



CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW: GERMANY

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I POLITICAL CONTEXT

POLITICAL CHANGE

I.1

WHAT IS THE POLITICAL CONTEXT OF THE EUROZONE CRISIS PERIOD IN GERMANY? HAVE THERE BEEN CHANGES IN GOVERNMENT, ELECTIONS, REFERENDA OR OTHER MAJOR POLITICAL EVENTS DURING THE PERIOD OF 2008-PRESENT?

In 2008, the German Government under Chancellor Angela Merkel was formed by the Christian Democrats (CDU) and the Social Democrats (SPD). In this period of time, Germany had to deal with effects which arose from the crash of the bank “Lehman Brothers”. Many German citizens suffered severe losses in this time due to their engagement in risky assets sold to them by their banks in Germany. Subsequently, several court judgments obliged the banks to pay damages to their clients because they had faultily advised them.

After the federal elections in 2009, the Christian Democrats (CDU) and the Liberals (FDP) governed the Federal Republic of Germany. The chancellor was again Angela Merkel. In this period of time, the direct Greek aid package was adopted. This was approved by a clear majority in the parliament. Chancellor Merkel expressed in a speech at the Bundestag in 2010 a sentence which had become famous afterwards. She said: “If the Euro fails, Europe fails” (“Scheitert der Euro, scheitert Europa”). From her point of view, there is no alternative (“alternativlos”) to the financial assistance programmes for European countries such as Greece. Despite these clear words, the opposition in parliament (Social Democrats (SPD), the Greens (Bündnis 90/Die Grünen) and the Left (Die Linke)) criticized that the *Bundestag* did not receive sufficient information regarding the implementation of this political aim. Most members of the opposition were also in favour of a financial transaction tax in order to force banks to participate in the costs of the financial crisis. This proposal was rejected by the Federal Government. The German federal state also had to rescue some banks, such as the “WestLB” and the former “Hypo Real Estate” for which public bad banks had been created. In 2015, the German *Bundesbank* published a report which stated that since the beginning of the crisis the German Federal State has already invested Euro 236 billion to rescue banks. In addition, the *Länder* had to pay additional public money to save banks, in particular banks of the *Länder* (for example the *Länder* Hamburg and Schleswig-Holstein for the “HSH Nordbank”).

Germany’s participation in the rescue packages has raised many concerns. Amongst other reasons these concerns had led to the foundation of a new political party, the “Alternative for Germany” (“Alternative für Deutschland”) or briefly AfD. The beginning of this party in 2013 constituted the creation of the “Electoral Alternative 2013” (“Wahlalternative 2013”) whose manifesto was endorsed by economists, journalists, and business leaders, half of whom were professors and three-quarters of whom had academic degrees. They also had support from some of the complainants at the *Bundesverfassungsgericht* against Euro Crisis measures. After having participated in an election in Lower Saxony the AfD also competed against other parties in the 2013 federal elections and achieved a result of nearly 5 % of the votes. It was

only due to the 5 % barrier that the AfD did not enter the German *Bundestag* but it was seen as a remarkable success for the young party. In 2014, the AfD participated in the elections for the European Parliament and achieved 7.1% of the national votes which allowed them to send 7 MEPs to Brussels. The AfD is a member of the European Conservatives and Reformists (ECR) group in the European Parliament. The AfD had further success in election campaigns and is today represented in some *Länder* parliaments, amongst them Saxony, Bremen, Thuringa and Brandenburg. In 2014 and 2015, the party faced extreme inner-party conflicts between a right-wing faction mainly focusing on topics in migration policy and a faction focusing on Euro criticism and financial politics. In July 2015, the right-wing faction won the internal battle which caused many exits of party members, amongst them one of the founders and some MEPs. Some members of the AfD who left the party created a new party called “Alliance for Progress and Renewal” (“Allianz für Fortschritt und Aufbruch”), or briefly ALFA. Until today, they did not participate in elections but some of their members are members of *Länder* parliaments because they cancelled their membership of the AfD and became members of ALFA while keeping their mandate as an elected MP.

In the 2013 federal elections, the Liberals (FDP), which were the junior partner of the Christian Democrats in the Merkel-government from 2009 to 2013, failed to achieve the minimum threshold of votes (5 %). Chancellor Merkel is since then leading a coalition of Christian Democrats (CDU) and Social Democrats (SPD). The discussion about the Euro crisis became intensive after the election of a new government in Greece under Prime Minister Tsipras. In particular, the contrary positions of the Greek Finance Minister Giannis Varoufakis and the German Finance Minister Wolfgang Schäuble raised much media attention. Schäuble did not want to exclude the Exit of Greece from the Eurozone (so-called “Grexit”) which had become a well accepted opinion in Germany after the ambiguous positions and behaviours of Greek members of the Government and negotiators. The discussion in Germany focused on the limits of the German contribution to financial assistance programmes.

During the whole period of the Euro Crisis, the data of the German economy was all in all positive. The federal state benefited from the high demand for German securities which allowed the Finance Minister to issue German securities with very low interest rates. The German yearly deficit financing could be reduced being positive in 2014 (surplus of 0.27 %).

II CHANGES TO THE BUDGETARY PROCESS

BUDGETARY PROCESS

II.1

DESCRIBE THE MAIN CHARACTERISTICS OF THE BUDGETARY PROCESS (CYCLE, ACTORS, INSTRUMENTS, ETC.) IN GERMANY.

The legal basis for the budgetary process on the federal level in German is Article 110 *Grundgesetz* (GG).

The yearly federal budgetary process is determined by the budget law and the budget plan. The budget plan contains all the expenses and revenues of every federal authority and is annexed to the budget law. In order to assemble the budget plan the budget units in the federal ministries and the supreme federal authorities have to develop drafts of their budget plan for the next budgetary year which have to make sure that expenses and revenues are balanced. The Federal Finance Ministry collects all the drafts and assesses whether they are in line with the tax estimation.

When the Finance Ministry has combined and approved all the drafts, the Federal government adopts the budget plan. Usually, the outline of the budget plan is published in the summer prior to the next budgetary year. The draft of the budget plan is sent simultaneously to the *Bundestag* und the *Bundesrat*, a requirement of Article 110 (3) GG. The draft budget plan is assessed in light of another budget plan which covers several fiscal years (usually five years). Within six weeks the *Bundesrat* comments on the draft of the yearly budget plan. The comment of the *Bundesrat* is sent to the *Bundestag* along with a statement of the Federal Government to the *Bundesrat's* comments.

Like every other federal law, the budget law and the annexed budget plan require three readings in the *Bundestag*. However, the procedure is partly different from other legislative procedures. The first reading in plenary is mainly the presentation of the budget plan accompanied by discussions between the government and the opposition in parliament which end with the referral of the budget law (including the annexed budget plan) to the Budget Committee of the *Bundestag*. The Committee looks intensively at every budgetary position and gives recommendations. The recommendations of the Committee are presented to the *Bundestag* in its plenary composition. They are subject to the second reading. During the second reading, every single budget plan of the whole budget plan, for example for a single ministry, must be adopted separately. During the third reading, the budget law annexed with the budget plan as a whole must be adopted.

After the adoption by the *Bundestag*, the budget law is sent to the *Bundesrat* which has the right to refuse the law and call for a mediation in the Conciliation Committee. If the *Bundesrat* agrees with the draft budget law, the Federal Finance Minister, the Chancellor and the Federal President sign the law and it is published in the Federal Law Gazette. Within the time indicated in the law, it enters into force.

The Federal budget is permanently supervised by the Accounting Committee, a sub-committee of the *Bundestag*'s Budget Committee. In addition, the Federal Court of Auditors controls how the public spending was carried out and publishes remarks which are important for the *Bundestag* when it comes to the decision about the formal approve of the Federal Government.

GENERAL CHANGE

II.2

HOW HAS THE BUDGETARY PROCESS CHANGED SINCE THE BEGINNING OF THE FINANCIAL/EUROZONE CRISIS?

Before the Eurozone crisis there were no specific laws determining how financial assistance to Member States of the EU can be granted. Discussions in Parliament and Constitutional Court Decisions have led to a law which lays down the requirements for financial assistance for Member States in the framework of the ESM in the ESM Financing Act (ESM-*Finanzierungsgesetz*, briefly ESMFinG). According to this law it is in general the Budget Committee of the *Bundestag* which decides about financial assistance (§ 5 ESMFinG). The law also defines in which cases an approval of the Budget Committee is necessary before the German representative in the ESM can vote in favour of an ESM proposal or abstain. As long as there is no approval by the Budget Committee or the Plenary the German representative has to refuse the proposal.

The Budget Committee is not authorized to vote about an ESM proposal when the overall budgetary responsibility of the *Bundestag* is concerned. In this case, the *Bundestag* as a plenary has to decide (§ 4 ESMFinG). One of the most controversial norms concerns the special Committee, a sub-Committee of the Budget Committee. While the Budget Committee consists of around 40 MPs, the special Committee has around 9 MPs. According to § 6 ESMFinG it is only competent when there is a proposal to buy government bonds at the secondary market (Art. 18 TESM). Only in this case it is necessary to restrict the information to a reduced number of MPs in order to guarantee secrecy of the decision.

