SV 1/2013-15
3 October 2013

Translation in excerpts

IN THE NAME OF THE REPUBLIC

The Constitutional Court, chaired by President
Gerhart HOLZINGER,

in the presence of Vice-President
Brigitte BIERLEIN

and the members
Markus ACHATZ,
Sieglinde GAHLEITNER,
Christoph GRABENWARTER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Rudolf MÜLLER,
Johannes SCHNIZER and
Ingrid SIESS-SCHERZ

as voting judges, in the presence of the recording clerk
Robert STEINWENDER,

has decided today after private deliberations on the applications filed by Eva GLAWISCHNIG, Werner KOGLER, Dieter BROSZ, Christiane BRUNNER, Kurt GRÜNEWALD, Alev KORUN, Ruperta LICHTENECKER, Gabriela MOSER, Daniela MUSIOL, Karl ÖLLINGER, Peter PILZ, Helene JARMER, Wolfgang PIRKLHUBER, Birgit SCHATZ, Bruno ROSSMANN, Judith SCHWENTNER, Albert STEINHAUSER, Harald WALSER, Tanja WINDBÜCHLER-SOUSCHILL, Wolfgang ZINGGL, represented by Maria Windhager, lawyer, Siebensterngasse 42-44, 1070 Vienna, Josef BUCHER, Sigisbert DOLINSCHEK, Gerald GROSZ, Ursula HAUBNER, Gerhard HUBER, Kurt LIST, Stefan PETZNER, Herbert SCHEIBNER, Martina SCHENK, Wolfgang SPADIUT, Peter WESTENTHALER, Rainer WIDMANN, Ernest WINDHOLZ, represented by Gernot Steier, lawyer, Rathausplatz 108, 3040 Neulengbach, Dagmar BELAKOWITSCH-JENEWEIN, Gerhard DEIMEK, Rupert DOPPLER, Peter FICHTENBAUER, Carmen GARTELGRUBER, Alois GRADAUER, Martin GRAF, Heinz HACKL, Roman HAIDER, Werner HERBERT, Christian HÖBART, Norbert HOFER, Johannes HÜBNER, Harald JANNACH, Josef JURY, Andreas KARLSBÖCK, Herbert KICKL, Anneliese KITZMÜLLER, Mario KUNASEK, Christian LAUSCH, Maximilian LINDNER, Leopold MAYERHOFER, Edith MÜHLBERGHUBER, Werner NEUBAUER, Elmar PODGORSCHEK, Josef A. RIEMER, Walter ROSENKRANZ, Harald STEFAN, Heinz Christian STRACHE, Martin STRUTZ, Bernhard THEMESSL, Heidemarie UNTERREINER, Mathias VENIER, Harald VILIMSKY, Bernhard VOCK, Susanne WINTER, Wolfgang ZANGER, represented by Eike Lindinger, lawyer, Wickenburggasse 26/5, 1080 Vienna, pursuant to Article 140(a) read in conjunction with Article 140 paragraph 1 of the Constitution (B-VG, *Bundes-Verfassungsgesetz*) to find that individual provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Federal Law Gazette *BGBL*. III 17/2013, are unlawful, *in eventu* that the entire Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Federal Law Gazette *BGBL*. III 17/2013 is unlawful, as follows:

I. The application is rejected as inadmissible inasmuch as it seeks that Article 3(1)(b) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), Federal Law Gazette *BGBL*. III 17/2013 be found unlawful and no longer applicable by the competent Austrian authorities. The remainder of the application is dismissed.

II. The application filed in the event that the Constitutional Court were to decide that the TSCG would have required approval, applying Article 50 paragraph 1 subparagraph 1 in conjunction with Article 4 of the Constitution mutatis mutandis, to find that the entire Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Federal Law Gazette *BGBL*. III 17/2013 is unlawful and no longer applicable by the competent Austrian authorities, is rejected as inadmissible.

Reasoning

I. Application and Preliminary Proceedings

1.1. The applicants have addressed the Constitutional Court to find pursuant to Article 140(a) of the Constitution that

[…] Art 2(2) TSCG,
[…] Art 3(1)(b) TSCG,
[…] Art 5 TSCG,
[…] Art 7 TSCG, and
[…] Art 8 TSCG

are unlawful and no longer applicable by the competent Austrian authorities; and *in eventu* to find:

should the Constitutional Court hold that the TSCG would have required approval, applying Article 50 paragraph 1 subparagraph 2 in conjunction with Article 4 of the Constitution mutatis mutandis, […]

that the entire TSCG is unlawful and no longer applicable by the competent Austrian authorities.

1.2. The applicants have invoked Article 140(a) in conjunction with Article 140 paragraph 1 of the Constitution to justify the legitimacy of their application, referring to the fact that the application has been signed by 70 Members of Parliament, i.e. more than one third of all members of the National Council.

[…]
2. The Federal Government submitted a comment in which it seeks that the application be partially rejected on substantive grounds and otherwise dismissed.
[…]

II. The Law

1.1. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, and the Kingdom of Sweden (TSCG), Federal Law Gazette *BGBL.* III 17/2013, reads as follows (the challenged provisions have been highlighted):

"TITLE I

PURPOSE AND SCOPE

ARTICLE 1

1. By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion.

2. This Treaty shall apply in full to the Contracting Parties whose currency is the euro. It shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14.

TITLE II

CONSISTENCY AND RELATIONSHIP WITH THE LAW OF THE UNION

ARTICLE 2

1. Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

2. This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union.

TITLE III

FISCAL COMPACT

ARTICLE 3

1. The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law:

(a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus;
(b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;
(c) the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;
(d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1,0 % of the gross domestic product at market prices;
(e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned

to implement measures to correct the deviations over a defined period of time.

2.The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.

3. For the purposes of this Article, the definitions set out in Article 2 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, shall apply.

The following definitions shall also apply for the purposes of this Article:

(a) "annual structural balance of the general government" refers to the annual cyclically-adjusted balance net of one-off and temporary measures;
(b) "exceptional circumstances" refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.

ARTICLE 4

When the ratio of a Contracting Party's general government debt to gross domestic product exceeds the 60 % reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU) No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the

European Union.

ARTICLE 5

1. Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact.

2. The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission.

ARTICLE 6

With a view to better coordinating the planning of their national debt issuance, the Contracting Parties shall report ex-ante on their public debt issuance plans to the Council of the European Union and to the European Commission.

ARTICLE 7

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

ARTICLE 8

1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with

Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3 (2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

2. Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union.

TITLE IV

ECONOMIC POLICY COORDINATION AND CONVERGENCE

ARTICLE 9

Building upon economic policy coordination, as defined in the Treaty on the Functioning of the European Union, the Contracting Parties undertake to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness. To that end, the Contracting Parties shall take the

necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability.

ARTICLE 10

In accordance with the requirements of the Treaties on which the European Union is founded, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market.

ARTICLE 11

With a view to benchmarking best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves. Such coordination shall involve the institutions of the European Union as required by European Union law.

TITLE V

GOVERNANCE OF THE EURO AREA

ARTICLE 12

1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings.

The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office.

2. Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the

Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area.

3. The Heads of State or Government of the Contracting Parties other than those whose currency is the euro, which have ratified this Treaty, shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of this Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

4. The President of the Euro Summit shall ensure the preparation and continuity of Euro Summit meetings, in close cooperation with the President of the European Commission. The body charged with the preparation of and follow up to the Euro Summit meetings shall be the Euro Group and its President may be invited to attend such meetings for that purpose.

5. The President of the European Parliament may be invited to be heard. The President of the Euro Summit shall present a report to the European Parliament after each Euro Summit meeting.

6. The President of the Euro Summit shall keep the Contracting Parties other than those whose currency is the euro and the other Member States of the European Union closely informed of the preparation and outcome of the Euro Summit meetings.

ARTICLE 13

As provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty.

TITLE VI

GENERAL AND FINAL PROVISIONS

ARTICLE 14

1. This Treaty shall be ratified by the Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the General Secretariat of the Council of the European Union ("the Depositary").

2. This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier.

3. This Treaty shall apply as from the date of entry into force amongst the Contracting Parties whose currency is the euro which have ratified it. It shall apply to the other Contracting Parties whose currency is the euro as from the first day of the month following the deposit of their respective instrument of ratification.

4. By derogation from paragraphs 3 and 5, Title V shall apply to all Contracting Parties concerned as from the date of entry into force of this Treaty.

5. This Treaty shall apply to the Contracting Parties with a derogation, as defined in Article 139(1) of the Treaty on the Functioning of the European Union, or with an exemption, as referred to in Protocol (No 16) on certain provisions related to Denmark annexed to the European Union Treaties, which have ratified this Treaty, as from the date when the decision abrogating that derogation or exemption takes effect, unless the Contracting Party concerned declares its intention to be bound at an earlier date by all or part of the provisions in Titles III and IV of this Treaty.

