 2013, as interpreted by Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk', 1 *NVwZ* (2012).

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proval of the holder of supreme power, i.e., the people.[58] This is most likely not the best momentum to come up with the next 'grand plan' for Europe. Instead it is a time to be very cautious in not jeopardizing the already achieved success of Europe.

[58] *Supra* n. 6, at para. 223.

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