INSTITUTIONAL CHANGE

II.3

WHAT INSTITUTIONAL CHANGES ARE BROUGHT ABOUT BY THE CHANGES IN THE BUDGETARY PROCESS, E.G. RELATING TO COMPETENCES OF PARLIAMENT, GOVERNMENT, THE JUDICIARY AND INDEPENDENT ADVISORY BODIES?

In relation to decisions about financial assistance for Member States the Act on the Financing of the ESM contains rules for the distribution of competences (see question II.2). In addition, the Stability Council (*Stabilitätsrat*) has received more competences (see questions VII.5 and IX.4).

CHANGE OF TIME-LINE

II.4

HOW HAS THE TIME-LINE OF THE BUDGETARY CYCLE CHANGED AS A RESULT OF THE IMPLEMENTATION OF EURO-CRISIS LAW?

The budgetary circle has not changed as a result of the implementation of Euro-crisis law.

MISCELLANEOUS

II.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND CHANGES TO THE BUDGETARY PROCESS?

No other relevant information.

III CHANGES TO NATIONAL (CONSTITUTIONAL) LAW

NATURE NATIONAL INSTRUMENTS

III.1

WHAT IS THE CHARACTER OF THE LEGAL INSTRUMENTS ADOPTED AT NATIONAL LEVEL TO IMPLEMENT EURO-CRISIS LAW (CONSTITUTIONAL AMENDMENT, ORGANIC LAWS, ORDINARY LEGISLATION, ETC)?

Euro-Crisis Law has been implemented on the level of ordinary German legislation. There had been no amendments of the Constitution due to Euro-Crisis measures.

CONSTITUTIONAL AMENDMENT

III.2

HAVE THERE BEEN ANY CONSTITUTIONAL AMENDMENTS IN RESPONSE TO THE EURO-CRISIS OR RELATED TO EURO-CRISIS LAW? OR HAVE ANY AMENDMENTS BEEN PROPOSED?

There have not been amendments of the German Constitution because of Euro-crisis measures. However, the decisions of the *Bundesverfassungsgericht* concerning the implementation of Euro-crisis measures have led to rules of constitutional level which were at least not explicitly written in the German Constitution. This is true for example for the term ‘overall budgetary responsibility’, which cannot be found in the *Grundgesetz*, or for the right to file a constitutional complaint against a German law implementing Euro-crisis law based on the right to vote for the German *Bundestag* (Art. 38 (1) sentence 1 GG). Nonetheless, there had been no amendments of the text of the German Constitution as a response to Euro-crisis measures.

CONSTITUTIONAL CONTEXT

III.3

IF NATIONAL CONSTITUTIONAL LAW ALREADY CONTAINED RELEVANT ELEMENTS, SUCH AS A BALANCED BUDGET RULE OR INDEPENDENT BUDGETARY COUNCILS, BEFORE THE CRISIS THAT ARE NOW PART OF EURO-CRISIS LAW, WHAT IS THE BACKGROUND OF THESE RULES?

Since 2009 the German Constitution contains rules which aim at reducing the public deficit. They are often called ‘debt brake’ and can be found in Art. 109 (3) and Art. 115 (2) GG. These rules were the result of a longer discussion about the increasing German deficit since the German reunification and the downgrade of the New Economy at the beginning of the years 2000s. The effects of the Euro crisis had no or a minor impact on these rules. Nonetheless, EU law in general had an important impact because the discussion around the violation of the Maastricht criteria by Germany in 2005 had been well remembered. However, the German rules on public spending do not completely correlate with the rules for limiting public spending on the European level (see questions IX.4 and IX.5). The most important facts about the German debt brake are as follows:

Art. 109 (3) GG lays down the principle that the yearly public deficit must be financed without credits. According to Art. 109 (3) sentence 5 GG the *Länder* cannot finance any of

their spending by credits. For the federal level, Art. 109 (3) sentence 4 GG provides that loans can be arranged up to an amount of 0.35 % of GDP. The Constitution also contains a clause about adaptations to economic circumstances and exceptions when these limits can be overstepped. The adaptation clause provides that when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically. Deviations of actual borrowing from the credit limits are to be recorded on a control account; debits exceeding the threshold of 1.5 percent in relation to the nominal gross domestic product are to be reduced in accordance with the economic cycle. Under exceptional circumstances, the rules of the debt brake do not have to be respected: Exceptions are natural catastrophes and unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity.

These rules did not apply immediately from their adoption. There is a norm which sets a transition period. According to Art. 143d (1) GG, the debt brake entered into force for the budgetary year 2011, but the *Länder* can deviate from it until 31 December 2019 and the federal state until 31 December 2015.

PURPOSE CONSTITUTIONAL AMENDMENT

III.4

WHAT IS THE PURPOSE OF THE CONSTITUTIONAL AMENDMENT AND WHAT IS ITS POSITION IN THE CONSTITUTION?

Not applicable.

RELATIONSHIP WITH EU LAW

III.5

IS THE CONSTITUTIONAL AMENDMENT SEEN AS CHANGING THE RELATIONSHIP BETWEEN NATIONAL AND EUROPEAN CONSTITUTIONAL LAW?

Not applicable.

ORGANIC LAW

III.6

HAVE THERE BEEN CHANGES TO ORGANIC LAWS OR OTHER TYPES OF LEGISLATION THAT ARE OF A DIFFERENT NATURE OR LEVEL THAN ORDINARY LEGISLATION, IN RELATION TO EURO-CRISIS LAW OR THE BUDGETARY PROCESS?

No.

CONSTITUTIONAL AMENDMENT AND ORDINARY LAW

III.7

IF ORDINARY LEGISLATION WAS ADOPTED IN CONJUNCTION WITH A CONSTITUTIONAL AMENDMENT, WHAT IS THE RELATIONSHIP BETWEEN THE TWO?

Not applicable.

PERCEPTION SOURCE OF LEGAL CHANGE

III.8

IN THE PUBLIC AND POLITICAL DISCUSSIONS ON THE ADOPTION OF ORDINARY LEGISLATION, WHAT WAS THE PERCEPTION ON THE APPROPRIATE LEGAL FRAMEWORK? WAS THE ORDINARY LEGISLATION SEEN AS IMPLEMENTING NATIONAL CONSTITUTIONAL LAW, OR EURO-CRISIS LAW?

There hadn't been a major discussion whether ordinary legislation was the appropriate legal framework. The discussion rather focused on the question whether the implementation of a European legal act concerns provisions of the German Constitution or even infringes the German Constitution. Legal discussions examined Article 23 GG and its scope of application, in particular in relation to the limits which Article 23 (1) sentence 3 GG in conjunction with Article 79 (3) GG defines for the implementation of EU law (see question IX.3).

MISCELLANEOUS

III.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND TO CHANGES TO NATIONAL (CONSTITUTIONAL) LAW?

No other information.

IV EARLY EMERGENCY FUNDING

Prior to 2010, loan assistance to States was made primarily via bilateral agreements (to Latvia, Hungary, Romania, 1st round of Greek loan assistance).

The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) are two temporary emergency funds, both resulting from the turbulent political weekend of 7-9 May 2010. On May 9, a Decision of the Representatives of the Governments of the Euro Area Member States was adopted expressing agreement on both funds.

The EFSM is based on a 'Council regulation establishing a European financial stabilisation mechanism' of May 11, 2010 adopted on the basis of article 122(2) TFEU and therefore binding on all 27 member states of the EU.

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF>)

The EFSF is a special purpose vehicle created under Luxembourgish private law by the 17 member states of the Eurozone. The EFSF Framework Agreement was signed on June 7, 2010. On June 24, 2011, the Heads of State or Government of the Eurozone agreed to increase the EFSF's scope of activity and increase its guarantee commitments.

(http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf

and

http://www.efsf.europa.eu/attachments/faq_en.pdf)

NEGOTIATIONS

IV.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE NEGOTIATION OF THE EFSF AND THE EFSM, IN PARTICULAR IN RELATION TO (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

No difficulties known.

ENTRY INTO FORCE

IV.2

ARTICLE 1(1) EFSF FRAMEWORK AGREEMENT PROVIDES THAT IT WILL ENTER INTO FORCE IF SUFFICIENT EUROZONE MEMBER STATES HAVE CONCLUDED ALL PROCEDURES NECESSARY UNDER THEIR RESPECTIVE NATIONAL LAWS TO ENSURE THAT THEIR OBLIGATIONS SHALL COME INTO IMMEDIATE FORCE AND EFFECT AND PROVIDED WRITTEN CONFIRMATION OF THIS. WHAT DOES THIS PROCEDURE LOOK LIKE IN GERMANY AND IN WHAT WAY DOES IT INVOLVE PARLIAMENT?

The German *Bundestag* has to consent to the issuance of new financial commitments. According to Article 115 (1) GG, a federal law has to be adopted if Germany decides to take over borrowing obligations. The provision requires the authorization by a federal law for "the borrowing of funds and the assumption of surety obligations, guarantees, or other commitments that may lead to expenditures in future fiscal years".

