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The ESM Pandemic Crisis Support Facility: Fallen into Oblivion?

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1. Introduction

In May 2020, the Eurogroup, acknowledging the Conclusions of the European Council of April 2020, agreed on the terms and conditions of the Pandemic Crisis Support facility[1]. This is an ESM facility, available to all Euro area Member States for amounts of up to 2 percent of the respective Member's GDP as of end-2019, designed to support the financing of direct and indirect healthcare, cure and prevention costs related to Covid-19. The Eurogroup also acknowledged the view expressed by the EU institutions that all ESM Members States are eligible to receive support under the Pandemic Crisis Support facility[2]. In its statement, the Eurogroup underscored that the only condition to access the credit line will be that Euro area Member States commit themselves to use the credit line to finance direct and indirect healthcare, cure, and prevention costs due to the Covid-19 crisis. The European Commission will

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[1] https://www.consilium.europa.eu/en/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/

[2] Based on a preliminary assessment conducted pursuant to Art. 13(1) of the ESM Treaty, the European Commission found that each Member State is eligible to receive stability support under the new facility, https://ec.europa.eu/info/sites/info/files/economy-finance/20-05-04_pre_eligibility.pdf.

incorporate this requirement, in a standardized form, in each memorandum it signs on behalf of the ESM with the requesting country[3]. No other measure will be incorporated therein.

As a further step, the ESM Board of Governors endorsed the establishment of the Pandemic Crisis Support facility[4]. Under this facility, disbursements will be made in cash – in the form of a loan or a Primary Market Purchase[5] – or "in kind". The credit line will be available until the end of 2022 and is designed to meet healthcare, cure and prevention costs aimed at helping the healthcare sector respond effectively to the COVID-19 pandemic. These costs may include the part of overall public healthcare spending estimated to be directly or indirectly attributed to addressing the impact of COVID-19 on the healthcare systems, in 2020 and 2021. The loans will have a maximum average maturity of 10 years and bear an annual interest rate of 10 points basis (0.1 per cent), plus a 25 points basis (0.25 per cent) service fee for each disbursement[6]. The ESM Members States requesting assistance under the Pandemic Crisis Support facility will be subject to enhanced surveillance by the European Commission. However, the monitoring and reporting requirements will only focus on the use of the funds to cover direct and indirect healthcare costs. In this context, the Commission will not conduct *ad hoc* on-site missions further to those normally scheduled within the European Semester.

Notwithstanding the need of resources to fight Covid-19 and the favourable financial terms, so far none of the ESM Member States has requested the activation of the facility. This failed activation of the facility has some ground. On the one hand, it is imputable to the availability of resources under the National Recovery and Resilience Plans (NRRPs) that each EU Member State must prepare to receive resources under the Multiannual Financial Framework (MFF) and the Next Generation EU (NGEU). On the other hand, it is imputable to the absence of macroeconomic conditionality from the facility that questions its consistency with the ESM and EU Treaties. This questionable consistency may have refrained many countries from requesting assistance under the facility.

In this context, this work explores the difficult challenge of the validity of the acts in which the facility is articulated before the Court of Justice of the European Union (CJEU), argues that a national court may assess the validity of the national acts relating to the establishment of the facility, highlights that this assessment should be based upon a preliminary ruling of the CJEU concerning the interpretation of Articles 125 and 136(3) TFEU, emphasises that a preliminary ruling enlarging the *ultima ratio* interpretation given in *Pringle* might be set aside in the German jurisdiction on the trail of the PSPP judgment, and concludes that in this case the German Federal Constitutional Court may declare the invalidity of the national acts relating to the facility with the result of blocking the disbursement of resources.

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[3] The European Commission acknowledged this position in a letter dated 7th May 2020 by the Vice-president Dombrovskis and Commissioner Gentiloni to the Eurogroup President Centeno, at https://www.consilium.europa.eu/media/43823/letter-to-peg.pdf.

[4] https://www.esm.europa.eu/sites/default/files/2020-05-15-bog-summary_of_decisions.pdf.

[5] The ESM may engage in Primary Market Purchases of bonds or other debt securities issued by ESM Members under the Primary Market Support Facility (PMSF). The main objective of the PMSF is to allow the ESM Members to maintain or restore their market access. Cf. https://www.esm.europa.eu/sites/default/files/esm_guideline_on_the_primary_market_support_facility.pdf.

[6] https://www.esm.europa.eu/sites/default/files/20200515_-_esm_bog_-_md_proposal_for_financial_assistance_-_draft.pdf.

2. Conditionality under the ESM

Conditionality is the distinguishing feature of the Euro countries rescue mechanisms. The origins of these mechanisms go back to the Greek debt crisis (2010)[7]. The outbreak of the Greek crisis revealed the flaws of the European financial architecture relating to Euro countries: the ECB could not operate as lender of last resort on behalf of the Euro countries (Art. 123 TFEU), the Commission could not provide funding under the Balance-of-Payment Facility (Art. 143 TFEU)[8] and Member States could not be liable or assume the commitments of other Member States (Art. 125 TFEU). This last norm, far from impeding genuine non-concessionary loans, implies that the liabilities of Member States are not backed by implicit guarantees from the European Union or other Member States, with the result that financial markets must be driven solely by the creditworthiness of the borrowing country[9]. This picture assumed that market discipline should have been sufficient to prevent budget imbalances[10].

The immediate response to the crisis was the Greek Loan Facility, a syndicated loan facility under English law, consisting of two documents: the Inter-creditor Agreement, (under which the Euro countries committed themselves to provide funding to Greece) and the Loan Facility Agreement (under which the Euro countries formalized the terms of the loan with Greece)[11]. As a further step, the Euro countries established a semi-permanent mechanism, the European Financial Stability Facility (EFSF), in the form of a corporation (*société anonyme*) registered in Luxembourg and subject to the laws of Luxembourg[12]. The last step of the saga coincided with the ESM, an international organization created on the basis of an international agreement between the Euro countries, with the mandate of mobilizing funding and providing stability support under strict conditionality in favour of ESM Members States who are experiencing, or are threatened by, severe financing problems, to the extent that support is needed to preserve the financial stability of the whole Euro area and of its Member States (Art. 3, ESM Treaty)[13].