ARTICLE 15

This Treaty shall be open to accession by Member States of the European Union other than the Contracting Parties. Accession shall be effective upon depositing the instrument of accession with the Depositary, which shall notify the other Contracting Parties thereof. Following authentication by the Contracting Parties, the text of this Treaty in the official language of the acceding Member State that is also an official language and a working language of the institutions of the Union, shall be deposited in the archives of the Depositary as an authentic text of this Treaty.

ARTICLE 16

Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the

necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union. "

1.2. When the TSCG was signed by the Contracting Parties, they agreed as follows as regards Article 8 of said Treaty (cf. explanatory notes on RV 1725 *BlgNR 24. GP*, 13):

"TREATY ON STABILITY, COORDINATION AND GOVERNANCE IN THE ECONOMIC AND MONETARY UNION, ARRANGEMENTS AGREED BY THE CONTRACTING PARTIES AT THE TIME OF SIGNATURE CONCERNING ARTICLE 8 OF THE TREATY

The following arrangements will apply to bring a matter to the Court of Justice of the European Union in accordance with the second sentence of Article 8(1) of the Treaty on Stability, Coordination and Governance in the economic and monetary union (hereinafter" the Treaty") and on the basis of Article 273 of the Treaty on the Functioning of the European Union, if the Commission concludes in a report to the Contracting Parties that one of them has failed to comply with Article 3(2) of the Treaty:
(1) The application, whereby the Court of Justice is requested to declare that a Contracting Party has failed to comply with Article 3(2) of the Treaty, as concluded in the Commission's report, will be lodged with the Registry of the Court of Justice by the applicants mentioned in paragraph 2 within three months of receipt by the Contracting Parties of the Commission's report concluding that a Contracting Party has failed to comply with Article 3(2) of the Treaty. The applicants will act in the interest of, and in close cooperation with, all the Contracting Parties bound by Articles 3 and 8 of the Treaty, with the exception of the Contracting Party against which the case is directed, and in accordance with the Statute and Rules of Procedure of the Court of Justice.
(2) The applicants will be the Contracting Parties bound by Articles 3 and 8 of the Treaty that are Member States forming the pre-established group of three Member States holding the Presidency of the Council of the European Union in accordance with Article 1(4) of the Council's Rules of Procedure (Trio of Presidencies) at the date of publication of the Commission's report, to the extent that at that date i) they have not been found to be in breach of their obligations under Article 3(2) of the Treaty by a Commission report, ii) they are not otherwise the subject of proceedings before the Court of Justice under Article 8(1) or (2) of the Treaty, and iii) they are not unable to act on other international law. If none of the three Member States concerned meets these criteria, the duty to bring the matter to the Court of Justice will be supported by the members of the former Trio of Presidencies, under the same conditions.

(3) Upon request from the applicants, any necessary technical or logistical support will be provided to them in the course of the proceedings before the Court of Justice by the Contracting Parties in the interest of which the case has been filed.
(4) If costs are incurred by the applicants as a result of the judgment of the Court of Justice, these will be jointly supported by all the Contracting Parties in the interest of which the case has been filed.
(5) If a new report from the Commission concludes that the failure of the Contracting Party concerned to comply with Article 3(2) of the Treaty has ceased, the applicants will immediately inform the Court of Justice in writing that they wish to discontinue the proceedings**,** in accordance.
(6) On the basis of an assessment by the European Commission that a Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in Article 8(1) of the Treaty, the Contracting Parties bound by Articles 3 and 8 of the Treaty state their intention to make full use of the procedure established by Article 8(2) to bring the case before the Court of Justice, building upon the arrangements agreed for the implementation of Article 8(1) of the Treaty."

2. The relevant provisions of the Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, and the Republic of Finland (Treaty Establishing the European Stability Mechanism— TESM), Federal Law Gazette *BGBL.* III 138/2012 read as follows:

"WHEREAS:

[…]

(5) On 9 December 2011 the Heads of State or Government of the Member States whose currency is the euro agreed to move towards a stronger economic union including a new fiscal compact and strengthened economic policy coordination to be implemented through an international agreement, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG"). The TSCG will help develop a closer coordination within the euro area with a view to ensuring a lasting, sound and robust management of public finances and thus addresses one of the main sources of financial instability. This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional,

as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article.

[…]

ARTICLE 37

Interpretation and dispute settlement

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

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

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

III. Considerations

A. On the admissibility of the application:

1. According to Article 140(a) of the Constitution, the Constitutional Court decides on the unlawfulness of state treaties. In doing so, it shall apply Article 140 of the Constitution to political state treaties which modify or supplement legislative acts and which alter the treaties on which the European Union is founded, and Article 139 of the Constitution to all other state treaties.

The TSCG now challenged is a state treaty approved by the National Council according to Article 50 paragraph 1 subparagraph 1 of the Constitution. Therefore, Article

140 of the Constitution must be applied *mutatis mutandis* to its review within the terms of Article 140(a) of the Constitution.

2. The Constitutional Court decides on the unconstitutionality of federal laws, inter alia, upon application by one third of the members of the National Council (Article 140 paragraph 1, second sentence, of the Constitution). The intervening 70 MPs constitute more than one third of the members of the National Council in its 24th legislative session (cf. section 1 paragraph 1, 1992 Electoral Rules of the National Council); the requirement of Article 140 paragraph 1, second sentence, of the Constitution, is therefore met.

3. An application by members of the National Council is admissible once the act has been passed validly even though it might not have become effective yet (*cf. VfSlg. 6460/1971, 14.187/1995, 14.895/1997*). According to Article 50 of the Constitution, a state treaty takes effect domestically upon promulgation in the Federal Law Gazette (*VfSlg. 18.576/2008, 18.740/2009*).

Federal Law Gazette *BGBL.* III 17/2013 by which the TSCG was promulgated was published on 22 January 2013. The present application is dated 8 March 2013 and was received by the Constitutional Court on that day. The application is admissible in this respect as well.

4.1. In their application, the intervening MPs argue that the provisions of Article 2(2), Article 3(1)(b), Article 5, Article 7 and Article 8 of the TSCG are unconstitutional. In the opinion of the intervening MPs, the approval of the TSCG according to Article 50 paragraph 1 subparagraph 1 of the Constitution would therefore have required a preparatory federal constitutional law within the meaning of Article 44 of the Constitution, because Article 50 of the Constitution no longer allows for the conclusion of constitution-amending state treaties since the entry into force of the constitutional amendment Federal Law Gazette *BGBL*. I 2/2008 — aside from the special case set out in Article 50 paragraph 1 subparagraph 1 in conjunction with subparagraph 4 of the Constitution concerning the approval of a state treaty which alters the treaties on which the European Union is founded as. The intervening MPs have therefore applied to the Constitutional Court to find that Article 2(2) TSCG, Article 3(1)(b) TSCG, Article 5 TSCG, Article 7 TSCG and Article 8 TSCG are unlawful pursuant to Article 140(a) of the Constitution and no longer applicable by the competent Austrian authorities.

4.2. The Federal Government considers the application to find Article 3(1)(b) TSCG unlawful inadmissible, because it is framed in too narrow terms considering the concerns raised. Article 3(1)(b) TSCG, it argues, spells out in detail the rule concerning a balanced budgetary position (Article 3(1)(a) TSCG) to the effect that this rule is deemed to be complied with also at a structural deficit of 0,5 % of the gross domestic product. If Article 3(1)(b) TSCG were found to be unlawful, the remaining part of the TSCG would appear to not only fail to rectify the interference with the National Council's budget prerogative, considered unconstitutional by the applicants, but — to the contrary — even increase the extent of such interference.

4.3. The concern raised by the Federal Government is pertinent:

According to Article 140(a) of the Constitution, the Constitutional Court decides on whether state treaties are contrary to law. A state treaty which is found to be unconstitutional or unlawful must no longer be applied by the implementing bodies as of the day on which the decision is promulgated, unless the Constitutional Court sets a deadline within which such state treaty remains applicable.

Both in regard of Article 140(a) of the Constitution prior to being amended by Federal Law Gazette *BGBL*. I 51/2012 (*cf. VfSlg. 12.717/1991, 14.533/1996, 16.628/2002*) and its later version after the said constitutional amendment (cf. *VfGH 16.3.2013, SV 2/2012*), the Constitutional Court understands that in proceedings under Article 140(a) of the Constitution it is called upon to judge on the unlawfulness of only some individual provisions of a state treaty, if (only) some provisions of that state treaty are found to be unlawful (*cf.* section 66 paragraph 2 Constitutional Court Act*, VfGG*).

