

Judicial challenges of measures to overcome the crisis

A brief note on judicial challenges of legal acts adopted in the context of the euro area debt crisis

Introduction

This brief note intends to give some legal information on judicial challenges against acts adopted in the context of the euro area sovereign and banking debt crisis. The access to the European Union (EU) judicature and the grounds for challenging measures adopted in the context of Economic and Monetary Union (EMU) are summarily sketched for observers interested in EMU law developments.

Whose acts can be challenged?

Under the EU legal architecture, it is for the European Court of Justice (ECJ) to rule on the validity of acts adopted by the EU institutions. The relevant institutions are: the (Ecofin) Council (of Ministers), the European Commission (Commission) and the European Central Bank (ECB).

Note 1

The *European Council* (the Heads of State and Government of the EU Member States plus the President of the European Commission, chaired by a permanent President, Herman Van Rompuy) does not usually adopt legal binding acts. If it does, then its acts intended to produce legal effects vis-à-vis third parties can also be challenged, like similar acts of the *European Parliament* (Article 263 TFEU).

The *Euro Area Summit* is not an institution of the EU but an ad hoc gathering without Treaty status at least until the ratification of the so-called fiscal compact treaty, the Treaty on Stability, Coordination and Governance in the economic and monetary Union (TSCG).

The *Euro Group*, the gathering of the Euro Area Ministers of Finance does have Treaty status (Article 137 TFEU and Protocol No. 14 on the Euro Group) and a permanent chairman (Jean-Claude Juncker), but is not competent to adopt legally binding acts.

Note 2

The intergovernmental method employed by the Member States in countering the crisis not only requires policy changes to be reflected in successive amendments to legal instruments but also allows challenges of acts of ratification before national courts. On which more below.

Who can challenge?

The Commission is the primary guardian of the [Treaty on the Functioning of the European Union](#) (TFEU) and the [Treaty on European Union](#) (TEU), the two founding treaties of the EU (Article 17 TEU and Article 258 TFEU). The Commission can challenge the validity of acts producing legal effect adopted by other EU institutions. The ECJ is competent to rule on the validity of legal acts having binding effect adopted by the ECB, the Council and the Commission (Article 263, 1st and 2nd paragraph, TFEU). The General Court first decides, whereupon appeal lies with the ECJ (Article 256 (1) TFEU). In addition to the Commission, such challenges can be brought by Member States, the European Parliament, and the Council.

Note 3

The ECB can bring National Central Banks (NCBs) before the ECJ if it finds non-compliance with their EU obligations (Article 271 sub (d) TFEU and Article 35.6 ESCB Statute). Here, the ECB and the Commission share the guardian function.

Natural and legal persons are not in a position to challenge legal acts of the EU institutions with the exception of acts addressed to them or concerning them directly and individually (Article 263, 4th

paragraph, TFEU). Even though the possibility of legal challenge by individuals and companies has been broadened by the latest Treaty revision (the amendments brought about by the Lisbon Reform Treaty which entered into force on 1 December 2009), binding legal acts of EU institutions are by and large immune from judicial challenges from parties that consider themselves affected but that cannot convincingly prove that they are directly and individually concerned.

Large margin of discretion for institutions in complex economic policy decisions

Moreover, assuming standing to challenge a legal act, the chances of success are slim. The EU judicature has traditionally shown reluctance to interfere in executive or policy decisions taken by institutions in complex economic questions. The courts allow the policy makers a margin of discretion and will largely confine themselves to finding manifest errors or procedural irregularities when executive decisions requiring complex economic assessments are challenged. This is the case in competition law enforcement and in wider economic policy decisions that have come up for review, e.g. in the context of the Common Agricultural Policy.