The common thread of these financial facilities is that the provision of funding is subject to strict conditionality incorporated in a memorandum of understanding (MoU) between the requesting country and the European Commission. The MoU is negotiated and signed by the European Commission on behalf of the ESM, subject to prior compliance with conditionality and approval by the Board of Governors (Art. 13(4), ESM Treaty). It must be fully consistent with the measures of economic policy coordination provided for in the TFEU and with any act of EU law, including any opinion, warning, recommendation, or decision addressed to the ESM Member concerned (Art. 13(3), ESM Treaty).

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[7] K. FEATHERSTONE, *The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime*, in *Journal of Common Market Studies*, 2011, p. 193 ss.

[8] Council Regulation (EC) 332/2002 of 18 February 20202 establishing a facility providing medium-term financial assistance for member states' balance payments, [2002] O.J. L 53/1.

[9] R. SMITS, *The European Central Bank: Institutional Aspects*, The Hague-London-Boston, 1997, p. 77.

[10] J-V. LOUIS*, The No-Bailout Clause and Rescue Packages*, in *Common Market Law Review*, 2010, p. 971 ss., pp. 979-982.

[11] https://www.oireachtas.ie/en/bills/bill/2010/22/.

[12] https://data.oireachtas.ie/ie/oireachtas/act/2010/16/eng/enacted/a1610.pdf.

[13] https://www.esm.europa.eu/legal-documents/esm-treaty. On the legal developments of the sovereign debt crisis, see T. MIDDLETON, *Not Bailing Out ... Legal Aspects of the 2010 Sovereign Debt Crisis,* in *A Man for All Treaties: Liber Amicorum en l'Honneur de Jean-Claude Piris*, Bruxelles, 2010, p. 421 ss. and A. DE GREGORIO MERINO, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of the Financial Assistance*, in *Common Market Law Review*, 2012, p. 1613 ss.

Subordinating the provision of resources to strict conditionality is not an ancillary issue. Conditionality constitutes the *raison d'être* of the financial assistance that Euro countries can provide each other via the ESM and amounts to a sort of circumstance precluding the infringement of Art. 125 TFEU (the so-called "no bail-out rule"). In the *Pringle* case[14], the CJEU emphasized that Art. 125 permits the granting of financial assistance by one or more Member States to another Member State, provided that the conditions attached to such assistance prompt that Member State to implement a sound budgetary policy[15]. In this sense, conditionality reflects the necessity to maintain the financial stability of the monetary union as a whole[16]. It is also true that Art. 125 contains an exception in favour of mutual financial guarantees for the joint execution of a specific project. However, the ESM facility does not meet the requirements of the exception. There is no guarantee by t Member States, but a credit line arranged by the ESM. There is no specific project, but a general improvement of the national health services to fight Covid-19. There is not a joint execution of a common project, but single executions of projects by requesting countries. The case could be different in relation to the so-called Corona Bonds. These would be bonds to be issued under a Corona Bond Treaty, backed by the guarantee of the signatory countries, with proceeds earmarked for fighting the effects of COVID-19.[17]

Further, the facility must be consistent with Art. 136(3) TFEU, under which Member States whose currency is the Euro can establish a stability mechanism to be activated to safeguard the stability of the Euro area as a whole, and to grant assistance under strict conditionality[18]. Although this provision does not contain an exception to the requirement of strict conditionality, strict conditionality may take various forms either in substance or in operation. However, this flexibility cannot be so wide to reduce conditionality to the mere obligation to apply resources to healthcare national services to fight Covid-19 pandemic. [19]

2.1. A Dubious Conditionality

So far, no request has been addressed to the ESM to draw resources under the Pandemic Crisis Support facility and it is unlikely that such a request could be advanced before the availability of the facility expires (December 2022)[20]. This lack of request has more than one explanation. First, governments – before the outbreak of the Ukrainian war – had issued bonded loans bearing very low interest rates. Second, huge resources are coming under the NRRPs that

[14] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756. See B. DE WITTE, T. BEUKERS, *The Court of Justice Approves the Creation of the European Stability Mechanism: Pringle*, in *Common Market Law Review,* 2013, p. 805 ss.
[15] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., para. 137.
[16] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland*, cit., paras. 135–36.
[17] On this proposal see M. GOLDMANN, *The Case for Corona Bonds* (2020) at https://www.mpg.de/14677295/good-reasons-for-corona-bonds.
[18] European Council Decision of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency is the Euro (2011/199/EU), [2011] O.J. 91/1.
[19] Contra, E. CASTELLARIN, *L'Evolution de la Conditionalité du Mechanism Européen de Stabilité*, in *Il Diritto dell'Unione Europea*, 2020, p. 29 ss., pp. 49-50, in whose view the adjective "strict" would imply a certain room for manoeuvre to quantify and qualify the conditions attached to financial assistance. This room for manoeuvre would justify the "only" condition to apply resources to healthcare national services to fight Covid-19 pandemic.
[20] However, the ESM Board of Governors is enabled to postpone the deadline.

Member States are submitting to the European Commission. Third, potential recipients seem rather sceptical about the validity of an ESM financial assistance without economic conditions.

This scepticism has some grounds. As a rule, ESM financial assistance is to be used in favour of the general budget of those countries which are experiencing severe financing problems (Art. 3, ESM Treaty) and not to mend the wounds of a specific internal sector such as the national health service. It is true that the ESM toolkit contains a facility designed for Indirect Bank Recapitalization to help beneficiary ESM Members recapitalize troubled banks[21]. Nevertheless, the troubled banks must pose a serious threat to the financial stability of the Euro area as a whole or of its Member States[22]. This is not the case of the national health services.