Article 3(1)(a) TSCG states that the budgetary position of the general government of a Contracting Party shall be balanced or in surplus. According to Article 3(1)(b) TSCG this is the case ("the rule under point (a) shall be deemed to be respected"), if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices. Article 3(1)(d) TSCG stipulates that under certain conditions the structural deficit may be at most 1 % of the gross domestic product at market prices.

The intervening MPs have now raised the concern that the TSCG should not have been approved according to Article 50 paragraph 1 subparagraph 1 of the Constitution by the National Council as (merely) modifying or supplementing legislative acts, since the lower limit for the structural deficit laid down in Article 3(1)(b) of 0,5 % of the gross domestic product at market prices would violate Article 13 paragraph 2 of the Constitution, as it curtailed the constitutional rules governing the federal, provincial (*Laender*) and municipal budgets contained in that clause. Since Article 50 of the Constitution was amended by Federal Law Gazette *BGBL*. I 2/2008 (1st Federal Constitutional Adjustment Act) to the effect that state treaties must not amend the Constitution — with the exception of the state treaties specified in Article 50 paragraph 1 subparagraph 2 of the Constitution which amend the treaties on which the European Union is founded — the Constitution should have been amended before the TSCG was approved according to Article 50 paragraph 1 subparagraph 1 of the Constitution.

If these concerns were well-founded, the Constitutional Court would have to review the unlawfulness of that provision according to which the obligation under international law assumed by the Republic of Austria in Article 3(1)(b) TSCG of a balanced budget of the general government is met if the lower limit of a structural deficit of 0,5 % of the gross domestic product at market rates is adhered to.

If Article 3(1)(b) TSCG were found to be unlawful, this provision would no longer have to be applied by the bodies responsible for its implementation according to Article 140(a) paragraph 1 of the Constitution while those provisions of the state treaty which were not found to be unlawful would have to be further applied.

In the present case this meant that the competent Austrian bodies would have to continue applying Article 3(1)(a) TSCG, according to which the Contracting Parties apply the following remaining rule, amongst others, "in addition to their obligations under European Union law":

"a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus."

Therefore, this rule must be reviewed as to its substance in light of the remaining provisions of the TSCG and existing obligations under European Union law, to which the introductory sentence of Article 3(1) TSCG refers.

Interpretation of the wording suggests that the term "balanced" in the phrase "balanced or in surplus" refers to a budget which does not show a deficit. Disregarding point (b), the other provisions of Article 1(3) TSCG materially corroborate that a "balanced budget" is a budget without a deficit, as these provisions lay down the conditions in which a budget — *in derogation* from point (a) — may show a deficit. Specifically, point (d) sets out criteria under which a "structural deficit" of at most 1,0 % of the gross domestic product at market prices" is permitted by law.

Essentially, the introductory sentence of paragraph 1 refers to "the obligations under European Union law". One may infer from the context that this refers in particular to Article 2a of Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 1997 L 209, 1, last amended by Regulation (EU) No 1175/2011, OJ 2011 L 306, 12 (i.e. the version amended by the so-called 'six-pack' of the European Stability and Growth Pact). According to its paragraph 1, every Member State "shall have a differentiated medium-term objective for its budgetary position" (Article 3(1) TSCG points (b) to (e) tie in with this provision). Article 2a(2) of Regulation (EC) 1466/97 then states (no highlighting in the legislative text):

"Taking these factors into account, for Member States that have adopted the euro and for ERM2 Member States the country-specific medium-term budgetary objectives shall be specified within a defined range between – 1 % of GDP *and balance* or surplus, in cyclically adjusted terms, net of one-off and temporary measures."

This provision clearly differentiates between three possible balances of the budgetary position: "-1 % of GDP", "balanced" and "in surplus". In this provision as well, the expression "balanced" refers to a budgetary position which is neither in deficit nor in surplus, with the term "balanced" leaving a mathematical margin which is factually in the "0 %-range". In particular, an interpretation such as "close to balance" or similar is precluded, since such a "criterion for a balanced position" is used in Article 2a(1) Regulation (EG) 1466/97 to describe a budget which, in fact, is not balanced but shows a (minimal) deficit.

"In addition" to this limitation, Article 3(1) TSCG lays down further provisions, including one according to which the budgetary position of the general government of a Contracting Party is balanced or in surplus. The fact that "balanced" here does not refer to a budgetary position without a deficit derives exclusively from point (b),

which, however would no longer be applicable. It follows that the implementing bodies in Austria would then be left with the obligation to target a balanced budget, i.e. one without a deficit. The remaining legal provisions to be applied by the Austrian implementing bodies would violate the constitutional provisions invoked by the intervening MPs, in particular Article 13 paragraph 2 of the Constitution for the very same reasons, and the budget margin for the Austrian territorial entities would be even narrower. The scope of the provisions the intervening MPs seek to have declared unlawful by the Constitutional Court fails to remedy the unlawfulness invoked by them, so that their application is inadmissible in this respect.

5. The application reasons in detail why Article 7 TSCG, Article 2(2) TSCG, Article 5 TSCG and Article 8 TSCG contradict federal constitutional law and should have been subjected to an approval procedure according to Article 50 paragraph 1 subparagraph 1 of the Constitution only after resolution of this contradiction by way of a preparatory constitutional law provision. As regards Articles 5 and 8 TSCG (here the Federal Government brought forward the concern whether the requirement of substantiating concerns about the unlawfulness of the challenged provisions of the TSCG "individually" [section 62 paragraph 1 in conjunction with section 66 Constitutional Court Act] has been satisfied), the concerns are specified in the application mainly in the reasoning on Article 9 paragraph 2 of the Constitution. Hence, the application substantively details the concerns regarding all those provisions of the TSCG which the applicants have requested the Constitutional Court to find unlawful and is therefore admissible in this respect.

6. "*In eventu*" the intervening MPs are seeking the following: "In the event that the Constitutional Court were to find, applying Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 of the Constitution *mutatis mutandis*, that the TSCG would have required approval", the MPs are applying to the Constitutional Court to find the entire TSCG unlawful and no longer applicable by the competent Austrian authorities. This application is filed under one explicit condition ("in the event that"), namely that the Constitutional Court finds, applying Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 of the Constitution *mutatis mutandis*, that the TSCG would have required approval. In keeping with current opinion, this application therefore does not qualify as a generally admissible *in-eventu* application which ties in with a primary claim, but as a claim which is to be invoked only if and when the Constitutional Court reaches a legal opinion that satisfies a stated condition. Any such conditional application is inadmissible because it lacks a "claim stated" according to section 15 paragraph 2 Constitutional Court

Act (*cf. e.g. VfSlg. 16.589/2002, 17.215/2004, 18.121/2007*). The application is therefore rejected as inadmissible.

7. Inasmuch as it seeks to find Article 3(1)(b) TSCG unlawful, the application is rejected as inadmissible. Likewise, the *in-eventu* application filed to find the entire TSCG unlawful in the event that the Constitutional Court should reach a certain finding, is rejected as inadmissible.

The remainder of the application is admissible.

B. On the merits:

1. In proceedings to review the constitutionality of a law pursuant to Article 140 of the Constitution which are initiated by application, the Constitutional Court must limit itself to deliberating the issues raised (cf. *VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003*). Therefore, it must solely assess whether the provision challenged is unconstitutional for the reasons set out in the reasoning of the application (*VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*).

As Article 140 of the Constitution is to be applied mutatis mutandis in these proceedings under Article 140(a) of the Constitution, the Constitutional Court must limit itself to the concerns raised by the applicant MPs when reviewing the application (*VfGH 16.3.2013, SV 2/2012*).

The applicant MPs largely based their application on *Griller*, *Zur verfassungsrechtlichen Beurteilung des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion ("Fiskalpakt"), JRP 2012, 177 et seq*.; the Federal Government largely based itself on *Potacs/Cl. Mayer, Fiskalpakt verfassungswidrig? JRP 2013, 140 et seq.*

2. On 4 July 2012 the National Council approved the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) pursuant to Article 50 paragraph 1 subparagraph 1 of the Constitution, which was then signed on 2 March 2012 by all members of the European Union with the exception of the United Kingdom and the Czech Republic. After the Federal Council had approved the Treaty on 6 July 2012 pursuant to Article 50 paragraph 2 subparagraph 2 of the

Constitution, the TSCG was promulgated by Federal Law Gazette BGBL. III 17/2013, which was issued on 22 January 2013. Following its Article 14(2) the TSCG took effect on 1 January 2013.