This is why Article 115 (1) GG formed the legal basis upon which the Act on the Assumption of Guarantees within the Framework of a European Stabilisation Mechanism (StabMechG)¹

¹ See the consolidated version:

http://www.bundestag.de/blob/192554/08516a1e200e1e75a44ba3e724a8487b/stabmechg_en_2012_consolidated-data.pdf

was adopted by the German legislator on 22 May 2010.² The StabMechG authorized the Federal Ministry of Finance to issue guarantees up to the amount of Euro 123 billion with a possible extension of 20%.

The StabMechG was adopted via the usual procedure for the adoption of federal laws in Germany. However, the procedure only lasted 11 days which is very fast in comparison to other federal laws. The draft law was introduced in the legislative procedure by the governing coalition of the parliamentary groups of Christian Democrats (CDU/CSU) and Liberals (FDP) on 11 May 2010.³ After the Budget Committee of the *Bundestag* had proposed some modifications to the draft law on 19 May 2010, the *Bundestag* adopted the modified version of the law on 21 May 2010 with 319 Yes votes, 73 No-Votes and 195 abstentions in a ballot by name.⁴ The majority of MPs of the then governmental parties Christian Democrats (CDU/CSU) and Liberals (FDP) voted in favour of the law. However, there were four Christian Democrats and two Liberals who voted against the law as well as the complete parliamentary group of Left (Die Linke). The Social Democrats (SPD), the Greens (Bündnis 90/Die Grünen), three Christian Democrats and one Liberal abstained. The same day, the *Bundesrat* gave its consent to the StabMechG.⁵ On 22 May 2010, the law was signed by the Federal President and entered into force via publication in the Federal Law Gazette.

The StabMechG was amended twice. The first modification, which entered into force on 9 October 2011, raised the guarantee sum from Euro 123 billion to Euro 211 billion and adapted the German law to the modifications of the EFSF-framework treaty.⁶ The parliamentary voting by name in the *Bundestag* on 29 September 2011 led to the following result: 523 Yes-votes (governing coalition of Christian Democrats (CDU/CSU) and Liberals (FDP); Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) from the opposition), 85 No-votes (the parliamentary group of the Left (Die Linke), one Social Democrat and one Green MP – all from the opposition, 10 Christian Democrats and three Liberals from the governing coalition) and 3 abstentions (one Social Democrat, one Christian Democrat and one Liberal).⁷ The second amendment, which was published in the Federal Law gazette on 23 June 2012 entered into force on 1 June 2012, strengthened the participation rights of the parliament.⁸ The amendment was supported by all parliamentary groups, except the Left (Die Linke) forming part of the opposition.⁹

² See Deutscher Bundestag. Gesetzesentwurf der Fraktionen der CDU/CSU und FDP. Entwurf eines Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus. Drucksache 17/1685, p.4

³ Bundestag, printed matter No. 17/1685, <http://dipbt.bundestag.de/dip21/btd/17/016/1701685.pdf>

⁴ Bundestag, plenary records No. 17/44, 21 May 2010, p. 4443-4445, <http://dip21.bundestag.de/dip21/btp/17/17044.pdf>.

⁵ Bundesrat, printed matter No. 298/10 and plenary records No. 870, 21 May 2010, http://www.bundesrat.de/SharedDocs/downloads/DE/plenarprotokolle/2010/Plenarprotokoll-870.pdf?__blob=publicationFile&v=3

⁶ German Federal Law Gazette 2011, part I, No. 51, p. 1992, http://www.bgbl.de/xaver/bgbl/stArticlexav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl111s1992.pdf

⁷ Bundestag, plenary records No. 17/130, 29 September 2011, p. 15236-15239, <http://dipbt.bundestag.de/dip21/btp/17/17130.pdf#P.15204>

⁸ German Federal Law Gazette 2012, part I, No. 23, p. 1166, http://www.bgbl.de/xaver/bgbl/stArticlexav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl112s1166.pdf

⁹ Bundestag, stenographi report of the 176th session, 27 April 2012, p. 20934.

GUARANTEES

IV.3

MEMBER STATES ARE OBLIGED TO ISSUE GUARANTEES UNDER THE EFSF. WHAT PROCEDURE WAS USED FOR THIS IN GERMANY? WHAT DEBATES HAVE ARISEN DURING THIS PROCEDURE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE GUARANTEES FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

The procedure is laid down in the StabMechG. According to this law, the Federal Ministry of Finance is authorized to issue guarantees up to an amount of Euro 211 billion for financial assistance programmes which the European Financial Stability Facility carries out to implement the emergency measures to the benefit of a euro-area Member State. Such guarantees can only be issued if it is indispensable to safeguard the stability of the euro area as a whole. In addition, there must be a common agreement by the euro-area Member States (excluding the Member State asking for financial support), the European Central Bank (ECB) and – where possible – the International Monetary Fund (IMF). Emergency measures can only be approved if the respective Member State agrees to strict conditions in the context of an economic and fiscal policy programme.

The StabMechG contains a further norm which binds the German representative in the EFSF board to a decision of the German *Bundestag* if the EFSF-decision affects the overall budgetary responsibility of the German *Bundestag*. The German representative is obliged to vote against an EFSF-decision as long as there is no other parliamentary authorization. The overall budgetary responsibility shall be deemed to be affected in particular

1. in the event of the conclusion of an agreement on an emergency measure from the European Financial Stability Facility at the request of a euro-area Member State,
2. in the event of a significant amendment to an agreement on an emergency measure, an amendment to its instruments and terms, and in the event of an amendment that has an impact on the amount of the guarantee facility,
3. in the event of amendments to the Framework Agreement for the European Financial Stability Facility,
4. in the event of the transfer of rights and obligations from the European Financial Stability Facility to the European Stability Mechanism, and
5. in the event of the adoption of a significant amendment by the Federal Government to the guidelines of the Board of Directors of the European Financial Stability Facility.

If a decision of the *Bundestag* is not necessary, the Budget Committee must be informed and has the right to deliver opinions on the respective decisions. Furthermore, the StabMechG introduced a new sub-group of the Budget Committee (Stabilisation Board) which decides in all cases in which the Federal Government invokes the particular confidentiality of the matter. In addition, the Federal Government shall provide the German *Bundestag* with information on a comprehensive basis, as early as possible, continuously and, as a rule, in writing in matters pertaining to the StabMechG.

The *Bundestag* approved upon application of the Federal Government financial assistance in

the framework of the EFSF for Ireland on 1 December 2010 (approval by the Budget Committee), for Portugal on 12 May 2011, for the Hellenic Republic on 27 February 2012¹⁰, and for Spain on 19 July 2012¹¹. Furthermore, there had been authorisations of the *Bundestag* to extend the term for loans in the framework of the EFSF for Spain and Portugal¹² as well as for Ireland¹³ and the Hellenic Republic.¹⁴

As outlined below under question IV.4 the scope of the guarantees taken up by Germany was rarely debated in the legislative negotiations on the StabMechG in May, 2010. Mainly the possible extension of the guarantees of up to 20% was criticized. The opposition feared that such extension could become a ‘blank check’ for financial guarantees. Such fear mainly resulted from the fact that the legal details of the EFSF Framework Agreement were not known at the time when the *Bundestag* was supposed to vote on the StabMechG.¹⁵

This is why the parliamentary group The Greens (Bündnis 90/Die Grünen) asked the Federal Government after the entry into force of the StabMechG (the Greens abstained) whether it is intended to receive parliamentary approval for the EFSF-framework treaty. From their point of view, a parliamentary approval was required pursuant to Article 59 (2) GG because the framework treaty must be seen as a treaty regulating the political relations of the (German) Federal State. However, the Federal Government negated this question because they were of the opinion that the EFSF-framework treaty was a civil law agreement which does not fall within the category of Article 59 (2) GG-treaties.¹⁶

In the course of the first modification of the StabMechG which led to an increase of the guarantee sum, there were controversial discussions about the (in-)compatibility of the law with the German Constitution, in particular concerning participation rights of the parliament. The StabMechG transfers essential decision rights concerning EFSF-matters to a sub-group of the Budget Committee consisting of nine Members of Parliament in order to enable prompt decision in emergency cases. The Social Democrats (SPD) argued that it is not compatible with the German Constitution to transfer such parliamentary rights to a group of nine Members of Parliament.¹⁷ The Left (Die Linke) entirely refused financial assistance measures such as provided for by the EFSF because these measures do not help financially suffering countries but increase social injustice.¹⁸

¹⁰ The voting result can be seen on <http://bundestag.de/bundestag/plenum/abstimmung/grafik?id=327>

¹¹ The voting result can be seen on

<http://bundestag.de/bundestag/plenum/abstimmung/grafik?id=124&url=/apps/na/na/fraktion.form&controller=fraktion>

¹² The voting result can be seen on

<http://bundestag.de/bundestag/plenum/abstimmung/grafik?id=219&url=/apps/na/na/fraktion.form&controller=fraktion>; a further extension for Portugal was approved, see

<http://bundestag.de/bundestag/plenum/abstimmung/grafik?id=222&url=/apps/na/na/fraktion.form&controller=fraktion>

¹³ The voting result can be seen on

<http://bundestag.de/bundestag/plenum/abstimmung/grafik?id=221&url=/apps/na/na/fraktion.form&controller=fraktion>

¹⁴ The voting result can be seen on <http://bundestag.de/bundestag/plenum/abstimmung/grafik?id=327>

¹⁵ See Deutscher Bundestag, Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p.4.