This scepticism is reflected in the absence of any reference to the facility in the ESM Amending Treaty. In January 2021, the ESM Member States signed an agreement amending the ESM Treaty (the Amending Agreement)[23]. This was the culmination of a long and complicated process begun in December 2017, when the European Commission first submitted a proposal for transforming the ESM into a European Monetary Fund to be incorporated into the EU legal framework[24]. Since the December 2017 proposal failed to generate the necessary consensus among the Euro countries, in December 2018 the Euro Summit decided to reform the ESM by amending the establishing treaty[25]. The Amending Agreement provides a legal basis for a set of new tasks assigned to the ESM. These new tasks include providing a backstop to the Single Resolution Fund[26], and a stronger role in future economic adjustment programmes and crisis prevention. Further, the application process for the ESM precautionary credit lines has been simplified, and the ESM financial instruments will result more effective.

The amendments to the ESM Treaty failed to include the Pandemic Crisis Support facility. This failed inclusion may be due to the temporary nature of the facility. Nevertheless, it can also reflect the questionability of an ESM facility disentangled from any economic condition. Further, it confirms the perplexities of the Euro countries on the utilization of the facility.

2.2. Implied Justification

The absence of macroeconomic conditions from the facility may be implicitly justified under two regards: the suspension of the revised Growth and Stability Pact and the conditionality contained in the NRRPs.

With reference to the revised Stability and Growth Pact[27], it contains an escape clause under which «in periods of severe economic downturn for the Euro area or the Union as a whole,

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[21] https://www.esm.europa.eu/assistance/lending-toolkit.

[22] Under this facility, Spain received 41.3 billion euros to rescue savings banks and, in return, modernized the banking sector, https://www.esm.europa.eu/assistance/spain.

[23] https://www.esm.europa.eu/sites/default/files/migration_files/esm-treaty-amending-agreement-21_en.pdf.

[24] COM (2017) 827 final. See M. MEGLIANI, *From the European Stability Mechanism to the European Monetary Fund: There and Back Again*, in *German Law Journal*, 2020, p. 674 ss.

[25] The Euro Summit endorsed the Term Sheet on the ESM Reform submitted by the Eurogroup https://www.consilium.europa.eu/media/37267/esm-term-sheet-041218_final_clean.pdf.

[26] The SRF is a fund established by the EU for resolving bank crises in the context of the Banking Union. It is financed by contributions from the banking sector, not the member states. Should the SRF be depleted, the ESM can act as a backstop and lend the necessary funds by way of a revolving credit line. The ceiling for ESM loans to the SRF is set at €68bn. When the ESM revolving credit line is activated, the SRF will reimburse the ESM loans using resources from bank contributions within a period of three years, with an extension up to five years.

[27] The Stability and Growth Pact is an agreement among EU countries containing a set of rules designed to ensure that EU countries pursue sound public finances and coordinate their fiscal policies. On the Stability and Growth

Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective, provided that this does not endanger fiscal sustainability in the medium term»[28]. To react to the Covid-19 crisis, the Governments of the EU countries have adopted fiscal measures to increase the capacity of national health services and provide relief to those citizens and economic sectors that have been adversely impacted. In this context, the Commission has recognised that the conditions to activate the general escape clause were met[29] and the Council has endorsed this recognition[30]. The operation of the escape clause affects the applicability of the no bail-out rule. Under the purposive criterion laid down in *Pringle*, lending against strict economic conditions is instrumental to preserving the budgetary discipline[31]. However, if the budgetary discipline is suspended because of the Covid-19 pandemic, this suspension reasonably would extend to the economic conditions under the ESM facility. It is meaningless to impose economic conditions designed to preserve budgetary discipline when this discipline has been relaxed. The result is that the absence of economic conditions from the ESM Pandemic Support facility is implicitly justified by the suspension of the Stability and Growth Pact. The one thing goes with the other.

With reference to NRRPs, ESM conditionality may be satisfied by the economic conditions set out in the national recovery and resilience plans that each EU Member State must prepare to receive resources under the MFF and the NGEU[32]. These plans focus on reforms and investments. With reference to the reform component, the national plans should address those areas in need of reform to improve the functioning of the economy and society and the sustainability of public finances, to create jobs, to strengthen inclusive growth and social cohesion and to make sectors, economies, and social systems more resilient to shocks and change. These reforms should include pension reforms, labour market reforms, education and training reforms, reforms improving the business environment by addressing regulatory requirements and red tape or well-designed and comprehensive reform packages in the green and digital sectors[33]. The Commission is mandated to assess the recovery and resilience plans within two months of the official submission and make a proposal for a Council implementing

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Pact see, *inter alia*, A. BRUNILA, M. BUTI and D. FRANCO (eds.), *The Stability and Growth Pact: The Architecture of Fiscal Policy in EMU*, London, 2011.

[28] The clause was introduced as part of the "Six-Pack" reform of the Stability and Growth Pact in 2011, on the trail of the global economic and financial crisis. In detail, the clause is set out in Articles 5(1), 6(3), 9(1) and 10(3) of Regulation (EC) 1466/97 (as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, O.J. [2011] L 306/12) and in Articles 3(5) and 5(2) of Regulation (EC) 1467/97 (as amended by Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure, O.J. [2011] L 306/33.

[29] COM(220) 123 final.

[30] https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministersof-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/.

[31] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., para. 135.

[32] Point A18, European Council Conclusions of 21 July 2020, EUCO 10/20.