The explanatory notes to the government bill (*1725 BlgNR 24. GP, 3*) retain the following on the history of this Treaty:

"Since the first six months of 2010 […] the European Union has adopted a number of measures to strengthen economic policy governance in the euro area and to step up efforts to fight the sovereign debt crisis in the euro area. The European Semester, which is to generate higher growth and employment as well as greater stability in the Union, and especially in the euro area, by an integrated view of economic and fiscal policies, was first implemented in the first six months of 2011. On 13 December 2011 the so-called 'six-pack' entered into force which makes the rules of the Stability and Growth pact more stringent, introduces a new procedure on macro-economic imbalances, and sets minimum standards for national fiscal frameworks. Moreover, the 'two-pack' is currently being negotiated with the European Parliament, which provides for enhanced coordination of national fiscal policies in the euro area and governs the procedure for countries with macro-economic adjustment programmes. At their meeting on 9 December 2011 the heads of state and government of the euro area agreed on further-reaching measures as well as on initiating a new fiscal policy compact and enhanced economic policy coordination in the euro area.

As the United Kingdom did not agree to the initially envisaged amendment of the founding treaties of the European Union in order to embed the outlined objectives, a draft treaty under international law, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, was submitted on 16 December 2011. On 12 January 2012, the Federal President […] granted an authorisation for negotiations on the treaty at the proposal of the Federal Government. The National Council and the Federal Council were informed of the start of the negotiations pursuant to Article 50 paragraph 5 of the Constitution. The Federal Ministry for European and International Affairs reported to the National Council and the Federal Council on the progress of these negotiations. The negotiations were held by 17 euro states and nine non-euro states (all with the exception of the United Kingdom). The Treaty was adopted on 30 January 2012 by the heads of state and government of the Contracting Parties on the sidelines of an informal meeting of the European Council. Invoking domestic policy reasons, the Czech Republic eventually decided not to become a Contracting Party. The treaty was signed in the margins of the European Council on 2 March 2012."

By the TSCG, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve

the governance of the euro area, thereby supporting the achievement the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion (Article 1(1), TSCG). The TSCG shall apply in full to the Contracting Parties whose currency is the euro. It shall apply to the other Contracting Parties to the extent and under the conditions specified in detail (Article 1(2) in conjunction with Article 14 TSCG). Summarizing, Title V TSCG on the governance of the euro area applies to all Contracting Parties and the non-euro states may additionally state that they wish to be bound by all or some provisions of Title III and Title IV TSCG.

Title III "Fiscal Compact" is the core element of the TSCG and, in addition and without prejudice to the obligations arising to the Contracting Parties under European Union law (Article 3(1) TSCG), contains the balanced budget rule which is spelled out concretely in a number, the rule on a rapid approach to this objective ("adjustment path"), and an automatic correction mechanism in the event of significant deviations from this objective ("debt brake").

Title IV TSCG moreover contains provisions on "Economic Policy Coordination and Convergence".

For its implementation, the TSCG does not only take recourse in multiple ways on European Union bodies such as the Commission and the Court of Justice of the European Union (CJEU), but is also substantively intertwined with European Union law. Article 126 TFEU (including protocol No 12 on the excessive deficit procedure) is particularly relevant here, since it sets out general requirements for fiscal discipline, in particular with a view to ensuring price stability, apart from defining reference values for the public sector deficit (maximum of 3 % of GDP) und government debt levels (maximum of 60 % of GDP). This obligation was then concretely specified in the so-called "Stability and Growth Pact" (SGP in the following) — notably by two regulations on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies ("preventive arm" of the SGP) and on speeding up and clarifying the implementation of the excessive deficit procedure ("corrective arm" of the SGP) — and then substantially widened and enhanced in 2011 in response to recent crises by means of five EU Regulations and one Directive (the so-called 'six-pack'). The primary law bases were expanded with the Lisbon Treaty with the addition of Article 136 TFEU, which contains special provisions for Member States whose currency is the euro, and is to

form the basis for enhanced coordination and surveillance of budgetary discipline in the euro states. Two regulations (the so-called 'two-pack') which are based on Article 121(6) TFEU and Article 136 TFEU have recently entered into force, aiming in particular at reinforced budgetary surveillance of the Member States whose currency is the euro (from the comprehensive literature *Obwexer, Das System der "Europäischen Wirtschaftsregierung" und die Rechtsnatur ihrer Teile: Sixpack — Euro-Plus-Pakt — Europäisches Semester — Rettungsschirm, ZÖR 2012, 209; Lödl/Matzinger/Zimmer, Europarechtliche Rechtsetzung zur Haushaltsdisziplin der Mitgliedstaaten und deren Umsetzung in Österreich, ÖHW 1-3/2012, 16; Calliess/Schoenfleisch, Auf dem Weg in die Europäische "Fiskalunion"? Europa- und verfassungsrechtliche Fragen einer Reform der Wirtschafts- und Währungsunion im Kontext des Fiskalvertrages, JZ 2012, 477; Cl. Mayer, Vertrag über Stabilität, Koordinierung und Steuerung in der WWU und Europäischer Stabilitätsmechanismus, JRP 2012, 124*).

The TSCG and the TESM are interconnected. The granting of financial aid within the framework of new ESM programmes is, for instance, dependent on the ratification of the TSCG by the ESM member concerned and on the national implementation of the obligations set out in Article 3 TSCG (recital 5 TESM).

3.1. Article 7 TSCG reads:

"While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended."

This provision must be seen in the light of Article 126 TFEU and the multi-step procedure it provides for cases of an excessive deficit of a Member State. The SGP as amended by the 'six-pack' complemented the procedure according to Article 126 TFEU and altered it to the effect that the qualified majority in the Council is superseded by "reverse qualified majority voting" in major cases (on its effect see *Kumin,*

"Reverse Majority Voting" — Auf dem Weg zur Herrschaft der Exekutive über die Legislative? ZÖR 2013, 441 [442 et seq.]). In sanctioning proceedings within the framework of the preventive arm of the SGP, for instance, a decision is deemed as having been adopted by the Council if a recommendation by the Commission to the Council to adopt a certain decision is not rejected by the Council by a qualified majority within 10 days of adoption of such recommendation by the Commission (Articles 4(1) and (2) Regulation (EU) 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306, 1).

The SGP, even its amended 'six-pack' version, does not provide for reverse qualified majority voting for the primary decision by the Council, which is the starting point for the multi-step procedure under Article 126(6) TFEU to assess, on the proposal of the Commission, whether there is in fact an excessive deficit in a Member State or not. (According to the 'six-pack', reverse qualified majority voting applies only to decisions on sanctions, the earlier decision which determines that a Member State failed to comply with its obligations must still be adopted by the Council by a "positive"qualified majority [cf. *Calliess/Schoenfleisch*, JZ 2012, 479]).

3.2. In the opinion of the applicant MPs, Article 7 TSCG alters the legal situation only to the effect that reverse qualified majority voting must also be applied to the Contracting Parties of the TSCG when it comes to the Council decision to determine, on the proposal of the Commission, whether there is an excessive deficit at all. As a consequence, the Austrian representative in the Council was allowed to vote accordingly only if there was a qualified majority against the Commission proposal. Otherwise, the Austrian representative in the Council would be under the contractual obligation to vote in support of the Commission proposal (which however could become relevant only in respect of another Member State but never in "one's own cause" on account of Article 126(13) TFEU).

The constitution-amending character of Article 7 TSCG, the applicants argue, resulted from the fact that the Austrian representative in the Council, generally the Austrian Minister, was being placed under an obligation to always vote "for the Commission" if the latter was of the opinion that an excessive deficit existed in another country. This, in a way, lent the Commission a power to give instructions to the Austrian representative in the Council. As a supreme body of the executive pursuant to Article 69 paragraph 1 of the Constitution, a minister is, on principle,

never bound by any instructions. The specific constitutional justification available for such procedures within the European Union via the Federal Act on the Accession to the European Union was lacking for Article 7 TSCG, because the said special power of the Commission emanated from the TSCG, which, it is argued, is a treaty outside the EU legal framework.

Besides, the determination of an excessive deficit was considered to be a measure of binding character within the EU legal framework, i.e. according to Article 126(6) TFEU, and only the commitment of the Austrian minister was to be generated by a legal act outside the scope of Union law. A proposal aimed at determining an excessive deficit under Article 126(6) TFEU was an undertaking within the terms of Article 23(e) paragraph 1 of the Constitution. Article 23(e) paragraph 3 of the Constitution stipulates that the National Council shall have a right to issue, with respect to any such undertaking, a statement to which the competent federal minister is bound and from which he or she may deviate for "compelling integration or foreign policy reasons" only. While Article 23(e) paragraph 3 of the Constitution applies only to an undertaking that is directed at the "enactment of a binding legal act which will have an impact on the enactment of federal acts on the territory governed by that legal act", it is still conceivable that the voting behaviour of the competent federal minister in excessive deficit procedures is prescribed by way of federal act, even if other Member States are affected thereby. Since Article 7 TSCG did not leave scope for the National Council to issue a binding statement in this respect, the applicants consider this to be tantamount to a direct amendment of Article 23(e) paragraph 3 of the Constitution.