¹⁶ Bundestag, printed matter No. 17/2569, p. 2 et seq., <http://dipbt.bundestag.de/dip21/btd/17/025/1702569.pdf>

¹⁷ Bundestag, printed matter No. 17/7130, p. 5, <http://dipbt.bundestag.de/dip21/btd/17/071/1707130.pdf>

¹⁸ Bundestag, printed matter No. 17/7130, p. 6, <http://dipbt.bundestag.de/dip21/btd/17/071/1707130.pdf>

In the plenary debate on the first amendment of the StabMechG the extension of the guarantee sum up to Euro 211 billion was mainly criticized by The Left (Die Linke). Its head of the parliamentary group, Gregor Gysi, asked the Federal Government to promise that the guarantees issued by Germany would not be adopted at the cost of German pensioners, employees and small businesses.

The Greens (Bündnis 90/Die Grünen) criticized the “salami politics” of the Federal Government with regard to the necessity of financial guarantees. One of its MPs, Jürgen Trittin, accused the Federal Government of regularly defining financial red lines only to overstepping them shortly afterwards.¹⁹ Gerhard Schick, another MP from the Greens, referred to rumors speculating that the lending capacity of the EFSF will be enlarged above the amount of Euro 750 billion and demanded the Federal Government to clarify if there is any validity behind such rumors.²⁰

The most controversial debate about the enlargement of the EFSF concerned the participation rights of the *Bundestag* in EFSF decisions. For a detailed summary of the debate and its outcome see below under question IV.4, under II.2a, question IV.4, under III, 4 and question IV.5.

ACTIVATION PROBLEMS

IV.4

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER DURING THE NATIONAL PROCEDURES RELATED TO THE ENTRY INTO FORCE OF THE EFSF FRAMEWORK AGREEMENT AND/OR THE ISSUANCE AND INCREASE OF GUARANTEES?

I. General Facts and Modus of Examination

The subsequent analysis focuses on the controversies that arose in the German *Bundestag* mainly with regard to the adoption of the European Financial Stability Facility (EFSF). The other measure mentioned above, the European Financial Stabilisation Mechanism (EFSM), was hardly discussed in the *Bundestag* as it was based on a Council Regulation²¹ and, therefore, did not need the *Bundestag*'s formal approval. The EFSF, on the other hand, had to be implemented by the *Bundestag* through the means of a federal law. Nevertheless, the arguments for and against the EFSF and the EFSM are inextricably linked and were often voiced conjointly in the *Bundestag* debate.

Before outlining the analytical sources applied for the assessment of the negotiations about the EFSF, the main features of the legislative process in Germany will be summarized.

The *Bundestag* is the most important institution of the legislative process in Germany on the

¹⁹ See Deutscher Bundestag. Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, Online available at <http://dipbt.bundestag.de/dip21/btp/17/17044.pdf#P.4412,15227> A.

²⁰ See Deutscher Bundestag. Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, 15219 D.

²¹ Council Regulations automatically take effect in the member states. Council Regulation No 407/2010 of May, 11, 2010.

federal level as it decides (mostly together with the *Bundesrat* which represents the *Länder*) on all federal laws. Members and parliamentary groups of the *Bundestag* are able to introduce and revise new pieces of legislation as bills (also known as the ‘right of initiative’). The *Bundesrat* and the Federal Government are also entitled to introduce new legislative proposals. Overall, 2/3 of the bills introduced stem from the Federal Government. Nevertheless, it is the *Bundestag* where these bills are debated, modified, and voted on through a complex legislative procedure.²²

Usually a bill is presented and debated in the first plenary session of the *Bundestag* and then referred to the parliamentary committees (where expert hearings take place and bills are revised and modified). Further, in accordance with Rule 62 of the Rules of Procedure of the *Bundestag*, the Lead Committee recommends to the *Bundestag* a definite decision on the bill (the acceptance of the bill or the addition of amendments). Such decision is formally submitted to the *Bundestag* in a so-called recommendation („Beschlussempfehlung“) together with a report („Bericht“), the latter of which specifies the deliberations of the committee in more detail. In the end, the committee’s recommendation is debated in the second plenary of the *Bundestag* session and then usually voted upon in the third plenary session.²³

In addition, also the *Bundesrat* participates in the legislative procedure and depending on the nature of the bill and the majority structures in the *Bundesrat*, the bill may even be rejected. If *Bundestag* and *Bundesrat* have consented to a bill, it enters into force once it is signed by the Federal President and published in the German Law Gazette (“*Bundesgesetzblatt*”).²⁴

In the subsequent assessment of the legislative debate on the EFSF, two main sources of the legislative process will be drawn on: First, the plenary sessions will be analyzed, which are mainly used by members of the *Bundestag* to convey political standpoints to the public and the media (all debates can be found in the so-called plenary protocols, “*Plenarprotokoll*”).²⁵ Second, the recommendations and reports of the respective Lead Committee will serve as a basis for the assessment.²⁶ The reports are especially interesting as they contain a detailed summary of the positions of all parliamentary groups on the respective bill.

The *Bundestag* adopted three laws with regard to the EFSF:

First, on 22 May 2010 the ‘Law for the Acquisition of Guarantees within the Framework of a European Stabilization Mechanism’²⁷ (*StabMechG*) was adopted, which authorized the

²² See Deutscher Bundestag, ‘Initiation of Legislation. Online available at: http://www.bundestag.de/htdocs_e/bundestag/function/legislation/legislat/02initleg.html.

²³ See Deutscher Bundestag, ‘The legislation of the Federation’. Online available at: http://www.bundestag.de/htdocs_e/bundestag/function/legislation/legislat/index.html.

²⁴ See Deutscher Bundestag, ‘The legislation of the Federation’. Online available at: http://www.bundestag.de/htdocs_e/bundestag/function/legislation/legislat/index.html.

²⁵ See Deutscher Bundestag, ‘The first reading’. Online available at: http://www.bundestag.de/htdocs_e/bundestag/function/legislation/legislat/07firstrdg.html.

²⁶ See Deutscher Bundestag, ‘The committee stage’. Online available at: http://www.bundestag.de/htdocs_e/bundestag/function/legislation/legislat/08comstage.html.

²⁷ The German title of the law is: ‘Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilitätsmechanismus’

issuance of EFSF guarantees (see question IV.3). It was discussed together with the European Financial Stabilization Mechanism (EFSM), as outlined below.

Second, on 14 October 2011 the financial capabilities of the EFSF were extended through revising the StabMechG.²⁸

Third, on 23 May 2012 the parliamentary rights regarding EFSF-measures were strengthened via a second amendment of the StabMechG.

Below, the debates on these laws will be presented separately, as the content and scope of the controversies differ notably.

II. Parliamentary negotiations on the EFSM and the StabMechG in May 2010

1. The Position of the Government

On 19 May 2010, Chancellor Angela Merkel held a Federal Government Declaration (“Regierungserklärung”) to the *Bundestag*. Those declarations are usually made during the election period, if policy-program corrections are inevitable, if issues of high public interest are at stake, or if important decisions have been taken on an international level.²⁹ Merkel explained her position with regard to the EFSM and the EFSF that had been initiated in several EU and Eurozone meetings during the weekend of 7-9 May 2010.

Merkel used drastic words in the Government Declaration in order to persuade the members of the *Bundestag* on the importance and necessity of the rescue packages.³⁰ By and large, two main arguments can be identified in Merkel’s Government Declaration that have been repeatedly used by the Federal Government throughout the financial crises to justify EU rescue measures.

First, Merkel linked the survival of the euro to the survival of the European project. She stressed that rescue measures are not only necessary to stabilize the Eurozone. To a larger degree, it is about “the preservation and probation of the European idea”³¹. According to Merkel, the Eurozone is a ‘community of fate’ and “if the Euro fails, Europe fails”.³²

Second, Merkel promised to introduce stricter fiscal policy measures at the EU level as a ‘trade-off’ for the loan guarantees Germany had taken over. Merkel pointed out that a “new culture of stability” is needed in the European Union in order to improve the fiscal policy coordination and mutual supervision amongst all EU member states.³³ Merkel further stated

²⁸ These are the dates when the respective German bills officially took effect.

²⁹ <http://www.bpb.de/nachschlagen/lexika/handwoerterbuch-politisches-system/40362/regierungserklaerung?p=all>

³⁰ Schuler Katharina, ‘Merkel will weiter anecken’, in: Zeit Online, 19.05.2010. Online available at: <http://www.zeit.de/politik/deutschland/2010-05/merkel-eu-regierungserklaerung>.

³¹ Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p.4126.

³² Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p.4126.

³³ Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p.4128.

“such rules should not depend on the weakest [Member State], but must be in conformity with the strongest”³⁴. She concluded that her Government would fight for economically necessary fiscal policy measures - even if they were not supported by all EU Member States.