[33] Reforms might also bring budgetary savings (such as some pension reforms or the removal of environmentally harmful national subsidies) or increase the revenue in the medium to long-run (as a second-round effect from fostering a more efficient, digital, and sustainable economy with a higher potential output, lower structural unemployment, increased labour force participation or higher innovation capacity). Commission Staff Working Document Guidance to Member States Recovery and Resilience Plans, SWD(2020) 205 final, pp. 11-12.

decision [34]. Against this background, the economic conditions relating to the reform programmes contained in the national recovery and resilience plans can be referred to in the memoranda of understanding negotiated by the European Commission under the ESM Pandemic Crisis Support facility. In this way, the requirement of economic conditionality would be implicitly, but substantively, satisfied.

3. An Uneasy Judicial Challenge

The validity of the ESM facility should be ascertained by the CJEU. However, the machinery of the ESM Pandemic Crisis Support facility makes it difficult to challenge the single acts in which the facility is articulated in that venue.

3.1. Challengeable Acts

The Establishment of the facility is articulated in a series of acts the validity of which is difficult to challenge. Regarding the Eurogroup proposal to establish the facility, it is necessary to bear in mind that, in the light of Protocol No 14 annexed to the TFEU, the Eurogroup is qualifiable as an informal meeting of the Ministers of Finance of the Euro countries (Art. 1). This point was clarified in *Mallis*, where the CJEU ruled that the Eurogroup is not a decision-making body, and its statements or proposals cannot be regarded as measures intended to produce legal effects with respect to third parties[35]. It follows that the Eurogroup is not a body, office, or agency of the European Union within the meaning of Art. 263 TFEU and that its acts are not justiciable before the CJEU[36]. On the same footing, the conclusions of the European Council are political acts that, normally, do not produce legal effects and, thereby, are not challengeable before the CJEU (Art. 15(1) TEU)[37]. This implies that both the Eurogroup proposal and the European Council conclusions relating to the establishment of the Pandemic Crisis Support facility are not justiciable.

Regarding the European Commission negotiation of a memorandum of understanding, under the ESM Treaty the Commission receives a mandate from the ESM Board of Governors to negotiate and sign the memorandum with the country requesting stability support[38]. In this process, the European Commission does not possess any power to make decisions of its own: this power remains with the ESM[39]. Therefore, the mere signature of the memorandum of

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[34] Article 19(1), Regulation (EU) 20121/241 of the European Parliament and of the Council of 21 February Establishing the Recovery and Resilience Facility, [2021] O.J. L 57/17.

[35] Court of Justice, 20 September 2016, Joined Cases C-105–109/15 P *Mallis et al. v. Comm'n & ECB* ECLI:EU:C:2016:702, para. 49.

[36] *Ibid*., paras. 51 and 61.

[37] However, following the entry into force of the Lisbon Treaty, the CJEU has acquired the power to review European Council decisions when they produce legal effects vis-à-vis third parties (Art. 263 TFEU) or to review a complaint that the European Council has failed to act when it had a duty to do so (Art. 265 TFEU). See R.J. GOEBEL, *The European Union and the Treaty of Lisbon*, in *Fordham Journal of International Law,* 2011, p. 1251 ss., p. 1258.

[38] It is worth considering that Member States are entitled, in areas not falling under the exclusive EU competence, to entrust tasks to the EU institutions outside the EU framework, provided that these tasks do not alter the essential character of the powers conferred on those institutions by the Treaties. See Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., cit. para. 158.

[39] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., para. 161.

understanding does not make this act imputable to the Commission[40]. Nevertheless, the Commission is called to ensure that the memoranda of understanding are consistent with EU law[41] and pursue an objective general interest of the European Union[42]. Against this background, the negotiation of a memorandum of understanding without any reference to conditions of economic policy seems inconsistent with the reading of Art. 125 TFEU given in *Pringle* and the wording of Art. 136(3) TFEU. Nevertheless, the activity of the Commission in defining the content of the memorandum of understanding may not infringe Articles 125 and 136(3) for two reasons: first, the negotiation of the memorandum as such does not produce legal effects; second, the norm concerns the prohibition of being liable for or assuming commitments of Member States by the other Member States or the European Union. The role of the Commission under the Pandemic Crisis Support facility, however, may be incompatible both with Art. 17 TEU – which requires the Commission to ensure the application of the Treaties and of the measures adopted by the EU institutions pursuant to them – and with Art. 13(3) and (4) of the ESM Treaty – which requires the Commission to ensure that the memoranda of understanding concluded with the requesting states are consistent with EU law. In this case, the negotiation of a memorandum of understanding in the framework of a financial agreement under the new ESM facility might become the object of a motion of censure by the European Parliament under Art. 234 TFEU. However, it is rather unlikely, that such a motion can be formalized and, mostly, meet the necessary quorum[43].

3.2. The Decision Establishing the Facility

The decision of the ESM Board of Governors establishing the facility presents more margin of manoeuvre in terms of challenging. Art. 12(1) of the ESM Treaty stipulates that stability support may be granted to an ESM Member State only subject to strict conditionality, that may range from a macro-economic adjustment programme to continuous respect for pre-established eligibility conditions.

The Pandemic Crisis Support facility is based on the Enhanced Conditions Credit Lines (ECCL) that is a form of precautionary financial assistance open to ESM Member States whose general economic and financial situation is substantively sound but presents some weaknesses. In this context, the requesting Member State must sign a memorandum of understanding with the European Commission (Art. 13(4) ESM Treaty) that contains the corrective measures addressing the above-mentioned weaknesses and ensures continuous compliance with the

[40] Court of Justice, 20 September 2016, Joined Cases C-8–10/15 *Ledra Advert. Ltd. et al. v. Comm'n & ECB* ECLI:EU:C: 2016:701, para 52.

[41] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., para. 164.

[42] Court of Justice, 20 September 2016, Joined Cases C-8–10/15 *Ledra Advert. Ltd. et al. v. Comm'n & ECB*, cit., para. 71.