3.3. In the view of the Federal Government, Article 7 TSCG does not lead to "reverse majority voting", hence it does not contain a procedural rule on how a qualified majority is to be reached in the Council that deviated from Article 126(6) TFEU. Article 7 TSCG would differ from the reverse qualified majority voting introduced by the 'six-pack'. In certain cases, the latter implied a legal fiction favouring the adoption of a decision by the Council, unless a qualified majority of its members voted against a proposal or a recommendation by the Commission. Article 7 TSFG in contrast merely stipulates by way of self-commitment that the Contracting Parties undertook, when voting in the Council on violations of the deficit criterion, to comply with a certain voting behaviour in an excess deficit procedure, i.e. to "support" the proposals and recommendations of the Commission. This commitment only bound the Contracting Parties vis-à-vis each other, but not vis-à-vis the Commission. An assessment by the Commission of the budget situation of a euro member was

merely a factual prerequisite for triggering a vote in the Council which requires a qualified majority, as stipulated in the EU Treaties, but which is governed by a commitment on the part of the Contracting Parties of the TSCG to comply with a certain voting behaviour. This commitment depended on the decision-making process of the Contracting Parties to the TSCG, who were absolutely free in forming a will in the run-up to the vote in the Council. Such commitment did not apply if a qualified majority of the euro states among the Contracting Parties were not to share the Commission‘s view and be against the proposed or recommended decision. Any such constellation did therefore neither bindingly commit the Austrian representative vis-à-vis the Commission when voting in the Council, nor was it consistent with the constitutional understanding of an ‘instruction’. The intention of the TSCG rule was merely to ensure that a decision is taken at any rate if there is a proposal or recommendation by the Commission, while the voting rules of the EU Treaty did not guarantee such (Article 238 TFEU).

As regards Article 23(e) paragraph 3 of the Constitution, the Federal Government first comments that the requirement of Article 23(e) paragraph 3 of the Constitution according to which a pertaining statement by the National Council only covered such undertakings which are directed at the enactment of a binding legal act which has an impact on the enactment of federal laws in the territory concerned was not met for a deficit procedure against another EU Member State. Even if one were to assume that Article 23(e) of the Constitution were applicable, the competent federal minister would be allowed to deviate from the National Council’s statement for "compelling integration or foreign policy reasons". Article 7 TSCG constituted a sufficient integration and/or foreign policy reason.

3.4.1. According to Article 126(6) TFEU, the Council decides on the proposal of the Commission whether there is an excessive deficit, considering the comments which the Member State concerned wishes to submit as appropriate, and after reviewing the overall situation. In this case, the Council will decide without taking the vote of the Council Member representing that Member State into account; a qualified majority of the other Member States in the Council is calculated according to Article 238(3)(a) TFEU (Article 126(13) subparagraphs (2) and (3) TFEU). It is undisputed both by the applicant MPs and the Federal Government that the 'six-pack' did not bring about any changes in this respect (see also 3.1. above).

As an international law provision which even in the opinion of the applicant MPs and the Federal Government is "outside the scope of the EU legal framework", Article 7 TSCG now governs the following "in full respect of the procedural rules of the treaties on which the European Union is founded": The Contracting Parties of the TSCG commit themselves to supporting the proposals and recommendations in cases where the Commission believes that a Member State of the European Union whose currency is the euro violates the deficit criterion within an excessive deficit procedure. Article 7 first sentence TSCG such refers to that Commission proposal on the basis of which the Council decides under Article 126(6) TFEU by a qualified majority according to Article 238(3)(a) TFEU that there is an excessive deficit in a Member State. According to Article 7 second sentence TSCG this obligation of the Member States of the Contracting Parties of the TSCG whose currency is the euro does not apply if it is clear among these Contracting Parties that a qualified majority of the Contracting Parties — calculated by analogy to the relevant provisions of the treaties on which the European Union is founded (reference here being made to Article 126(13)(2) in conjunction with Article 238(3)(a) TFEU) and disregarding the standpoint of the Contracting Party concerned — is against the decision proposed or recommended by the Commission.

Article 7 TSCG such first leaves the procedure according to Article 126(6) TFEU unchanged. A decision by the Council on the proposal of the Commission according to the voting requirements set out in Article 126(13)(2) in conjunction with Article 238(3)(a) TFEU is still required. The legal obligation for the Contracting Parties of the TSCG whose currency is the euro to adopt a decision in favour of the Commission proposal according to Article 126(6) TFEU in such a case emanates from Article 7 first sentence TSCG and is subject to the condition of Article 7(2) TSCG. The commitment of these Contracting Parties — specifically of their representatives in the Council — to vote in a certain manner in a procedure under Article 126(6) TFEU is such based on Article 7 TSCG as an international-law agreement. Article 7 TSCG binds "the Contracting Parties as regards their free vote in the Council and thereby strengthens the influence of the European Commission in the deficit procedure, both factually and legally" (German Federal Constitutional Court [*BVerfG] 12/09/2012, 2 BvR 1390/12 et al, para 208)*. Factually, Article 7 TSCG strengthens the Commission, because its proposal must now be rejected by a qualified majority, unless it is to become a decision according to Article 126(6) TFEU in consideration of Article 7 first sentence TSCG; legally, Article 7 TSCG strengthens the position of the Commission in a procedure according to Article 126(6) TFEU, since this provision creates an obligation under international law for the euro Member States to vote in the Council

according to Article 126(6) TFEU following the rules of Article 7 TSCG. The legal reason for this resides in the (self)commitment of the euro Member States under international law by Article 7 TSCG (*Peers, Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework, ECL 9 [2013], 37 [51*]) and not in the fact that this provision would give rise to any power for the Commission to issue instructions or directions vis-à-vis the representatives of the euro member states in the Council. It is undisputed, also by the applicant MPs, that determining the voting behaviour of a federal minister in an international body by way of state treaty is constitutionally admissible.

The concerns raised by the applicant MPs regarding Article 20 paragraph 1 in conjunction with Article 69 paragraph 1 of the Constitution are such unfounded. Whether Union law restrictions may apply to the Member States of the European Union as regards the creation of such obligations by way of international law treaty in the specific case in which the voting behaviour in the supranational body of the Council is determined by a treaty under international law, is a matter beyond the standard of review of the Constitutional Court (*cf. VfGH 16.3.2013, SV 2/12, para 53*) and beyond the concerns of the applicant MPs.

3.4.2. Likewise, Article 7 TSCG does not violate Article 23(e) paragraph 3 of the Constitution. If the National Council determines the voting behaviour of the competent federal minister in the Council of the European Union by approving a pertaining state treaty provision, it creates an obligation under international law vis-à-vis the other parties to the state treaty, but does not affect Article 23(e) paragraph 3 of the Constitution (with the Federal Government rightly referring in its comment to Article 23(e) paragraph 3, second half sentence, of the Constitution).

3.5. Article 7 TSCG is therefore not unconstitutional for the reasons invoked by the applicant MPs. The concerns of the applicant MPs as to the lawful approval of Article 7 TSCG according to Article 50 paragraph 1 subparagraph 1 of the Constitution are hence unfounded.

4.1. Article 2(2) TSCG reads as follows:

"This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union."

The applicant MPs consider this "severability clause" according to which the TSCG shall "apply" only insofar as it is compatible with Union law as one which amends the Constitution since it creates a novel judicial review competence generally applying to all bodies of the Austrian legal system which may be called upon to implement the TSCG. The assignment of such a novel task and obligation would necessitate an amendment of the Constitution.

Whether a provision of the TSCG is "applicable" and such to be implemented by Austrian bodies must always be reviewed by that body against the standard of the entirety of Union law. This compels, for instance, the National Council to review, when considering the debt brake (Article 3(1)(b) TSCG), whether the latter is not contrary to Union law. If this were the case, it must not be considered during budget preparation. According to the applicant MPs, this created a novel and comprehensive judicial review competence which would have to be considered each and every time the TSCG is applied. Given the fact that concerns under Union law have been raised against several provisions of the TSCG, this was a major and practically relevant obligation.

The review function such assigned to bodies of the Austrian legal order went beyond that which resulted from the primacy of Union law, since the primacy of Union law is limited to directly applicable law and Article 2(2) TSCG — unlike in a case of Union law primacy — stipulates that any TSCG provision conflicting with Union law shall no longer apply.