In the report of the Budget Committee, the then governmental parliamentary coalition of Christian Democrats (CDU/CSU) and Liberals (FDP)³⁵ reinforced this position of the government through reference to the expert hearing that took place on 19 May.³⁶ The conclusion of the experts was that financial assistance was necessary in order not to threaten the solvency of Eurozone states and provoke a further escalation of the crises. The experts also strengthened the government’s assessment that the rescue measure would not violate the ‘no-bailout’ clause of Article 125 TFEU (for details on the latter issue see part II.2 of this answer).³⁷

2. The Debate

Not many MPs opposed to the general idea behind the financial measures presented by Merkel. Only the parliamentary group The Left (Die Linke) voiced strong doubts (see below).

Other parliamentary groups in the *Bundestag* (Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen)) agreed with the necessity of a financial rescue package. The parliamentary leader of the Social Democrats, Frank-Walter Steinmeier, even said: “Let us be true: the decisions taken on May 8th and 9th - which were far-reaching decisions to save the euro - were correct.”³⁸ According to the Greens “the rescue fund to support the euro is in its intention the right signal of the European Union against financial speculations.”³⁹

Overall, two major topics were debated: first the lack of involvement of the *Bundestag* in the elaboration of the EFSM/EFSF and second Merkel’s wavering position regarding the idea of a Financial Transaction Tax (FTT). The parliamentary group The Left from the opposition also heavily criticized the austerity measures imposed on EU Member States in return for receiving loans.

³⁴ Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p.4128.

³⁵ In this report, the German description of the political parties in the Bundestag will be used. The acronyms stand for the subsequent meaning. CDU (Christian Democratic Union); CSU (Christian Social Union); SPD (Social Democratic Party of Germany); FDP (Free Democratic Party), DIE LINKE (The Left Party), BÜNDNIS 90/THE GREENS (Alliance 90/the Greens).

³⁶ See Deutscher Bundestag, Haushaltsausschuss, Protokoll Nr. 17/21, 21. Sitzung, 19.Mai 2010. The expert hearing comprised people from academia, the banking sector and think tanks. The following people were present: Dr. Heiner Flassbeck (UNCTAD Director of the Division on Globalization and development Strategies), Prof. Dr. Clemens Fuest (Said Business School, Oxford University), Prof. Dr. Ulrich Häde (Europa-University Viadrina Frankfurt (Oder)), Jochen Sanio (President Bundesanstalt für Finanzdienstleistungsaufsicht), Dr. Daniela Schwarzer (Leiterin der Forschungsgruppe EU-Integration, SWP), Prof. Dr. Axel A. Weber (Präsident der Deutschen Bundesbank).

³⁷ See Deutscher Bundestag, Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p.3; see also Deutscher Bundestag, Haushaltsausschuss, Protokoll Nr. 17/21, 21. Sitzung, 19.Mai 2010, pp.9-10.

³⁸ See Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p.4133.

³⁹ Deutscher Bundestag, Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p.5.

a. The Lack of Involvement of the Bundestag

First, all opposition parties (Social Democrats, the Greens and the Left) criticized the information and transparency policy of the Merkel government before, during and after the Eurozone meetings on the weekend of 7-9 May 2010.

In particular, the Greens and the Left accused Merkel of having violated Article 23 (3) GG according to which the Federal Government is obliged to inform the *Bundestag* prior to the adoption of legislative acts in European matters and consider the position of the parliament in the negotiations on the European level.⁴⁰ The allegation of having violated the German Basic Law is especially important because it became subject to several cases brought to the German Federal Constitutional Court (FCC) (see question IV.5).

The Social Democrats did not overtly accuse the Federal Government of having breached the German Constitution but criticized that Merkel had not convincingly explained why the European Council decided so rapidly about the rescue measures. Merkel had claimed that the speedy procedure was necessary due to the turmoil of the markets. However, in the view of the Social Democrats, Merkel had failed to deliver evidence to proof this.⁴¹

Further, all three opposition parties criticized the fact that the *Bundestag* was supposed to vote on the StabMechG at a point in time when the legal details of the EFSF Framework Agreement were not yet known. The background to this criticism was that the parliamentarians knew about the financial scope of the EFSF but had not seen the legal provisions of the EFSF agreement in detail. What worried the parliamentarians most was the fact that the extension of 20 % of the German guarantee sum could become a ‘blank check’.⁴² The parliamentary leader of the Greens, Jürgen Trittin, claimed that it is an “affront towards the parliament” that Merkel expects the *Bundestag* to vote on a rescue package of which the details are unknown.⁴³

In order to attenuate the opposition’s criticism with regard to the involvement of the *Bundestag*, the then government coalition of Christian Democrats (CDU/CSU) and Liberals (FDP) together with the Greens introduced an amendment to the StabMechG (§ 1 (4) and (5)) after the first reading in plenary at the stage of the Budget Committee discussion.⁴⁴ The amendment had two main results: First, the Government assures to submit missing legal details of the EFSF to the Budget Committee before the final issuance of guarantees. Second,

⁴⁰ See for instance Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p. 5-6.

⁴¹ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p. 4.

⁴² See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p. 4.

⁴³ See Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p. 4146.

⁴⁴ Except the party DIE LINKEN, the amendment was agreed upon by all parliamentary groups in the Budget Committee (including BÜNDNIS 90/DIE GRÜNEB and the SPD). However, the whole bill with the connected amendments was only recommended to the Bundestag with the votes of CDU/CSU and FDP: BÜNDNIS 90/DIE GRÜNEN and SPD abstained in the recommendation to the Bundestag. For details of this voting procedures see Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p. 6.

the Federal Government commits itself to make efforts in order to reach consensus with the Budget Committee before the issuance of new guarantees. Only in urgent situations, guarantees can be issued without prior consent of the Budget Committee, however the Federal Government has to inform the Committee afterwards without delay.

The amendments are – amongst others – relevant for cases in which the EFSF Board of Directors has to give its approval to loan requests of Eurozone states. Through the StabMechG, the *Bundestag* authorized the Federal Government, and thus by extension also the German EFSF representative, to issue loan guarantees up to the amount of Euro 123 billion. However, this does not mean that the Federal Government and its representatives in the EFSF could freely decide about the German guarantee sum. It is always necessary that the Federal Government makes efforts to reach consensus with the Budget Committee before the issuance of new guarantees (see also question IV.3). The wording of this obligation was however very weak and corrected in the *Bundesverfassungsgericht's* judgment on 7 September 2011.⁴⁵ (see also question IV.5)

Eventually and despite the government's endeavors to attenuate the opposition's criticism through the integration of the amendments, the StabMechG was not supported by the oppositional parliamentary groups. Social Democrats and the Greens abstained, The Left opposed to the bill (for voting details see under paragraph 4).

b. Regulation of Financial Markets

Another issue that was repeatedly criticized by the opposition was the fact that the Federal Government did not take a clear position on how to restrict threats arising from financial markets. The opposition pointed out that they perceive the unregulated financial markets as a major source of the crisis. The parliamentary leader of the Greens, Jürgen Trittin, criticized the government for not having a steady position with respect to a FTT.⁴⁶ The parliamentary leader of the Social Democrats, Frank-Walter Steinmeier, criticized Chancellor Merkel for her wavering position regarding a FTT.⁴⁷

In the report of the Budget Committee, the Social Democrats argued that progress in the fight against the financial crisis can only be made if the financial sector will be involved and held accountable. In the end, they even tied their consent to the StabMechG to a (written) promise of the Federal Government to introduce adequate regulatory measures of financial markets and introduce a financial transaction tax (at the G20 level or if that's not possible at the EU level).⁴⁸ The Government refused to submit such a written promise (see under paragraph 4 below).

⁴⁵ See Kranen, Dirk Heiner/Löhr, Sebastian, 2011: *Beteiligungsrechte des Bundestages und des Bundesrates bei Maßnahmen der EFSF*, in: *Wirtschaftsdienst* 11, p. 759.

⁴⁶ See Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p. 4145.

⁴⁷ See Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19.Mai 2010, p. 4131.

⁴⁸ See Deutscher Bundestag, Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 - Drucksache 17/1741, p.5, See also Deutscher Bundestag, Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, pp. 4416 C.

The Left criticized the Government's approach towards the FTT and laid out a specific proposal on how to best regulate the financial markets in the report of the Budget Committee. With regard to the rescue packages, they mainly opposed to EU austerity measures tied to the granting of loans.⁴⁹ Their parliamentary leader, Gesine Löttsch, thus requested an EU stimulus package, financed through 2 % of every Member State's GNP. She said that the draconic austerity measures introduced on the basis of Merkel's "neoliberal recipe" put economic recovery at risk and threaten social peace in Europe.⁵⁰

4. Voting Behavior in the Bundestag

The 17th German Bundestag consisted of 620 MPs in total. On 21 May 2010, the StabMechG was voted on. 587 parliamentarians casted their votes, of which 319 were in favour and 73 against the law. 195 parliamentarians abstained. The positive votes stemmed from the governing coalition, the negative votes were mainly casted by the The Left, however, there were also 5 no-votes from the governing coalition and 1 from the Social Democrats (SPD). Social Democrats and the Greens mainly abstained.⁵¹

The Social Democrats justified their abstention-vote with the fact that Merkel had not submitted a written promise to introduce a FTT.⁵² After all, this justification allowed the SPD to confirm its general consent with the StabMechG without voting in favour of it. The Greens argued that although they agree with the content of the StabMechG, they voted with abstention because the Federal Government had ignored the necessary procedures to involve and adequately inform the *Bundestag*.⁵³ The Left said that it would have voted for the bill if the government would have guaranteed to regulate financial markets and not force other EU states to raise taxes and decrease their social spending.⁵⁴

III. Parliamentary negotiations about the amendment of the StabMechG in October 2011

On 21 July 2011, European leaders convened in Brussels for an emergency summit due to the worsening of the financial crisis in the Eurozone. The aim was to address the three major challenges of the crisis, namely debt solvency, contagion, and growth. In the end, two major decisions were taken. First, a new rescue package was adopted for Greece up to the amount of Euro 109 billion. Second, the political leaders agreed to enlarge the lending capacity of the EFSF from Euro 440 billion to Euro 780 billion. Overall, the enlargement of the EFSF meant that Germany had to increase its loan guarantees from Euro 123 billion to Euro 211 billion.

