COMMENTS

THE NON-RATIFICATION OF THE CHANGES TO THE ESM: CONTRADICTIONS, IMPLICATIONS, AND PERSPECTIVES

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1. Introduction

The issue surrounding the ratification of changes to the European Stability Mechanism (ESM) has sparked a heated political and institutional debate In Italy.

After an intense clash of opinions, with differing – if not opposing – views on the reform of European economic governance, the Chamber of Deputies, on Thursday 21 December 2023, rejected authorisation of the law ratifying and implementing the Agreement Amending the Treaty establishing the ESM, which was drawn up in Brussels on 27 January and 8 February 2021. The law was rejected with 184 votes against, 72 in favour, and 44 abstentions.

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In this brief commentary, I would like to highlight four important aspects of the rejection of ratification. Firstly, some of the Government's arguments in support of the opinion not to ratify closely echo the case law of the German Constitutional Court in its judgments on quantitative easing and the Recovery Plan protecting parliamentary sovereignty on budgetary matters. Secondly, these arguments partially contradict some of the statements reported by other Government representatives in official documents. Thirdly, these arguments appear to be more hypothetical than real. Fourthly, it cannot be ruled out (and indeed, there are some indications to support such a hypothesis) that the decision on non-ratification may be resubmitted to parliamentary vote but with a different outcome.

Before proceeding with this analysis, in order to gain a more complete understanding of these four aspects, it may be useful to briefly review the changes to the ESM that were submitted for ratification.

2. The changes to the ESM submitted for ratification

The ESM was established in 2012 to address the financial crises that were affecting countries in the eurozone. It operates under an intergovernmental agreement (governed by international law) and aims to provide financial assistance through conditional loans to member countries facing financial difficulties in an attempt to maintain the stability of the eurozone as a whole.

The central aspect of the reform, passed in 2021, involves granting the ESM a new role as a financial safety net (backstop) for the Single Resolution Fund (SRF). The SRF is financed by all the European banks in the Banking Union and is intended to manage and resolve banking crises. Consequently, the ESM, which had primarily been an instrument providing assistance to States, could now also contribute to resolving banking crises.

3. The arguments put forward by the Italian Government, and the case law of the German *Bundesverfassungsgericht*

In a session held on 21 December 2023, the Fifth Permanent Commission (Budget, Treasury, and Planning) issued an unfavourable opinion regarding ratification of the ESM. It came following a bill presented by Ylenja Lucaselli, a representative of the parliamentary majority. Specifically, "since the draft law lacks mechanisms to ensure the involvement of Parliament in the procedure to activate the European Stability Mechanism, thereby excluding the Chambers from procedures of significant importance in terms of economic and financial policy, and since such exclusion may undermine Parliament's ability to monitor further payments of the subscribed capital [...], this Commission declares its opposition".

These reasons closely echo the established case law of the *Bundesverfassungsgericht* (BVG) on *Identitätskontrolle*. On several occasions, the BVG has asserted its authority to verify that no sovereign powers are transferred – and that European bodies introduce no measures – which would infringe upon the fundamental rights provided for in Article 79(3) of the *Grundgesetz*, particularly those ensuing from the democratic principle, the sovereignty of the people, and the sovereignty of the *Bundestag* in budgetary matters.

It is worth noting at this juncture that, after a legal proceeding that kept Europe on tenterhooks for a year and a half, the German Constitutional Court, a champion of parliamentary sovereignty in budgetary matters, finally consented to the ratification of the Recovery Plan. The court deemed that it did not substantially limit the budgetary power of the *Bundestag*, as the amount, duration, and purpose of the loans the Commission could take on were limited, as was Germany's potential liability. The possibility of further liability was considered unlikely.

4. Some contradictions

In the opinion of the Fifth Commission, lack of parliamentary involvement in the activation of the ESM could "affect Parliament's ability to adequately monitor any indirect effects of the ratification of the Treaty, considering that the mere request for additional capital contributions under Article 9 of the ESM Treaty is envisaged as binding with respect to any commitment regarding public spending, which would have intuitable effects on the public purse".

This consideration contradicts (at least partially) previous statements by two members of the Government reported in official documents.

A note from the Ministry of Economy and Finance dated 9 June 2023, addressed to the III Commission of the Chamber (Foreign Affairs and Community Affairs) in response to requests for information on the direct and indirect effects on public finances due to ratification of the ESM, clearly states that, regarding direct effects arising "from the ratification [...] there are no new or greater burdens" with respect to those already arising from the ESM Treaty of 2012. As for the indirect effects that might theoretically arise, however, "no changes are found in the agreement that would suggest increased risk".

Furthermore, during the meeting of the Fifth Commission, which subsequently issued the negative opinion, on 20 December 2023, the Undersecretary for Economy and Finance provided clarification on two aspects relating to the theoretical risks arising from ratification of the amendments to the ESM. Firstly, Undersecretary Freni excluded the possibility of a "significant increase in the likelihood that Italy would have to contribute capital" even in the remote event of triggering the backstop, as the latter would have a maximum ceiling of 68 billion euros, a figure that "fully falls within the maximum borrowing capacity of the ESM, which reaches 500 billion euros, of which 417.4 billion are currently available". Furthermore, the second innovative element introduced by the ESM amendments, namely the introduction of collective action clauses with single-majority voting for newly issued Government bonds with a maturity of more than one year, is explicitly considered "not likely to result in new or greater burdens on public finances".

The contradictions within the majority regarding the perception of the implications of the changes to the ESM were also evident in previous governments (including within the same Government, led by Giuseppe Conte, who signed the amendments), so much so that not even the Draghi Government proceeded with the ratification.

5. Practical implications

The risks to public finances mentioned in abstract terms in the opinion by the Budget Commission also appear unsupported by real elements.

Firstly, Italy holds a right of veto in decisions taken by the ESM. Indeed, Italy has subscribed €125 billion to the ESM's capital, with over €14 billion already paid in. The voting rights of members of the Council (which usually decides unanimously) are proportional to the capital subscribed by their respective countries. Germany, France, and Italy have voting rights exceeding 15 percent and can therefore veto decisions even under emergency conditions (which still require an 85 percent qualified majority vote).

Secondly, the ESM remains in force, preserving its original wording exactly as it has been for the past decade, including Article 9 of the Treaty (under which the Board of Governors may request payment of any unpaid authorised capital at any time), referred to in the V's Commission opinion as "binding with respect to any commitment regarding public spending, which would have intuitable effects on the public purse".

6. Future perspectives

Government representatives have repeatedly emphasised that the reform of the ESM did not represent a measure of immediate interest for Italy, since it mainly regards extending its scope of application to troubled systemically important banks, in a context where "the Italian banking system is among the most solid in Europe". This emphasis on the lack of current interest, combined with other concurrent circumstances, might lead one to consider it possible (and indeed desirable) for the decision on non-ratification to be resubmitted to parliamentary vote, but with a different outcome.

Indeed, according to Article 72(2) of the Chamber's regulations, at least six months must elapse before another bill to ratify the ESM Treaty (substantially identical to the rejected one) can be resubmitted. These six months will expire shortly after the next European elections. Perhaps in a less tense atmosphere, not dominated by electoral dynamics, the decision to ratify the ESM may be reconsidered. If, upon the Government's suggestion, Parliament were to reopen discussions, it may approve – alongside ratification – a directive or provision excluding its use by Italy.