If one were to construe Article 7 TSCG as transferring, for instance, decision-making powers from the Council to the Commission in violation of Article 126(6) TFEU, Article 2(2) TSCG would compel the competent federal minister to disregard the proposal of the Commission in an Article 126(6) TFEU procedure. The creation of such a novel general obligation of judicial review for all bodies in the Austrian legal system would necessitate an amendment of the Constitution.

4.2. The Federal Government does not share these concerns, arguing that Article 2(2) TSCG merely helps avoiding any overlap in the scope of application between the TSCG and Union law. Article 2(2) TSCG simply clarified that the TSCG should only govern such areas which are not already governed by primary or secondary Union law. Insofar, this provision complements Article 2(1) TSCG on how the TSCG should be applied consistent with and in implementation of Union law. According to the

case law of the CJEU, the primacy of Union law applied also to provisions in international law treaties of the Member States (the Federal Government referred to CJEU 10/11/1992, case C-3/91, *Exportur*, ECR 1992, I-5529 [para 8]; CJEU 20/05/2003, case C-469/00, *SARL*, ECR 2003, I-5053 [para 37]). The severability clause of Article 2(2) TSCG presupposes this primacy of Union law and such its scope of application — which in turn is constitutionally guaranteed by the Federal Constitutional Law on Accession to the European Union — and ensures that any such conflict would not arise at all.

The Federal Government further notes that comparable severability clauses are also found in other international law treaties (citing e.g. Article 11(2) of the Convention on the promotion and protection of investments between Austria and Egypt, Federal Law Gazette *BGBL*. III 73/2002) and frequently also in federal and state (*Laender)* laws on preserving the legislative powers of the territorial entities concerned. To date, the Constitutional Court has not objected to any such "power-safeguarding" clauses.

4.3. The Member States of the European Union must adhere to the law of the European Union. This obligation is specifically implemented through the primacy of Union law in given set-ups (as is the case for other provisions of Union law, i.e. the state liability law, or the obligation to directly implement provisions contained in directives in given set-ups, in their scope of application). Article 2(2) TSCG — for which it is irrelevant whether Union law is directly applicable or not — explicitly takes account of the obligation of all TSCG members to adhere to European Union law. As rightly stated by the Federal Government, this is not a new power but a legislative technique common to international contract law as well as to domestic law designed to avoid conflicts of norms, above all between different legal systems.

The Constitutional Court does not see why the inclusion of such a severability clause in an international law treaty would require specific constitutional authorisation. Even if one were to consider Article 2(2) TSCG to be more than a systemic interpretation rule and a (repeated) spelling out of the duties of loyalty on the Member States vis-à-vis the European Union, which already derive from Union law (cf. CJEU case law which has been justly highlighted by the Federal Government according to which "the provisions of a convention between two Member States cannot apply [….], if they are found to be contrary to the rules of the [then] EC Treaty", *CJEU Case*

C-469/00, SARL, ECR 2003, I-5053 [para 37]) and read this to be "derogation clause" (of whatever nature) in respect of provisions of the TSCG which are contrary to Union law, Article 2(2) TSCG differs greatly, both quantitatively as well as qualitatively, from transposition through accession to the European Union, in particular of the primacy of Union law, into the Austrian legal system. Such and comparably limited severability clauses as contained in Article 2(2) TSCG can be endorsed domestically by way of ordinary legislation. Apart from the Federal Constitutional Law on Accession to the European Union (on the concerns of the applicant MPs regarding Article 9 paragraph 2 of the Constitution see 5. below), the applicant MPs have not mentioned any constitutional provision (or constitutional principle) which would contradict any such severability clause.

4.4. Article 2(2) TSCG is therefore not unconstitutional for the reasons put forward by the applicant MPs. The concerns raised by the MPs on that basis in respect of Article 50 paragraph 1 subparagraph 1 of the Constitution are therefore unfounded.

5.1. The applicant MPs consider the listed provisions of the TSCG unconstitutional, arguing that they would transfer sovereign rights to European Union bodies, for which Article 9 paragraph 2 of the Constitution (as well as Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4) would not provide a legal basis. Therefore, any such transfer of sovereign rights would require a preparatory amendment of the Constitution pursuant to Article 44 of the Constitution. Concretely, the applicant MPs consider unconstitutional firstly, the power of the CJEU to decide on an allegedly insufficient transposition of the debt brake into national law and to impose sanctions as appropriate, as foreseen by Article 8 TSCG; secondly, the obligation of Member States to initiate infringement proceedings if the Commission is of the opinion that any such infringement exists, as stipulated in Article 8(1) TSCG; and thirdly Article 5 TSCG.

5.2. The applicants have substantiated the underlying premise which is relevant for claiming the unconstitutionality of the provisions of the TSCG, namely that Article 9 paragraph 2 of the Constitution does not apply to the transfer of sovereign rights to the European Union, as follows:

The applicant MPs base their line of reasoning on the fact that, undisputedly, Article 9 paragraph 2 of the Constitution (prior to being amended by Federal Law Gazette *BGBL*. I 2/2008) did not constitute a sound constitutional basis for Austria's accession to the European Union, but that Austria's accession to the European Union was based

on the Federal Constitutional Law on Accession to the European Union; ensuing changes of EU primary law were based on specific federal constitutional laws (cf. Federal Constitutional Law on the conclusion of the Treaty of Amsterdam, Federal Law Gazette *BGBL*. I 76/1998, Federal Constitutional Law on the conclusion of the Treaty of Nice, Federal Law Gazette *BGBL*. I 120/2001). The constitutional amendment Federal Law Gazette *BGBL*. I 2/2008, which reformed both Article 9 paragraph 2 of the Constitution and in particular Article 50 of the Constitution together with Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 of the Constitution, had created changes in the treaties on which the European Union is founded. This had done away with the need for specific laws of constitutional rank, the Lisbon Treaty had already been approved on the basis of the new provisions laid down in Article 50 of the Constitution.

The system of rules created by the constitutional amendment Federal Law Gazette *BGBL*. I 2/2008, however, precludes an amendment of the treaties on which the European Union is founded by any other way than by approval pursuant to Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 of the Constitution (or by another constitutional amendment for that matter). This included in particular that sovereign rights could only be transferred via the treaties on which the European Union is founded and specifically excluded the transfer of such rights outside of that scope via Article 9 paragraph 2 of the Constitution in conjunction with Article 50 paragraph 1 subparagraph 1 of the Constitution. Article 10 paragraph 3 of the Constitution, which governs the right of the *Laender* voice their opinion in the course of the conclusion of state treaties in (summarily stated) matters of the *Laender* showed that international law treaties within the terms of Article 50 paragraph 1 subparagraph 1 of the Constitution cannot be invoked in matters of European integration where it stipulates that the federation may deviate from a joint statement by the *Laender* "for compelling foreign policy reasons only", as against Article 23(d) paragraph 2 of the Constitution according to which the federation may deviate from a uniform comment by the *Laender* on undertakings within the framework of the European Union (again summarily stated, which concern *Laender* matters) "for compelling integration and foreign policy reasons only".

Moreover, the transfer of sovereign rights to the European Union via Article 9 paragraph 2 in conjunction with Article 50 paragraph 1 subparagraph 1 of the

Constitution would ultimately circumvent the qualified majority requirement for the transfer of rights to the European Union pursuant to Article 50 paragraph 4 of the Constitution. This very Article 50 paragraph 4 of the Constitution, however, was to ensure that the founding treaties can only be changed and sovereign rights can only be transferred to the European Union by a qualified majority. Even if Article 9 paragraph 2 of the Constitution were generally taken into account in this context, it was impossible to transfer any other, if only few, sovereign rights to the European Union on its basis, since a such vast number of sovereign rights had already been transferred to the European Union that the further transfer of any one sovereign right could no longer be considered as a transfer of "individual rights" within the meaning of Article 9 paragraph 2 of the Constitution, as it was the sum total of all sovereign rights transferred which counted, while the constitutional bases governing the transfer of sovereign rights to the European Union did not matter in this respect.

Ultimately, specific constitutional provisions, in particular Article 23(i) paragraph 3 and paragraph 4 of the Constitution as well as Article 23(j) paragraph 1 of the Constitution, proved that the transfer of sovereign rights to the European Union which supplement the Constitution, even if the founding treaties on principle already contain an authorisation of the European Union to this effect, suggests that their application requires a constitutional majority, as is set out in Article 50 paragraph 4 of the Constitution. All this would preclude the application of Article 9 paragraph 2 of the Constitution in conjunction with Article 50 paragraph 1 subparagraph 1 of the Constitution to the transfer of sovereign rights to the European Union.