[43] Under Art. 234 TFEU, the European Parliament may dismiss the European Commission under a motion of censure passed by a two-thirds majority of votes cast, representing an absolute majority of the members of Parliament. The motion is addressed against the Commission as a collegiate body and not against single Commissioners. The submission of a motion of censure requires the support of one-tenth of the members of the Parliament. Since direct elections to the Parliament, only seven motions of censure have been tabled and debated, and none has passed. See G. DE BURCA and P. CRAIG, *EU Law: Text, Cases and Materials*, Oxford, 2015, 6th ed., p. 38.

eligibility criteria met at the time of the request[44]. Under the ECCL, assistance is available to ESM Member States that do not comply with some of the eligibility criteria required for accessing the Precautionary Conditioned Credit Lines (PCCL), but whose general economic and financial situation is sound[45]. This implies that the memoranda of understanding must include those corrective measures aimed at addressing the missing eligibility criteria and avoiding any future problem in respect of access to market financing. All these requirements do not emerge from the text of the Pandemic Crisis Support facility, where the only condition consists in applying ESM resources to direct and indirect healthcare costs related to Covid-19.

The CJEU might be asked to rule on the consistency of the facility with Articles 125 and 136(3) TFEU under three different routes. First, the absence of macroeconomic conditions from the facility might give rise to a dispute between Member States, or between Member States and the ESM, in relation to the interpretation and application of the ESM Treaty or to the compatibility of the Governors' decision with the ESM Treaty. Such a dispute is to be submitted to the decision of the Board of Governors (Art. 37(2) ESM Treaty)[46]. In case the decision of the Board of Governors is contested, the dispute is referred to the CJEU under the arbitral clause (Art. 273 TFEU). In that context, the CJEU may provide an interpretation of Articles 125 and 136(3) TFEU. However, since the ESM Board of Governors' decision establishing the Pandemic Crisis Support facility was adopted unanimously (Art. 5(6)(i) ESM Treaty), it is unlikely to be challenged under the dispute settlement procedure.

Second, the decision of the ESM Board of Governors establishing the ESM facility may become subject to an infringement procedure. This is a judicial mechanism that allows the European Commission (Art. 258 TFEU) or another Member State (Art. 259 TFEU) to react when a Member State fails to comply with EU primary or secondary laws[47]. In detail, the infringed norms would be Articles 125 and 136(3) TFEU. In this context, it is worth emphasising that the fact that decision establishing the facility was taken by the ESM Board of Governors does not relieve ESM Member States from the responsibility for having infringed the norms mentioned above. Under the duty of loyal cooperation (Art. 4(3) TEU), EU Member States have both positive and negative obligations. In terms of positive obligations, Member States are called to take any appropriate measure, to ensure fulfillment of the obligations arising out of the EU Treaties or resulting from the acts of the EU institutions. In terms of negative obligations, Member States are called to refrain from any measure which could jeopardise the attainment of the EU objectives. Coherently with these obligations, Member States cannot adopt individual positions in international organisations when this would impede or hinder the

[44] ESM Guideline on Precautionary Financial Assistance, https://www.esm.europa.eu/sites/default/files/esm_guideline_on_precautionary_financial_assistance.pdf.

[45] These criteria are: (a) Respect of the commitments under the stability and growth pact; (b) A sustainable general government debt; (c) Respect of the commitments under the excessive imbalance procedure; (d) A track record of access to international capital markets on reasonable terms; (e) A sustainable external position; (f) The absence of bank solvency problems that would pose systemic threats to the stability of the Euro area banking system.

[46] This decision is taken by qualified majority (Art. 5(7)(m), ESM Treaty). In this case, the votes of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold shall be recalculated accordingly.

[47] Only rarely do Member States decide to act against another Member. It is more neutral to leave this task to the Commission. See D. CHALMERS, G. DAVIES, and G. MONTI, *European Union Law: Text and Materials*, Cambridge, 2019, 4th ed., p. 330.

attainment of the Union's tasks and objectives[48]. This point was highlighted in *Greece v. Commission*, where the ECJ held that «[t]he mere fact that the Community is not a member of an international organization in no way authorizes a Member State, acting individually in the

context of its participation in an international organization to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty»[49]. With specific reference to the ESM, the Pringle judgment has highlighted that the establishment of the ESM Treaty is consistent with the duty of loyal cooperation to the extent that it provides financial assistance under strict conditionality[50]. Consequently, this duty is infringed if such assistance is provided without strict conditionality. However, the consensus that has accompanied the establishment of the Pandemic Crisis Support facility among the EU institutions and Member States makes unlikely that the infringement procedure may be triggered.

Third, national courts of the Euro countries may submit a request for preliminary ruling to the CJEU. Under this procedure, a national court may (and, in case of a court of last instance, must) refer the issue of the validity of EU acts and interpretation of EU law to the CJEU (Art. 267 TFEU)[51]. The request would focus on the interpretation of Articles 125 and 136(3) TFEU. In this case, the CJEU will «provide the national court with all criteria for the interpretation of [EU] law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it»[52]. However, the seized court may decide not to refer to the CJEU. This choice may be grounded on the *acte clair* and *acte éclairé* doctrines. Under the *acte clair* doctrine, a potential referring court is dispensed from referring to the CJEU if the correct application of EU law may be so obvious as to leave no scope for any reasonable doubt as to the way in which the question is to be resolved[53]. At first blush, this is the case of Art. 136(3) TFEU under which the granting of *any* financial assistance under the ESM is to be made subject to *strict conditionality*. The wording of the norm does not leave much room for manoeuvre to an unconditional facility. Even admitting that strict conditionality may also include the condition that resources are applied to the national health services, this broad interpretation is not sufficient to neutralise the requirement of economic conditions[54]. Under the *acte éclairé* doctrine, a potential referring court is dispensed from referring when the referable question is

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[48] P. VAN ELSUWEGE and H. MERKET, *The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation*, in S. BLOCKMANS and R. WESSEL (eds.), *Principles and Practices of EU External Representation*, The Hague, 2012, p. 37 ss., p. 49.