The first plenary debate on the EFSF took place on 8 September 2011, which consisted of two major elements: First, the enlargement of the EFSF was discussed on the basis of the bill

⁴⁹ See Deutscher Bundestag, Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU und FDP – Drucksache 17/1685 -. Drucksache 17/1741, p. 5.

⁵⁰ See Deutscher Bundestag, Plenarprotokoll 17/42, 42. Sitzung, 19. Mai 2010, p. 4142.

⁵¹ See Deutscher Bundestag, Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, pp. 4443-4445.

⁵² See Deutscher Bundestag, Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, pp. 4416D-4417A.

⁵³ See Deutscher Bundestag, Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, p. 4423B.

⁵⁴ See Deutscher Bundestag, Plenarprotokoll 17/44, 44. Sitzung, 21. Mai 2010, p. 4422C.

called the ‘Law Amending the Law for the Acquisition of Guarantees within the Framework of a European Stabilization Mechanism’. Second, the strengthening of the Bundestag’s participation rights was discussed based on a resolution by the parliamentary groups of Christian Democrats (CDU/CSU) and Liberals (FDP), called ‘Securitization and Strengthening of the Parliamentary Rights with regard to further European Stabilization Measures’.⁵⁵ During the committee proceedings, the resolution was integrated into the amendment proposal and voted on as one bill in the *Bundestag*.

1. The Position of the Government with regard to the Enlargement of the EFSF

In the first plenary session on 8 September 2011, Finance Minister Wolfgang Schäuble explained the government’s position: He justified the necessity of expanding the EFSF budget through referring to the danger of contagion in the Eurozone. Schäuble explained that “[w]e needed to create this mechanism so that the problems of a country cannot be a threat to the stability of the entire euro zone.”⁵⁶ The chairman of the parliamentary group of CDU/CSU, Volker Kauder, argued in favour of the EFSF by exposing its broader implications. “[I]t is not only about the expansion of the rescue fund [...], it is about our future. It’s about jobs. It’s about perspectives, especially for the younger generation”⁵⁷, he argued.

In line with the rhetoric and argument of the Merkel government, Schäuble demanded the Eurozone countries in need of loans to mobilize their own efforts for reform. When it comes to giving out credits to cash-strapped states such as Greece, it is about providing help for the matter of self-help. “[T]he causes of the problems need to be solved by the countries themselves”⁵⁸, he claimed. The chairman of the FDP, Rainer Brüderle, said “if the Greeks fail to stick to their commitments, there will be no money; that is the rule of the game.”⁵⁹

Schäuble further remarked that a change of the EU Treaties might be necessary in the long-term. It is very difficult to pacify the financial markets with the existing EU Treaties in a sustainable manner. The markets expect us to create a better institutional structure for our common currency. “[T]hat’s the direction we have to take.”⁶⁰

2. The Debate

The expansion of the EFSF was much more controversial than its establishment in May 2010. Criticism was voiced strongly by the opposition parties and even came from within the government coalition.

In fact, until shortly before the voting, it was not clear if Merkel would receive the so-called

⁵⁵ The German title of this resolution is: ‚Parlamentsrechte im Rahmen zukünftiger europäischer Stabilisierungsmaßnahmen sichern und stärken’.

⁵⁶ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011. Online available at <http://dipbt.bundestag.de/dip21/btp/17/17124.pdf#P.14551>, 14552 B.

⁵⁷ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 15205 B.

⁵⁸ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 14552 B.

⁵⁹ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 14562 C.

⁶⁰ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 14554 C.

Chancellor majority (“Kanzlermehrheit”⁶¹). One of the most prominent critics of the expansion of the EFSF within the governing parties was the vice-chairman of the parliamentary group of the Christian Democrats (CDU/CSU), Wolfgang Bosbach.⁶² He criticized that the enlargement of the EFSF marks the transformation of the Monetary Union into a Debt Union, which is “not a way out of the crisis but rather a way into a crisis.”⁶³ According to him, the no-bail-out clause pursuant to Article 125 TFEU intends to ensure that over-indebtedness cannot be passed on to other Eurozone states.⁶⁴ Despite the opposition of some CDU-politicians, Merkel received the majority of votes in the *Bundestag* for the extension of the EFSF.⁶⁵

Even the opposition parties Social Democrats and the Greens voted in favour of the EFSF enlargement. However, this did not preclude them to engage in a furious debate. Three issues – that were only indirectly connected to the EFSF expansion - became central points of discussion in the debate: first the handling of the crisis by the government, second the government crossing ‘red lines’, and third Merkel’s position towards Eurobonds. These issues were mainly discussed in the plenary sessions. The issue of improving the *Bundestag*’s participation rights was mainly dealt with in the parliamentary committees.

a. The Course of Action in the Crisis by the Federal Government

Already in the first plenary session, Social Democrats (SPD) and the Greens (Bündnis 90/Die grünen) confirmed that they would vote in favour of the EFSF-expansion. The parliamentary leader of the Greens, Jürgen Trittin, said that it is a matter of solidarity to be in favour of the enlargement of the EFSF. The former Finance Minister and MP Peer Steinbrück (Social Democrats) claimed that the enlargement of the EFSF is the “right step”⁶⁶.

Nevertheless SPD-Chairman, Sigmar Gabriel, accused the Federal Government of having worsened the crisis via “short-sighted and populist slogans” with regard to Greece.⁶⁷ Peer Steinbrück said that Merkel misses “a guiding principle, a perspective, a strategy, including a plan B and C” for dealing with the crisis.⁶⁸ What is necessary is “a new narrative about Europe” which is not confined to the EU being an intergovernmental organization. Only then can it become clear why Germany has the responsibility to help stabilising the Euro currency.⁶⁹

⁶¹ A chancellor majority has been reached when a law can be adopted in the Bundestag solely with the votes of the governmental parties (in this case CDU/CSU and FDP) and without the votes of the opposition parties.

⁶² See <http://www.zeit.de/politik/deutschland/2011-09/bosbach-rueckzug-euro>.

⁶³ See <http://wobo.de/news/schuldenunion-waere-weg-in-die-krise>.

⁶⁴ See <http://wobo.de/news/schuldenunion-waere-weg-in-die-krise>.

⁶⁵ See <https://www.tagesschau.de/wirtschaft/efsf122.html>.

⁶⁶ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 15208D.

⁶⁷ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 14554 D.

⁶⁸ Deutscher Bundestag. Plenarprotokoll 17/130, 130. Sitzung, 29. September 2011. Online available at <http://dipbt.bundestag.de/dip21/btp/17/17130.pdf#P.15204>, 15207 D.

⁶⁹ Deutscher Bundestag. Plenarprotokoll 17/130, 130. Sitzung, 29. September 2011, 15207 D.

b. Crossing ‘Red Lines’

The Greens criticized the “salami politics” of the Federal Government. Their parliamentary leader Jürgen Trittin accused the Federal Government of regularly defining ‘red lines’ only to overstep them shortly afterwards. “First, it was said: no cent for Greece and then a rescue package for Greece was implemented. The next red line was: no adoption of a rescue package and then the EFSF was established. Now it is: no permanent bailout fund but soon the ESM will be created.”⁷⁰ Another MP of the Greens, Gerhard Schick, referred to rumors speculating that the lending capacity of the EFSF should even be enlarged to up to Euro 1 billion and demanded the Federal Government to clarify if there is any validity behind such rumors.⁷¹

c. Eurobonds

Although not directly linked with the debate about the EFSF, all opposition parties criticized Merkel for her position in relation to Eurobonds. Sigmar Gabriel (Social Democrats) said that the Federal Government’s argument of the Eurobonds being an illegal pooling of debt is not credible, as the government has asked the ECB to do the same through buying bonds of indebted countries up to the amount of Euro 120 billion.⁷² Jürgen Trittin (the Greens) spoke of the “European and monetary ghost-ride”⁷³ of the Federal Government. It is irresponsible to rant against Eurobonds although they have been introduced through the back door already, he said.⁷⁴ The parliamentary leader of the parliamentary group the Left (Die Linke), Gregor Gysi, called on the government to tell the truth about the introduction of Eurobonds.⁷⁵

3. Voting Behavior in the Bundestag

On 29 September 2011, the amendment bill was voted on in the *Bundestag*. 611 parliamentarians casted their votes, of which 523 were in favour and 85 against the bill. 3 parliamentarians abstained (one from the Christian Democrats (CDU/CSU), one from the Liberals (FDP) and another one from the Social Democrats (SPD)). The positive votes stemmed from the governing coalition (Christian Democrats and Liberals), the Social Democrats and the Greens. Interestingly 10 MPs from CDU/CSU, 3 MPs from the FDP and one MP from the SPD voted against the amendment bill.