5.3. The Federal Government has rebutted the arguments of the applicant MPs as follows:

First, the Federal Government points out that Austria’s accession to the European Union was not based on Article 9 paragraph 2 of the Constitution because of the quality and the quantity of the rights thereby transferred, but on the Federal Constitutional Act on the Accession to the European Union. From this, however, it did not follow that any form of transfer of a sovereign right to EU bodies was inadmissible without a special constitutional provision. It could be debated whether Article 9 paragraph 2 of the Constitution, irrespective of Article 50 paragraph 1 subparagraph 2 of the Constitution, which provides special approval requirements for the conclusion of state treaties which modify primary law, still authorised the

transfer of individual sovereign rights to bodies of the European Union, if this would change the primary law or if such sovereign rights were founded in (primary) Union law. The powers of the Commission and of the CJEU which the applicant MPs rated as amending the Constitution were in fact not based on Union law but on the TSCG, which is a treaty under international law. Referring to the explanatory notes on the government bill (*1725 BlgNR 24. GP, 3*) the applicant MPs themselves assumed that the TSCG is outside the legal framework of the European Union. The TSCG therefore did not create any powers within the framework of the European Union, but transferred sovereign rights to some of its bodies outside the scope of European Union law. Neither the Federal Constitutional Act on the Accession to the European Union nor Article 50 paragraph 1 subparagraph 2 of the Constitution suggest in any way that Article 9 paragraph 2 of the Constitution did not authorise the transfer of sovereign rights to EU bodies outside the legal framework of the European Union. It is irrelevant for this matter that the TSCG is closely connected in its substance to Union law. The Constitution differentiates strictly between Union law and (traditional) international law. This would manifest itself, for instance, in the amendment implementing the ESM, Federal Law Gazette *BGBL*. I 65/2012, by way of which rights of the National Council to participate in the decision-making process at national level regarding the ESM and the duties of information and reporting of the competent federal minister were laid down in Articles 50(a)-50(d) of the Constitution which are comparable in substance to those of Article 23(e) of the Constitution. The need for separate provisions amending the Constitution had then been justified by the fact that the ESM Treaty formally qualified as a "state treaty" pursuant to Article 50 paragraph 1 subparagraph 1 of the Constitution (*IA 1985/A 24. GP, 6*).

In the opinion of the Federal Government, a state treaty such as the TSCG approved pursuant to Article 50 paragraph 1 subparagraph 1 of the Constitution could transfer individual sovereign rights to intergovernmental institutions and their bodies, including bodies of the European Union, outside the scope of European Union law, regardless of the nature and number of sovereign rights which have already been transferred to the European Union by accession and by the ensuing changes in the treaties, as their transfer was based on approval by the Federal Constitutional Act on the Accession to the European Union and/or special constitutional authorisations.

5.4.1. For the above reasons (see 5.2.), the applicant MPs consider primarily Article 8 TSCG as unconstitutional, since it transferred the power (and such pertaining sovereign rights) to the CJEU to decide on the allegedly insufficient transposition of the debt brake into national law and to impose sanctions – according to the applicant MPs's opinion – without the required constitutional basis.

5.4.2. The Federal Government countered, basing itself on its line of reasoning above (see 5.3.), that Article 8(1) and (2) TSCG established the jurisdiction of the CJEU to assess whether a Contracting Party of the TSCG had complied with its obligations under Article 3(2) TSCG. Entrusting the task of deciding disputes arising out a state treaty in a binding manner to an intergovernmental institution constituted a near prototypical case in which Article 9 paragraph 2 of the Constitution is applicable. This in no way exceeded the scope of what can admissibly be transferred under this provision.

5.5.1. According to Article 9 paragraph 2 of the Constitution, individual sovereign rights may be transferred to intergovernmental bodies by way of a state treaty approved according to Article 50 paragraph 1 of the Constitution. This may also include Austrian bodies which are being subjected to the power of issuing instructions enjoyed by bodies of intergovernmental institutions. According to Article 50 paragraph 1 of the Constitution, the conclusion of political state treaties and of state treaties which modify or complement the law, and, secondly, state treaties which change the treaties on which the European Union is founded, must be approved by the National Council. Article 44 paragraph 3 of the Constitution notwithstanding, the latter state treaties require the majorities which are otherwise required under Article 44 paragraph 1 of the Constitution to amend the Constitution (Article 50 paragraph 4, second sentence, of the Constitution).

As a rule, Article 9 paragraph 2 of the Constitution governs the transfer of sovereign rights by an international law treaty ("state treaty") (on the concept of a state treaty within the meaning of Articles 50 and 140(a) of the Constitution as at any rate first containing "all agreements concluded between international law subjects to govern their relations under international law" see *VfGH 16/3/2013, SV 2/12, para 27* and other citations). In this respect, Article 9 paragraph 2 of the Constitution refers to state treaties within the meaning of Article 50 paragraph 1 subparagraph 1 of the Constitution. From the historic intention and the envisaged purpose of the reform of Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 of the Constitution by the constitutional amendment Federal Law Gazette *BGBL*. I 2/2008,

to create a general constitutional basis by the said set of rules for amending the founding treaties of the European Union by subjecting such treaties at any rate to the approval and the majority requirements governing constitutional amendments, one can undisputedly derive that Article 9 paragraph 2 of the Constitution and the limitations it places on the transfer of sovereign rights does not also apply to state treaties according to Article 50 paragraph 1 subparagraph 2 of the Constitution by which the treaties on which the European Union is founded are amended. However, Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 exclusively applies to state treaties which amend the "treaties on which the European Union is founded". Neither from the wording nor from the history of this provision can one derive that Article 50 paragraph 1 subparagraph 2 of the Constitution is directed at anything other than primary Union law.

The TSCG is a treaty under international law outside the scope of Union law, and therefore not one which amends the treaties on which the European Union is founded (cf. also Article 16 TSCG). An international law treaty between several but not all Member States of the European Union, considered by both the applicant MPs and the Federal Government as "outside the scope" of the EU legal framework, does not qualify as an amendment of the "treaties on which the European Union is founded" in the formal sense of Article 50 paragraph 1 subparagraph 2 of the Constitution. Neither do provisions of the TSCG transfer any powers under Union law (with Union law unfolding full legal effect) to bodies of the European Union, but rather sovereign rights under international law which are derived from the TSCG (under international law, this would be tantamount to a ‘lending of organs’).

Therefore, the approval of a state treaty such as the TSCG cannot be based on Article 50 paragraph 1 subparagraph 2 of the Constitution.

5.5.2. Likewise, Article 50 paragraph 1 subparagraph 2 in conjunction with subparagraph 4 of the Constitution did not change the substance of Article 9 paragraph 2 of the Constitution so that it would henceforth preclude the Republic of Austria from concluding a treaty under international law, based on current constitutional law, by which certain sovereign rights whose relevance is derived (exclusively) from the underlying international law treaty are transferred to the bodies of the European Union as well as to any other intergovernmental institution. Nothing in the history or in the meaning or purpose of Article 50 paragraph 1 subparagraph 2 and Article 9

paragraph 2 of the Constitution bears out the assumption that their meaning would deviate from the wording or the systematics of these constitutional provisions. Since not even the (circumvention) argument according to which the authorisation to transfer sovereign rights (under international law) to bodies of the European Union according to Article 9 paragraph 2 of the Constitution must not be used to circumvent the majority requirement of Article 50 paragraph 4 of the Constitution when amending the treaties on which the European Union is founded can purport that each and every case of a sovereign right which is based not (also) on Union law but exclusively on an international law treaty constituted, regardless of its specific content, such a circumvention. For such a case, one would rather first have to consider the limitations arising from Article 50 paragraph 1 subparagraph 1 of the Constitution according to which the state treaty which is to transfer sovereign rights must not be contrary to constitutional provisions, and second those limitations which emerge from Article 9 paragraph 2 of the Constitution on the admissible extent to which sovereign rights may be transferred by an international-law treaty, both quantitatively and qualitatively. Article 9 paragraph 2 of the Constitution is directed at the sovereign rights transferred on its basis, so that when assessing the limitations resulting for the transfer of sovereign rights under this constitutional provision, it does not apply to those rights which have been transferred on a special constitutional basis to the European Union by the European Union treaties.

The constitutional bases and limitations have been described which govern the conclusion of international (but not also Union) law treaties which transfer individual sovereign rights to intergovernmental institutions, including bodies of the European Union. The question whether and to what extent the statute of the intergovernmental institution onto which the sovereign rights are being transferred allows for such a transfer is a separate matter and, in general, not for the Constitutional Court to assess in proceedings under Article 140(a) of the Constitution (cf. *VfGH 16/3/2013, SV 2/12*, para 53; on the limitations of Union Law CJEU 27/11/2012, case C-370/12, *Pringle*, in particular para 155 et seq.; on fundamental issues of Union law see the standpoint in *Peers*, ECL 9 [2013], 37 [46 et seq.] and *Craig*, The Stability Coordination and Governance Treaty: Principle, Politics and Pragmatism, ERL 2012, 231 [240 et seq.]).