[49] Court of Justice, 12 February 2009, Case C-45/07, *Commission v Greece*, ECLI:EU:C:2009:81, para. 30.

[50] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., paras. 111, 151.

[51] The preliminary reference is a non-contentious procedure that serves as an instrument of cooperation between the CJEU and national courts under which the CJEU provides national courts with guidance on the interpretation of EU law and the validity of legal acts of the EU institutions. See B. WÄGENBAUR (ed.), *Court of Justice of the European Union: Commentary on Statute and Rules of Procedure,* Oxford, 2013, pp. 67-68.

[52] Court of Justice, 30 November 1995**,** Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, para. 19.

[53] In this process, the national court must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice, 6 October 1982, Case 283/81, *CILFIT*, ECLI:EU:C:1982:335, para. 16. Nevertheless, in *Consorzio Italian Management,* the CJEU highlighted that, in case of diverging lines of interpretation, the seized court must be particularly vigilant in assessing any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law, Court of Justice, 6 October 2012, Case C-561/19, *Consorzio Italian Management*, ECLI:EU:C:2021:799, para. 49.

[54] *Infra*, para. 4.2.

materially identical to another submitted in a similar case[55]. The most similar case is *Pringle*. However, the question potentially referable to the CJEU would not be identical to that previously submitted in *Pringle*. In *Pringle*, the CJEU was asked to rule on the validity of the decision amending Art. 136(3) TFEU and the interpretation of certain provisions of the European Treaties (among which, Art. 125 TFEU). Here, the issue would concern whether and to what extent the norms of the European Treaties allow the provision of financial assistance at the only condition that resources are applied in favour of the national health services to fight Covid-19. As questions are not identical, nationals court may decide to make a reference to the CJEU and in the case of courts of last instance would be obliged to do so[56].

4. Requesting a Preliminary Ruling

Before a referring court, what may come into play is the compatibility with the European Treaties of the national acts connected with the facility. This is particularly the case of Germany where private parties are entitled to challenge the acts of German public bodies concerning their participation in international financial rescue programmes. These acts also include the granting of financial resources under the new ESM facility. Under the German ESM Financing Act of 29th June 2012, in circumstances where the overall budgetary responsibility is affected, the German Government may, through its representative, approve a proposal for a decision in matters concerning the European Stability Mechanism or abstain from voting on such a proposal only after the plenary of the German Parliament has taken an affirmative decision to that effect. In the absence of such a decision, the German representative sitting on the ESM Board of Governors must reject the proposal for a financial assistance (sect. 4(2))[57].

To appreciate the validity of the acts by which the German Government has concurred to establish the facility, the German Federal Constitutional Court (*Bundeverfassungsgericht*) should submit a request for a preliminary ruling to the CJEU concerning the interpretation of Articles 125 and 136(3) TFEU. Reasonably, the request should focus on whether the Covid-19 pandemic crisis may justify the absence of strict economic conditions. Under the Pandemic Support facility, conditions are instrumental to healthcare related to the Covid-19 pandemic and, implicitly, to facilitate recovery. This circumscribed conditionality was conceived as an extreme measure in the face of an exogenous symmetric crisis. Against this background, hardly would the CJEU repudiate *Pringle*, as it constitutes the justification for mutual financial assistance by Euro countries. At the same time, it cannot ditch the new ESM facility, as it was conceived to fight the virus and to buttress recovery. Reasonably, the court will try to find out a check-and-balance solution arguing on the exceptionality of the pandemic occurrence.

[55] Court of Justice, 27 March 1963, Joined cases 28 to 30-62, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration* ECLI:EU:C:1963:6, p. 38.

[56] A court of last instance would be dispended from referring only when the question of EU law is irrelevant for the solution of the dispute, or the interpretation of the EU law provision concerned is based on the Court's case-law or, in the absence of such case-law, the interpretation of EU law is so obvious to leave no scope for any reasonable doubt Court of Justice, 6 October 2012, Case C-561/19, *Consorzio Italian Management*, cit., para. 51.

[57] ESM Financing Act of 13 September 2012 (Federal Law Gazette I, p. 1918), amended by Article 1 of the Act of 29 November 2014 (Federal Law Gazette I, p. 1821 and 2193) *Bundestag Printed Papers* 17/9048.

Considering this interpretation, the German Federal Constitutional Court should assess the validity of the national acts concerning the establishment and operation of the facility[58].

4.1. Disapplying a Preliminary Ruling

Under Art. 19(1) TEU, a referring court is abode by a preliminary ruling rendered by the CJEU. However, practice records a significant instance of diversion from this rule. In July 2017, the German Federal Constitutional Court (*Bundesverfassungsgericht)* made a request for preliminary ruling to the CJEU concerning whether and to what extent the decision of the ECB Board of Governors on the Public Sector Purchase Programme (PSPP)[59] or the manner and method of its implementation violate Art. 123(1) TFEU that prohibits monetary financing by the ECB and exceed the ECB's monetary policy mandate[60]. The complaints were filed before the German Federal Constitutional Court by private parties against the German Federal Government and the German Federal Parliament for omitting to take steps to ensure the rescission or the non-implementation of the ECB Board of Governors' decision on the PSPP and against the German Federal Bank (*Bundesbank*) for omitting to bring legal action against the ECB for its participation in the asset purchase programmes.

In the preliminary ruling (*Weiss* ruling), the CJEU analysed the position of the ECB that large scale purchases of government bonds contribute to achieving the objective of low inflation rates by means of facilitating access to financing that is conducive to boosting economic activity[61]. In this process, the CJEU refused to subject the ECB's action to review, on the assumption that nothing more could be required of the European Systems of Central Banks (ESCB) apart from that it used its economic expertise and technical means to carry out that purchasing of bonds with the utmost care and skill[62].