4. Improving the Participation Rights of the Bundestag

The improvement of participation rights of the *Bundestag* will be explained and focused on in greater detail as it has been one of the most controversial and important issues in the German constitutional debate. Especially Germany’s Federal Constitutional Court (FCC) has ever since its Maastricht judgment in 1993 defined the legal grounds for a stronger role of the *Bundestag* in European matters. In the following, it will be explained how and why

⁷⁰ Deutscher Bundestag. Plenarprotokoll 17/130, 130.Sitzung, 29. September 2011, 15227 A.

⁷¹ Deutscher Bundestag. Plenarprotokoll 17/130, 130.Sitzung, 29. September 2011, 15219 D.

⁷² Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 14556 B.

⁷³ Deutscher Bundestag. Plenarprotokoll 17/130, 130.Sitzung, 29. September 2011, 15206.

⁷⁴ Deutscher Bundestag. Plenarprotokoll 17/124, 124. Sitzung, 8. September 2011, 14566 C.

⁷⁵ Deutscher Bundestag. Plenarprotokoll 17/130, 130.Sitzung, 29. September 2011, 15215 B.

participation rights of the *Bundestag* are improved by the amendment bill.

In the StabMechG, adopted on 22 May 2010, the Federal Government was only obliged to make efforts to reach consensus with the *Bundestag*'s Budget Committee before the issuance of new guarantees and could – in urgent situations – even issue them without prior consent of the *Bundestag* (for more details see paragraph II, 2a of this answer). In the public debate, the weak participation rights of the *Bundestag* were criticized, yet it was not until the enlargement of the EFSF that the public debate erupted.

The controversy started on 24 August 2011, when the German newspaper 'Handelsblatt' published an article reporting that Finance Minister Schäuble was striving for a regulation according to which the EFSF should be able to issue loan guarantees without prior consent of the *Bundestag*. The President of the *Bundestag*, Norbert Lammert, clarified in the same issue of 'Handelsblatt' that the *Bundestag* would not agree to such general authorization of guarantees. On 7 September 2011, the Federal Constitutional Court confirmed Lammert's position. According to the FCC, the *Bundestag*'s budget responsibility has to be protected, especially in times of increased international cooperation and European integration. Amongst others, the Court ruled that the budget autonomy of the *Bundestag* was not sufficiently protected, as the Federal Government was simply obliged to make efforts to reach an agreement with the Budget Committee (see question IV.5).

This is why, the coalition parties of Christian Democrats (CDU/CSU) and Liberals (FDP) introduced a resolution on strengthening the *Bundestag*'s participation rights, called 'Securitization and Strengthening of the Parliamentary Rights with regard to further European Stabilization Measures'. During the committee proceedings, the latter resolution was integrated into the amended StabMechG and consented to by all parliamentary groups (excluding the parliamentary group The Left (Die Linke)). Interestingly the matter of improving the *Bundestag*'s participation rights was mainly debated during the committee proceedings and not in plenary sessions.

In the following, the provisions on participation rights of the *Bundestag* will be explained in more detail.

First, § 3 StabMechG concerns EFSF measures that touch upon the budget responsibility of the *Bundestag*. It determines that the German representative to the EFSF can only consent to a decision in the EFSF Board of Directors if the *Bundestag* has previously consented to it. Four major fields of EFSF matters are identified that concern the budget responsibility of the *Bundestag*: the issuance of rescue measures for a Eurozone state, the modifications of an existing rescue measure, changes of the EFSF agreement, the transformation of the EFSF into the ESM.⁷⁶ § 3 (3) StabMechG specifies that if cases of particular urgency and confidentiality arise, a 'special body' will take over the participation rights of the *Bundestag*. Such a 'special body' is supposed to consist of nine members of the Budget Committee according to the

⁷⁶ See Law of October 13, 2011, Bundesgesetzblatt Teil I, 2011 Nr. 51, 13.10.2011, p. 1992. Online available at http://www.bgbl.de/Xaver/stArticlexav?startbk=Bundesanzeiger_BGBl#_Bundesanzeiger_BGBl_%2F%2F*%5B%40attr_id%3D'bgbl111s1992.pdf'%5D_1371479981676.

majority situation of the *Bundestag* (the so-called “Neuner-Gremium” (Committee of Nine)).⁷⁷

Second, § 4 StabMechG determines that all other EFSF measures that concern the *Bundestag* and that are not mentioned in § 3 (2) StabMechG have to be adopted in consent with the parliamentary Budget Committee. Such issues concern the amendment of EFSF Board guidelines or the use of other EFSF instruments, such as the purchase of bonds on the secondary market.

Third, § 5 StabMechG regulates how the Federal Government has to inform the *Bundestag* about new developments, e.g. by submitting relevant documents at the earliest possible time.⁷⁸

The most controversial part of the modified participation rights was the establishment of the Committee of Nine (“Neuner-Gremium”). During the committee proceedings, the Social Democrats (SPD) doubted that such a committee would be in conformity with the FCC judgment from 7 September 2011 and thus suggested a less powerful role of this sub-Committee – however without success. Nevertheless, the Social Democrats voted in favour of the amendments.⁷⁹

In the end, the first Committee of Nine (“Neuner-Gremium”) was elected on 26 October 2011 for the legislature, constituting of 2 MPs from the Christian Democrats (CDU/CSU), 2 MPs from the Liberals (FDP), 2 MPs from the Social Democrats (SPD), 1 MP from the Greens (Bündnis 90/Die Grünen) and 1 MP from the Left (Die Linke) respectively.⁸⁰ One day later, the German Federal Constitutional Court (FCC) banned at the request of two MPs the establishment of the Committee of Nine (“Neuner-Gremium”) by a provisional order – a measure which is only ordered in extraordinary cases by the FCC (see question IV.5).

IV. Parliamentary negotiations on the amendment of the StabMechG in May 2012

The second amendment of the StabMechG was necessary because of the judgment of the Federal Constitutional Court (FCC) from 28 February 2012 (see for more details on the judgment under question IV.5). In this decision, the FCC declared that the so called Committee of Nine (“Neunergremium”) – a parliamentary sub-Committee of the Budget Committee consisting of 9 MPs who decide about rapid emergency measures in the framework of the German participation in the EFSF – was not in line with the German Constitution.

The legislative proposal of this amendment bill was introduced by the parliamentary groups of Christian Democrats (CDU/CSU) and Liberals (FDP), which supported the government at that time, as well as by the Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen), which were in opposition at that time, aimed at limiting the competences of the Committee of

⁷⁷ See Law of October 13, 2011, Bundesgesetzblatt Teil I, 2011 Nr. 51, 13.10.2011, p. 1992.

⁷⁸ See Law of October 13, 2011, Bundesgesetzblatt Teil I, 2011 Nr. 51, 13.10.2011, p. 1992.

⁷⁹ See Law of October 13, 2011, Bundesgesetzblatt Teil I, 2011 Nr. 51, 13.10.2011, p. 1992.

⁸⁰ See Law of October 13, 2011, Bundesgesetzblatt Teil I, 2011 Nr. 51, 13.10.2011, p. 1992.

Nine and at creating rules which safeguard that the composition of the Committee represents the majority relations in the plenary.⁸¹

The amendments of the StabMechG led to more competences for the *Bundestag* in its plenary composition. According to the amendment, the Committee of Nine is still competent for decisions which are in need of a particular confidentiality which is in particular important for certain operations of the EFSF at the secondary market. It comprehends cases in which not only the content but the fact that a discussion and a vote about a certain measure take place must be kept confidential.⁸² This is, for example, the case when the EFSF intends to buy government securities at the secondary market.

In addition, electing the members of the Committee of Nine will be based on a voting system which requires a personal and secret procedure. Every member of the Committee of Nine will have a replacement and the composition of the Committee will respect the composition of the *Bundestag* regarding its majority relations and the political emphasis.

1. The discussion in the Committee and the Plenary Stage

In the debate at the Budget Committee, the Social Democrats (SPD) reminded its members that they had already emphasized in earlier legislative procedures regarding the StabMechG that the rules concerning the Committee of Nine were not in conformity with the German constitution.⁸³ In the framework of the discussion in plenary session about the amendments of the StabMechG on 27 April 2012, the Social Democrats highlighted it again.⁸⁴ They regretted that the government coalition had not been willing to discuss the constitutional concerns of the Social Democrats at that time. However, they appreciated that the government coalition changed their attitude after the judgment of the FCC and worked on an interparliamentary group proposal of the amendment. In addition, the Social Democrats emphasised that the amended law will contain a possibility to hear experts for difficult and highly complex political decisions.