Challenge of the ECB's Securities Market Programme

Nevertheless, the extraordinary measures of the [ECB](#), notably the widening of the eligibility criteria for collateral and the [Securities Market Programme](#) (SMP)¹, have already led to a challenge before the General Court by an individual. *Herr Städter*, a German national, raised the invalidity of the contested measures as contrary to Articles 123-125 TFEU, which contain three basic prohibitions of EMU law: on monetary financing, on privileged access of public authorities to financial institutions, and the no bail-out clause. He did so five days after the period to challenge a legal act had lapsed for the latest of the several measures he attacked. The Court rejected his complaint on this procedural ground without going into the question of standing (judgment of 16 December 2011 in Case [T-532/11](#); only the [German](#) and [French](#) versions of this decision are available at www.curia.eu). The Court was not moved by the plea that these decisions were still being applied. Since the complainant had not indicated the specific execution measures that he had wanted to be declared invalid, the Court considered the time-bar for claims concerning the invalidity of legal acts of a public order nature in order to safeguard the clarity and security of legal situations (“*d’assurer la clarté et la sécurité des situations juridiques*”). The case is on appeal before the ECJ (Case [C-102/12 P](#)).

References for a preliminary ruling

In addition to direct challenges before the EU judicature, natural and legal persons may seek to address the legality of acts adopted in crisis management through national judicial channels and, by way of the preliminary ruling procedure, arrive at the ECJ. Under references for a preliminary ruling, the ECJ can

¹ Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5), Official Journal of the European Union, L 124/8, 20 May 2010.

interpret EU law and rule on the validity of acts of EU “institutions, bodies, offices or agencies” (Article 267 TFEU).

Note 4

The latter enumeration may be considered sufficiently wide to include the Euro Group or the Euro Area Summit.

Assuming a legal venue for interested parties at national level through which they can access a national court with a challenge of measures taken in connection with the crisis, the national court *may* (in the case of the highest court of the Member State: *should*) refer the issue of validity or interpretation to the ECJ. Thus, parties may be able to circumvent the limited direct access to the ECJ. Two such indirect challenges have appeared thus far.

Irish and German cases

The Irish Supreme Court has referred the question of the legality of the establishment of the European Stability Mechanism ([ESM](#)) to the ECJ, whilst [a German eurosceptic think tank \(Europolis\)](#) is said to have requested the [German Constitutional Court](#) to refer the legality under EU law of the ESM to the ECJ². The Irish case (*Thomas Pringle v The Government of Ireland, Ireland and the Attorney General*, [2012] IESC 47) directly addresses the compatibility of the ESM with the no bail-out clause but also encompasses wider questions such as the legal validity of adopting crisis measures in the form of intergovernmental acts in an area of exclusive competence of the EU (monetary union is an exclusive EU competence for the Member States that have adopted the euro) and where the TFEU assigns particular functions to the EU institutions which are alleged by the claimant to be varied, or enlarged, through the ESM Treaty. The [Irish Supreme Court](#) has requested the ECJ to judge through an accelerated procedure. In Luxembourg, the reference has been entered as Case [C-370/12](#).

Other references for preliminary rulings

Other cases have been referred to the EU judicature on the compatibility of crisis measures with EU law. These references concern the conformity with EU law of austerity measures imposed under the [Memorandum of Understanding of Portugal with the IMF](#), the Commission and the ECB in the context of [financial assistance to this Member State](#). In Case [C-264/12](#) (*Sindicato Nacional dos Profissionais de Seguros e Afins*), the application of the *Lei do Orçamento de Estado para 2012* (Portuguese State Budget Act for 2012) is at issue, with the referring labour law court requesting the ECJ to pronounce, *inter alia*, on the compatibility of severe salary cuts with economic rights enshrined in the [Charter of Fundamental Rights of the European Union](#). The same issues have been referred in a previous request for a preliminary ruling by the same court (Case [C-128/12](#); *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA*). Both references were initiated by union proceedings against deep salary cuts imposed on financial sector staff.

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² “Fresh challenge to bailout fund”, *Financial Times*, 14 August 2012, page 6.