The German Federal Constitutional Court strongly disagreed from the *Weiss* ruling. It highlighted that the interpretation of the ECB's monetary policy mandate given by the CJEU infringed the competences of the Member States in the field of economic and fiscal policy. The EU competence in economic policy matters is essentially limited to coordinating the policies

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[58] It pertains to national courts to find whether a national legal provision or an administrative act is valid, Court of Justice, 15 July 1964, Case 6/64 *Costa v. Enel* ECLI:EU:C:1964:66, pp. 592-593.

[59] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) [2015] O.J. L 121/20 (see now Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9) [2020] O.J. L 39/12).

[60] Bundesverfassungsgericht, Order of the Second Senate of 18 July 2017 – BvR 859/15, at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html.

[61] Court of Justice, 11 December 2018, Case C-493/17 *Weiss et al.*, ECLI:EU:C:2018:1000, paras. 77-78, See M. WENDEL, *Paradoxes of Ultra Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, in *German Law Journal*, 2020, p. 979 ss. This was not the first request for a preliminary ruling made by the German Federal Constitutional Court. The route was opened by *Gauweiler* that concerned the ECB's power to selectively purchase Eurozone government bonds in secondary markets under the Outright Monetary Transactions programme. See Bundesverfassungsgericht, Order of the Second Senate, 14 January 2014, 2 BvR 2728/13, at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html; CJEU 16 June 2015, Case 62/14 *Peter Gauweiler c. Deutcher Bundestag*, ECLI:EU:C:2015:400; and Bundesverfassungsgericht, Judgment of the Second Senate, 21 June 2016, 2BvR 2728/13, at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html. See T. TRIDIMANS and N. XANTHOULIS, *A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 17 ss.

[62] Court of Justice, 11 December 2018, Case C-493/17 *Weiss et al.*, cit., para. 91.

of the Member States (Art. 119(1) TFEU). In this context, the ESCB is merely called to support the general economic policies in the EU (Articles 119(2) and 127(1) second sentence TFEU, Art. 2 second sentence ESCB Statute) and is not allowed to pursue its own economic policy agenda. In the view of the German Federal Constitutional Court, in the *Weiss* ruling the CJEU endorsed the ECB's competence to pursue its own economic policy agenda by means of an asset purchase programme and refrained from subjecting the ECB's actions to an effective review as to conformity with the order of competences according to the principle of proportionality. Against this background, the German Federal Constitutional Court found that the *Weiss* ruling exceeded the judicial mandate conferred upon the CJEU under Art. 19(1) TEU. Therefore, the court concluded that the *Weiss* ruling had no binding force in Germany[63]. The decision of the German Federal Constitutional Court to set aside the *Weiss* ruling on the one hand highlights that the court is not willing to sacrifice the budgetary constitutional rules on the altar of the EU integration, on the other hand emphasises that the EU is not a federal system with the CJEU hierarchically posed over national constitutional courts[64].

Having set aside the CJEU's preliminary ruling for technical reasons[65], the German Federal Constitutional Court found that the PSPP constituted an *ultra vires* act, as the ECB failed to substantiate that the programme was proportionate[66]. Consequently, this act was not to be applied in Germany and was not binding in relation to German constitutional organs, administrative authorities and courts which were not allowed to participate either in the development or in the implementation and execution of *ultra vires* acts[67]. In the event of a manifest and structurally significant exceeding of competences by EU institutions, bodies, offices and agencies, the German constitutional organs must use the means at their disposal to ensure adherence to the European integration agenda (*Integrationsprogramm*) and respect for its limits. These means consist of the rescission of acts that are not covered by the EU integration agenda and – to the extent that these acts continue to have effect – of limiting their domestic impact[68].

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[63] Bundesverfassungsgericht, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 163, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html. For a first comment see N. PETERSEN, *Karlsruhe's Lochner Moment? A Rationale Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU After the PSPP Decision*, in 21 *German Law Journal*, 2020, p. 995 ss. Along the same lines, in July 2021, the Polish Constitutional Tribunal found that the CJEU exceeded its mandate by prescribing interim measures pertaining to the organizational structure and functioning of Polish courts and to the mode of proceedings before those courts, Trybunał Konstytucyjny: Obowiązek państwa członkowskiego UE polegający na wykonywaniu środków tymczasowych odnoszących się do kształtu ustroju i funkcjonowania konstytucyjnych organów władzy sądowniczej tego państwa (trybunal.gov.pl).

[64] This is because the EU has not evolved in a federal state and the member countries remain "*Herren der Veträge*", Bundesverfassungsgericht, 2 BvR 859/15 (judgment), cit. para. 111.

[65] This decision led the European Commission to open an infringement procedure against Germany for Breach of Fundamental Principles of EU Law (June 2021), June infringements package: key decisions (europa.eu).

[66] Bundesverfassungsgericht, 2 BvR 859/15 (judgment), cit. para. 232.

[67] Bundesverfassungsgericht, 2 BvR 859/15 (judgment), cit., para. 234. For a critique of the application of the *ultra vires* doctrine, see R. ADAM, *Il Controlimite dell'*ultra vires *e la sentenza della Corte Costituzionale Tedesca del 20 Maggio 2020*, in *Il Diritto dell'Unione Europea*, 2020, p. 9 ss., pp. 13-14.

