1. Introduction

This April, Greece adjusted the amount of its national deficit upwards for the third time within 12 months, which has lead to massive discrepancies in the capital market with respect to government bonds. Since a refinancing crisis of Greece was feared to have far-reaching consequences for the entire Euro zone, it was decided to grant Greece bilateral loans of up to 80 billion Euros in the scope of a concerted action of the member states, the Commission, the European Central Bank and the International Monetary Fund. Out of this volume of loans, up to 22.4 billion Euros shall be contributed by the Federal Republic of Germany. In an emergency proceeding, the Bundestag (German parliament) and Bundesrat (representation of the federal states) approved of the “Act on the Assumption of Guarantees to Maintain the Liquidity of the Hellenic Republic for the Sake of the Financial Stability Within the Monetary Union” (Monetary Union Financial Stability Act) on 7 May 2010.


2. Legal Questions

There are legal concerns against the admissibility of the Monetary Union Financial Stability Act on two levels: On the European level, a violation of Article 125 of the Treaty on the Functioning of the European Union (TFEU), which possibly constitutes a “bail-out” prohibition, is discussed. On the level of German constitutional law, the question of a breach of the principles of democracy laid down in the German Basic Law as well as the protection of property pursuant to Sec. 14 German Basic Law has been raised.

3. Violation of European Law?

3.1 Substantive Law

A central pillar of the European Monetary Union is the provision of Article 125 TFEU that may be construed as a so-called “bail-out” prohibition. According to the Act’s explanatory memorandum, every member state is responsible for its own debts in order to guarantee the stability of the Euro and the confidence in the common currency. Therefore, Article 125 TFEU may be construed not only as a clarification that no member state shall be liable for the debts of any other member state, but also as a prohibition to assume the liabilities of another member state. Given the imminent conflict with Article 125 TFEU, the German finance minister Wolfgang Schäuble argued that Article 125 TFEU would not conflict the rescue measures since these rescue measures have been decided on a voluntary basis. However, the point of voluntariness is not convincing since the European legislative body did discuss the possibility of voluntarily assuming liabilities when creating the regulation, but finally decided not to include such possibility.
To understand the functioning and restrictions of Article 125 TFEU, one must read the regulation within the entire context of the TFEU. Therefore it should be assessed whether such rescue measures would be admissible as an exception under any other regulation. According to the resolution of the finance ministers of the member states, Articles 126 and 136 TFEU have been referred to in order to authorize the rescue package.

Article 126 TFEU governs both the procedure of establishing that there is an excessive national deficit and the measures that the European Council (committee consisting of the heads of the states of the European Union) may take in order to react to such deficit. However, the regulation includes neither a permission nor a prohibition of bilateral rescue measures.

The effects of the aforementioned Article 136 TFEU. This regulation determines which member states are entitled to vote if there are measures decided in order to safeguard the functions of the Economic and Monetary Union. Article 136 TFEU does also not include any permission for bilateral rescue measures.

Furthermore, Article 143 TFEU may also be considered as a basis for authorization. Although the regulation expressly allows member states to support each other by providing each other with loans. However, this provision is only applicable for member states “subject to an exemption”. “Member states subject to an exemption” are those member states for whom the European Council has not decided that they fulfill the requirements for introducing the Euro (Article 139 (1) TFEU). Exactly because Greece is already part of the Euro zone, the Hellenic Republic cannot be a member state subject to an exemption. Therefore, this regulation cannot be considered as a basis for authorization.

Finally, Article 122 (2) TFEU may allow for bilateral rescue measures. The regulation provides for financial support within the European Union for exceptional cases where a member state suffers difficulties due to natural disasters or extraordinary circumstances beyond its scope of control. Financial problems, however, are rather unlikely to be classified as a natural disaster. Whether the worldwide financial crisis is an extraordinary event beyond the scope of control of the state in question is rather difficult to assess. In the case of Greece, it is at least doubtful that the financial crisis is the only reason for the liquidity problems, taking into account that other member states have been able to overcome this crisis without external support. However, Article 122 (2) TFEU might constitute an important starting point to justify the financial support.

3.2 Procedural Law

Besides the question of material breach, the formal question of entitlement to the claim needs to be clarified. Before the European Court of Justice, no citizens, but also the member states and bodies of the European Union are entitled to file a complaint. The European bodies and member states will surely not take the step to Luxembourg, given the political decision to support Greece. A judicial review of the rescue measures by the European Court of Justice is therefore not expected. Thus, the Latin saying – no complaint, no redress (nullo actore, nullus iudex) – applies.