5.5.3. From the angle of Article 9 paragraph 2 of the Constitution, constitutional reservations against the transfer of rights to the CJEU by Article 8(1) and (2) TSCG do not exist (cf. *mutatis mutandis* on the other jurisdictions provided *inter alia* in Article 37(3) TESM for the CJEU on the basis of that Treaty *VfGH 16/3/2013, SV*

2/12, para 58 et seq.). Both in terms of their content and in their totality, the powers transferred under Article 8(1) and (2) TSCG remain within the scope of what is admissible according to Article 9 paragraph 2 of the Constitution, since this provision of the TSCG calls on the CJEU to decide on application by one or several Contracting Parties of the TSCG whether a Contracting Party has complied with its obligations under Article 3(2) TSCG, whether a Contracting Party has complied with its obligations arising from such judgment of the CJEU, and finally, failing which, to impose financial sanctions against this Contracting Party. Article 8(1) and (2) TSCG therefore mandates the CJEU with determining whether the Contracting Parties have complied with the obligation assumed under Article 3(2) TSCG. According to Article 9 paragraph 2 of the Constitution, such powers may be transferred to an international court. The applicant MPs have not maintained that other provisions of the Federal Constitution have been violated (which would be relevant in terms of Article 50 paragraph 1 subparagraph 1 of the Constitution). Nor have they raised any concerns that international law treaties i.e. such which are beyond the scope of the treaties on which the European Union is founded, already have transferred sovereign rights to the CJEU in a manner and to an extent which would qualitatively or quantitatively exceed the limits of Article 9 paragraph 2 of the Constitution.

5.5.4. Even if one were to take the view of the applicant MPs, shown to be incorrect, reference would have to be made to Article 273 TFEU as regards the transfer of dispute settlement powers to the CJEU by and through international law treaties of the Member States (on state practice cf. e.g. Article 25 paragraph 5 of the Double Taxation Agreement concluded by the Republic of Austria and the Federal Republic of Germany, Federal Law Gazette *BGBL*. III 182/2002 as amended by 32/2012, which provides for the possibility of arbitration proceedings before the CJEU, if a taxation dispute cannot be settled amicably within three years after proceedings have been instituted).

5.6.1. The applicants read Article 8(1) TSCG to imply an inadmissible transfer of sovereign rights to the Commission on the grounds they raised (see 5.2. above), arguing that this provision governed an obligation of the Contracting Parties to initiate proceedings under Article 8 TSCG with the CJEU, if the Commission was of the opinion that a Contracting Party has not complied with its obligations under Article 3(2) TSCG. In the final analysis, it amounted to the Commission to order the initiation of such proceedings.

In the view of the Federal Government, the power transferred to the Commission by Article 8(1) TSCG is not a sovereign right within the meaning of Article 9 paragraph 2 of the Constitution. Under Article 8(1) TSCG, the Commission is to submit to the Contracting Parties a report on the provisions each of them has adopted in compliance with Article 3(2) TSCG, and in which it manifestly may conclude that a Contracting Party has failed to comply with this obligation. However, it is not the Commission, but only one or several Contracting Parties, which could bring the matter to the CJEU. Therefore, it is argued, Article 8(1) TSCG did not transfer decision-making powers to the Commission.

5.6.2. Article 8(1) TSCG stipulates that the Commission presents in due time to the Contracting Parties a report on the provisions each of them has issued in compliance with Article 3(2) TSCG. These provisions are designed to give effect at national level to the Contracting Parties' obligations under Article 3(1) TSCG. They must therefore have a "binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process" (Article 3(2) first sentence TSCG).

If the Commission concludes in its report according to Article 8(1) TSCG that a Contracting Party has failed to comply with the obligation arising from Article 3(2) TSCG, the Contracting Parties undertake to bring the matter to the CJEU according to Article 8 TSCG. This mechanism stands against the backdrop of Article 273 TFEU according to which the CJEU shall have jurisdiction in any dispute between Member States relating to the subject matters of the Treaties (regarding Article 37(3) TESM, see CJEU 27/11/2012, case C-370/12, *Pringle*, para 170 et seq.) and of the rule adopted by the Contracting Parties of the TSCG when signing this Treaty on Article 8 TSCG (cf. explanatory notes on *RV 1725 BlgNR 24. GP, 13*), in which the Contracting Parties have laid down the detailed modalities for when a matter is to be brought to the CJEU under Article 8(1) second sentence, TSCG. Even if one were to construe the fact that such an assessment in the Commission's report according to Article 8(1) TSCG triggers an obligation of the Contracting Parties to initiate proceedings with CJEU as a transfer of a sovereign right, any such transfer would constitute a transfer of a sovereign right that is covered by Article 9 paragraph 2 of the Constitution (on the general applicability of Article 9 paragraph 2 of the Constitution to this constellation, see 5.5.2. above; on the Union law viewpoints on the transfer of a task to the Commission through an international law treaty, concretely through the

TESM, see CJEU 27/11/2012, case C-370/12, *Pringle*, para 155 et seq.) It defies understanding – and has not been substantiated by the applicant MPs – why the limitations of Article 9 paragraph 2 of the Constitution would be exceeded by establishing any such power for the Commission.

6.1. The applicant MPs also invoke Article 5 TSCG in justification of a constitutionally inadmissible transfer of sovereign rights to the Commission. Article 5 TSCG, they argue, could contain new and additional facts requiring approval of budgetary and economic partnership programmes to which the Contracting Parties of the TSCG must commit themselves under the conditions governed by Article 5 TSCG.

6.2. The Federal Government in turn argues that already now, in excessive deficit procedures based on Article 126(7) TFEU, a Member State must be asked to submit, within six months, information on measures by which to correct the excessive deficit. Further steps must be implemented in the procedure on the basis of Article 126(8), (9) and (11) TFEU only if these measures appear to be insufficient. Article 5 TSCG, it is argued, merely defines these reporting duties within the excessive deficit procedure by requiring an "economic partnership programme" to be submitted. Article 5 TSCG does not provide for any further transfer of sovereign rights to the Commission.

6.3. Under Article 5(1) TSCG a Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes is defined in European Union law. Their submission to the Council and to the European Commission for endorsement and their monitoring takes place within the context of the existing surveillance procedures under the SGP.

Even if Article 5 TSCG contained a separate legal basis for the Commission to endorse the budgetary and economic partnership programmes to be put in place by the Member States — which is how the applicant MPs read Article 5 TSCG and which is refuted by the Federal Government which reads this provision merely as a reference to similar powers of the Commission granted in Union law by secondary

legislation within the framework of the ‘two-pack’ — Article 5 TSCG in fact transfers sovereign rights to the Commission by international law which can generally be based on Article 9 paragraph 2 of the Constitution (see 5.5.2. above). The applicant MPs do not raise any concerns against the material limitations of Article 9 paragraph 2 of the Constitution being exceeded in qualitative or quantitative terms.

Neither do the powers transferred to the Commission by Article 5 TSCG violate Article 13 paragraph 2 of the Constitution, which, in essence, has been argued by the applicant MPs. This constitutional provision leaves broad scope to the federal, *Laender* and municipal bodies responsible for budget management in how to meet the objectives of an overall macro-economic balance and sustainably sound finances within the framework of their powers and responsibilities. In particular, the federal, *Laender* and municipal bodies are free to adopt binding rules within the limits of their powers which (also) specify the objectives set out in Article 13 paragraph 2 of the Constitution. One cannot gather from Article 13 paragraph 2 of the Constitution that any such specification as to how the competent bodies are to comply with these objectives set out in this constitutional provision should only be possible via federal constitutional law (or Union law), but not via ordinary law or international treaty. That this gives the "ordinary legislator" the power to adopt far-reaching rules regarding the objectives set out in Article 13 paragraph 2 of the Constitution is a policy-making task inherent in the constitutional system of parliamentary democracy and not, as is ultimately argued by the applicant MPs, the sole prerogative of a "constitutional majority".

7.1. The concerns raised by the applicant MPs that Article 5 or 8 TSCG unconstitutionally transferred sovereign rights to the CJEU or the Commission are equally unfounded.

7.2. Hence, neither Article 2(2) nor Article 5 nor Article 7 nor Article 8 TSCG is unconstitutional for the reasons given by the applicant MPs to whose assessment the Constitutional Court has to limit itself.

IV. Result

1. On these grounds, the application was dismissed inasmuch and to the extent it was admissible.

2. Pursuant to section 19 paragraph 4, first sentence, Constitutional Court Act, this decision was rendered after having deliberated in private without there being a need for an oral hearing.

Vienna, 3 October 2013
The President:
HOLZINGER

Recording clerk:
STEINWENDER