[68] Bundesverfassungsgericht, 2 BvR 859/15 (judgment), cit., para. 231. In this context, the court underscored that, following a transitional period of no more than three months allowing for the necessary coordination with the ESCB, the *Bundesbank* could no longer participate in the ECB programmes and bonds purchased under the PSPP and held in its portfolio progressively must be sold, *ibid.* at para. 235. To avoid this scenario, in June 2020 the

4.2. A Warning for the Facility

The judgment of the German Federal Constitutional Court on the PSPP may constitute a precedent relating to a preliminary ruling concerning the interpretation of Articles 125 and 136(3) TFEU. In that context, the CJEU could further develop the *ultima ratio* interpretation of Art. 125 TFEU given in *Pringle*. Under this interpretation, Art. 125 TFEU possesses a dual objective. Further to the objective of preserving market discipline to bring Member States to adhere to sound budgetary policies, it also pursues the goal of maintaining the financial stability of the monetary union itself[69]. Financial stability is a higher objective of the monetary union that is not explicitly acknowledged in the TFEU but was recognized as embedded in the monetary union by the CJEU in the *Pringle* case[70]. In any case, strict conditionality is always required. To sterilize conditionality, the CJEU might assume that the ultimate objective of the no bail-out rule consists in preserving the existence of the monetary union. The monetary union is based on four convergence criteria: price stability, sound public finances, exchange-rate stability, long-term interest rates (Art. 140 TFEU)[71]. The continuing pandemic has affected these criteria and, thus, eroded the bases on which the monetary union stands and impaired its existence. This impairment could be further aggravated if the provision of resources were linked to economic conditions. By contrast, sterilizing economic conditions and linking the provision of resources to national healthcare services would help recovery and, consequently, preserve the existence of the monetary union. It is also worth highlighting that under the ESM Treaty the provision of resources is instrumental to preserve not only the financial stability of the monetary union, but also the economic and financial stability of the EU itself[72]. This is an overriding objective of the ESM that is implicitly pursued by the new facility. This argument could be sufficient to justify the absence of macroeconomic conditions from the facility.

However, the German Federal Constitutional Court might disagree with such an interpretation and, relying on the PSPP Judgment, argue that the CJEU has overstepped its competences on the correct interpretation and application of EU law and, thus, disapply the preliminary ruling[73]. As a further step, the court might conclude that the approval by the German Parliament of the ESM facility was invalid. Consequently, the Minister of Finance (in his capacity as German representative on the ESM Board of Governors) would not be allowed to vote in favour of the provision of resources under the facility. As unanimity is required to provide stability support (Art. 5(6)(f), ESM Treaty), the Pandemic Crisis Support facility would cease to be operational. As a result, no financial agreement could be signed and tranches under

ECB – via the *Bundesbank* – provided non-public minutes containing the required proportionality considerations that were endorsed by the German Parliament, German Government and *Bundesbank*, https://www.covfinancialservices.com/2020/07/judgement-of-the-bverfg-dated-5-may-2020-ecbs-public-sector-asset-purchase-program/. This solution was substantively acknowledged by the German Federal Constitutional Court in Bundesverfassungsgericht, Order of the Second Senate of 29 April 2021 - 2 BvR 1651/15, at http://www.bverfg.de/e/rs20210429_2bvr165115en.html.

[69] Court of Justice, 27 November 2012, Case C-370/12, *Pringle v. Ireland* cit., para. 136.

[70] V. BORGER, *The ESM and the European Court's Predicament in Pringle*, in *German Law Journal*, 2013, p. 113 ss., 130–132.

[71] P. DEGRAUWE, *The Economics of Convergence: Towards Monetary Union in Europe,* in *Review of World Economics*, 1996, p. 1 ss.

[72] Decision 2011/199/EU, cit, Whereas No. 4.

[73] *Supra*, para. 4.1.

previously concluded financial agreements could not be disbursed[74]. Such a possibility is reinforced by the Interim Relief regarding the NGEU issued by the German Federal Constitutional Court under which the German President was not allowed to sign the law approving the Own Resources Decision on behalf of the Federal Republic of Germany[75].

5. Conclusion

The lack of a proper conditionality attached to the ESM Pandemic Crisis Support facility questions its consistency with the ESM and EU Treaties. This questionability is reinforced by the failed inclusion of any reference to the facility in the ESM Amending Treaty. It is true that the resources available under the NPRRs have made superfluous requesting assistance under the facility. Nevertheless, the uncertain legal grounds on which the facility is based may have refrained more than one state from submitting such a request.

The issue is that the operation of the facility could trigger a race to the court to ascertain its validity. However, this would not be an easy race. This is because the acts in which the facility is articulated are not plainly challengeable before the CJEU. The most likely route would be to make a reference for a preliminary ruling to the CJEU centred on the interpretation of Articles 125 and 136(3) TFEU to appreciate the validity of the national acts relating to the facility.

A referring court should be bound by this interpretation. Nevertheless, a recent judgment of the German Federal Constitutional Court has questioned the respect for this rule. The court disapplied the preliminary ruling on the PSPP arguing that the CJEU erred in interpreting certain Treaty norms. Based on this disapplication, the court found that the acts of the ECB were invalid. Thereby, the German institutions were called to rescind them. In a similar vein, the German Federal Constitutional Court, if requested to declare the invalidity of the acts by which the German institutions have endorsed the establishment and operation of the Pandemic Crisis Support facility, could make a reference for a preliminary ruling to the CJEU relating the interpretation of Articles 125 and 136(3) TFEU. However, if the German court finds that the interpretation exceeds the judicial mandate of the CJEU, it could disapply the preliminary ruling and request the German authorities to rescind the national acts relating to the facility and limit their domestic impact. This implies that the German representative sitting on the ESM Board of Governors must vote against the provision of resources under the facility and the facility would cease to be operational.

[74] However, tranches already disbursed should not be accelerated in force of the principle of the protection of legitimate expectations that is common to the EU and German legal order (*Rechtsstaat* and *Vertrauensschutz*). See M. KUNNECKE, *Tradition and Change in Administrative Law*, Heidelberg, 2007, pp. 28-31, 124-128.

[75] BVerfG, Beschluss des Zweiten Senats vom 26 März 2021 - 2 BvR 547/21 - Rn. (1 - 1), at Bundesverfassungsgericht - Entscheidungen - Hängebeschluss zur Ausfertigung des Eigenmittelbeschluss-Ratifizierungsgesetzes-