4. Violation of German Constitutional Law

4.1 Substantive Law

The claimants are asserting a claim for violation of German constitutional law. Firstly, the claimants complained of a violation of their basic rights out of Sec. 38 (1) German Basic Law. Sec. 38 German Basic Law stipulates that the powers of the democratically authorized German parliament (Bundestag) may not be passed on to the European level by a relocation of responsibilities. For a relocation of national responsibilities to the European
Union, the Federal Constitutional Court calls for a so-called “integration responsibility”, i.e. the Bundestag and Bundesrat (constitutional body of the federal states) are granted appropriate participation rights in such modification and legislation procedures. Since the Bundestag has approved the decision of the Federal Government to support Greece, the required democratic legitimization is given so that there is no violation of Sec. 38 German Basic Law.

Secondly, a violation of the right to property pursuant to Sec. 14 German Basic Law is asserted. Starting points for a restriction of property are both a threatening inflation due to the allocation of loans and increased taxes that may become necessary to compensate the burden in the federal budget caused by the rescue package.

The central issue of threatening inflation is the question whether the guarantee of property also protects the increase of inflation, i.e. the negative influence on the exchange rate of a currency. This question is rather disputed in science and in jurisdiction. In 1969, the Federal Constitutional Court stated that measures causing a change of the exchange rate would not affect the freedom of property (cf. BVerfG, HFR 1969, 347) since Sec. 14 German Basic Law protected the possibility to exchange money against material goods in general. Since the exchange rate depended on several factors, i.e. the government’s monetary sovereignty and financial policy as well as the behavior of the citizens, the exchange rate could not be protected by the constitution. In its decision regarding the constitutional complaints against the introduction of the Euro, the Federal Constitutional Court furthermore clarified that the parliament and the federal government were entitled to a prerogative of assessment regarding the protection of the value of money. A minority opinion in German literature contradicts the above arguments, stating that the economic meaning of money is not appropriately considered: Money becomes an asset only by its purchasing power, i.e. the exchange rate constitutes the core of property. The core of property requires particular protection in case of a threatening inflation so that Sec. 14 German Basic Law should be decisive.

Up to present, the jurisdiction of the Federal Constitutional Court on the adverse effect of taxes and charges on property is based on the principle that public duties of payment do not constitute an intrusion in property since taxes encumber property as a whole, but not specific items of property – thus, property as a whole is not protected in the scope of Sec. 14 German Basic Law. An exception will be made only if taxes had a strangling effect. From the present point of view, it is not very likely that the support of Greece will lead to strangling tax increases for the people.

As far as the Federal Constitutional Court should agree with the above minority opinion and assume an intrusion in property, there would still be the possibility to justify such intrusion. Especially the general notion of property in Sec. 14 (2) sentence (2) German Basic Law as well as the Euro’s special relationship to and dependence on the community that have already been demonstrated in the court decision regarding the introduction of the Euro may be construed as reasons to justify any possible intrusion in property.

4.2 Procedural Law

The proceeding of the claimants before the Federal Constitutional Court was initially aimed at achieving a temporary injunction prohibiting the Federal Republic of Germany to grant financial aids. The Federal Constitutional Court rejected the request for a temporary injunction with reference to the fact that the adverse effects of not issuing the temporary injunction in case of unlawfulness of the rescue measures would outweigh the adverse effects of issuing the injunction in case of lawfulness of the measures. The Federal Constitutional Court based its decision on the assumption of the Federal Government that there was no other way to prevent a threatening illiquidity of Greece since otherwise the stability of the entire Monetary Union would be endangered. The final opinion of the court in the main proceeding will in any case be clear, more extensive and differentiated.
5. Conclusion

There are numerous indications to at least interpret the rescue of Greece as a breach of European Law. The genesis of Article 125 TFEU documents that the assumption of debts of other member states was not intended from the political point of view. However, presently it appears unlikely that a court will impose sanctions for any possible breach of European primary law since there is no party to file a claim.

The concerns regarding the compatibility with German constitutional law weigh less than those on the European scale. Taking into account the principles expressed by the Federal Constitutional Court in similar matters so far, the Court will most probably not establish that there is a breach of the Basic Law.