The Greens (Bündnis 90/Die Grünen) supported the amendments as well but they criticized that the procedure was – again – dominated by too much rush.⁸⁵ Legislative proceedings such as those of the amendment of the StabMechG should take into account other legislative proposals such as the implementation of the ESM and the Fiscal Compact in order to have a more profound and coherent legal situation. The Greens proposed a further amendment of the StabMechG which aimed at strengthening the rights of parliamentary minority groups. However, this proposal was refused in the Budget Committee by the Christian Democrats and

⁸¹ See Deutscher Bundestag, printed matter No. 17/9145, 27 March 2012, p. 1, <http://dipbt.bundestag.de/dip21/btd/17/091/1709145.pdf>

⁸² See Deutscher Bundestag, printed matter No. 17/9145, 27 March 2012, p. 5, <http://dipbt.bundestag.de/dip21/btd/17/091/1709145.pdf>

⁸³ See Deutscher Bundestag, printed matter No. 17/9435, 25 April 2012, p. 5, <http://dipbt.bundestag.de/dip21/btd/17/094/1709435.pdf>

⁸⁴ See Deutscher Bundestag, plenary protocol 17/176, 27 April 2012, p. 20927, <http://dip21.bundestag.de/dip21/btp/17/17176.pdf>

⁸⁵ See Deutscher Bundestag, printed matter No. 17/9435, 25 April 2012, p. 6, <http://dipbt.bundestag.de/dip21/btd/17/094/1709435.pdf>

the Liberals (government parties). The Social Democrats (SPD) and The Left (Die Linke) as opposition parties abstained. The Greens highlighted their proposal in the plenary session.⁸⁶ One of the most prominent MPs from the Greens, Hans-Christian Ströbele, who voted against the StabMechG in earlier legislative proceedings, argued that he is not totally convinced by the amendments but it is an important step into the direction of more parliamentary participation which is why he supported them.⁸⁷

The only parliamentary group which opposed to the introduction of the Committee of Nine and which did not support this legislative amendment was the Left (Die Linke). They declared that the amendment improves the participation rights of the parliament but does not go far enough.⁸⁸ They did not see the practical and political necessity to have such a Committee at all. From their point of view, all decisions should be discussed in plenary sessions. There are already sufficient rules to take care of the confidentiality in plenary sessions. Otherwise, such decisions would become problematic under aspects of democratic theory – Steffen Bockhahn (The Left) argued in plenary session on 27 April 2012.⁸⁹ He criticized the Social Democrats and the Greens because they are responsible for the fact that the government will not have to convince all MPs from the Christian Democrats and the Liberals but will be able to send MPs to the Committee of Nine who will serve loyally for all government decisions.

2. Voting Results

The parliamentary groups of the Christian Democrats and the Liberals (government) as well as the Social Democrats and the Greens (opposition) voted in favour of the amendments on 27 April 2012. The Left voted against it.⁹⁰

CASE LAW

IV.5

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ABOUT THE EFSM OR EFSF IN GERMANY?

I. General Facts about the Federal Constitutional Court

The Federal Constitutional Court (*Bundesverfassungsgericht*), or briefly FCC, is the supreme guardian of the German Basic Law (“Grundgesetz”). Like any other constitutional court, it may not be active on its own but must be called upon. In the framework of Euro crisis measures, two types of proceedings were relevant: The constitutional complaint and the *Organstreit* proceeding.

⁸⁶ See Deutscher Bundestag, plenary protocol 17/176, 27 April 2012, p. 20931, <http://dip21.bundestag.de/dip21/btp/17/17176.pdf>

⁸⁷ See Deutscher Bundestag, plenary protocol 17/176, 27 April 2012, p. 20933-20934, <http://dip21.bundestag.de/dip21/btp/17/17176.pdf>

⁸⁸ See Deutscher Bundestag, printed matter No. 17/9435, 25 April 2012, p. 5, <http://dipbt.bundestag.de/dip21/btd/17/094/1709435.pdf>

⁸⁹ See Deutscher Bundestag, plenary protocol 17/176, 27 April 2012, p. 20930, <http://dip21.bundestag.de/dip21/btp/17/17176.pdf>

⁹⁰ See Deutscher Bundestag, plenary protocol 17/176, 27 April 2012, p. 20934, <http://dip21.bundestag.de/dip21/btp/17/17176.pdf>

The German constitution allows any individual that perceives its fundamental rights to have been violated by state action to submit a constitutional complaint (“Verfassungsbeschwerde”) to the FCC. Article 93 (1) no. 4a GG specifies that such constitutional complaints can be filed upon on the basis of a perceived violation of a fundamental right.⁹¹

The jurisdiction of the FCC can also be invoked if disputes between constitutional bodies, such as the Federal President, the Federal Government, the Bundestag, or the Bundesrat. In the former, also known as *Organstreit* proceeding („Organstreitverfahren“), the matter may concern political party law, electoral law or parliamentary law. This proceeding is pointed out in Article 93 (1) no. 1 GG. Further details about procedural requirements can be found in the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, or briefly BVerfGG) which concretises the constitutional provisions.

II. Judgments on the Greek Bailout and the EFSF

Since the beginning of the financial crisis in 2008, the *Bundesverfassungsgericht* had to decide in several cases about the conformity of various German laws implementing EU rescue measures with the German Constitution.

The first judgment from 7 September 2011, which concerned the Greek bailout and the EFSF rescue fund, came to the Court as a constitutional complaint by several economists, lawyers, and one politician from the Christian Social Union in Bavaria (CSU). The CSU politician was Peter Gauweiler whose name is also known from the OMT-judgment of the European Court of Justice in 2015.⁹² The *Bundesverfassungsgericht*'s decision from 7 September 2011 was the first leading euro-case and is especially important because the Court developed standards of review that set the grounds for subsequent euro-case rulings.⁹³

On 28 February 2012, the FCC judged on a dispute between organs of the state (*Organstreit* proceeding) concerning the lack of involvement of the *Bundestag* in the administration of the EFSF. In this matter, the FCC had already issued a temporary court order half a year before on 27 October 2011.

Throughout the below description of these FCC judgments, a pattern in FCC rulings on European Union matters will be identified. Ever since the Maastricht Case in 1993, the FCC has shown a high sensitivity towards EU integration. However, this support was mostly tied to the Court's repeated claim to strengthen the role of the German *Bundestag* in European matters as required by Article 23 (2) GG. This obligation was applied to financial obligations stemming from the European level.

⁹¹ According to Article 79, para. 3 it is inadmissible to change the fundamental rights laid out in Article 1-19 of the GG through an amendment of the GG (this is the so-called „Ewigkeitsklausel“).

⁹² Judgment from 16 June 2015, Case C-62/14, ECLI:EU:C:2015:400 – Gauweiler.

⁹³ See Schneider, Karsten, 2013: *Yes, but... One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, in: German Law Journal 14(1), p. 56. Also Von Ungern-Sternberg, 'Parliaments: Fig Leaf or Heartbeat of Democracy?', *European Constitutional Law Review* (2012) 204-322

III. FCC Judgment from 7 September 2011

1. Name of the Court

Bundesverfassungsgericht/German Federal Constitutional Court (FCC)

2. Parties

The three constitutional complaints stemmed from two groups of plaintiffs. The first group was comprised of Prof. Karl-Albrecht Schachtschneider, a constitutional law professor from the University of Erlangen (as authorized representative of the group), the financial experts Joachim Starbatty, Wilhelm Nölling und Wilhelm Hankel, and finally the former CEO of ThyssenKrupp Dieter Spethmann. This group of plaintiffs (except Dieter Spethmann) had already submitted a constitutional complaint to the FCC in 1998 directed against the introduction of the euro currency.⁹⁴ However this complaint had been rejected by the FCC because it declared it as obviously unfounded.⁹⁵

The second (main) plaintiff was Peter Gauweiler, a member of the *Bundestag* from the parliamentary group of the Christian Social Union (CSU), a conservative parliamentary group which supported the government at that time. In June 2010, Gauweiler had already submitted an urgent application to the FCC against the German participation in the EFSF.⁹⁶ It was yet rejected by the FCC with reference to the possible ramifications for the German public. According to the Court, even a temporary suspension of financial commitments could tremendously reduce the confidence of the markets and therewith lead to “serious economic disadvantages for the general public.”⁹⁷

3. Type of action/procedure

A constitutional complaint as laid down in Article 93 (1) no. 4a GG in conjunction with §§ 13 no. 8a, 90 et seq. Federal Constitutional Court Act (BVerfGG).

4. Admissibility & Arguments of the parties

In the judgment, the FCC dedicated more space to the review of admissibility than the review of substance. As the admissibility of the complaints was anything but self-evident and controversially discussed in the run-up to the FCC judgment, it will be pointed out in more detail below.

⁹⁴ See Frankfurter Allgemeine Zeitung, ‘*Bundesverfassungsgericht billigt EU-Rettungsschirm*’, 07.11.2011. Online available at: <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/beschwerde-zurueckgewiesen-bundesverfassungsgericht-billigt-eu-rettungsschirm-11133178.html>

⁹⁵ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1877/97, 2 BvR 50/98, 31. März 1998.

⁹⁶ See Süddeutsche Zeitung, ‘*Karlsruhe lehnt Eilantrag ab*’, 10.10.2010. Online available at: <http://www.sueddeutsche.de/politik/euro-rettungspaket-karlsruhe-lehnt-eilantrag-ab-1.957050>.

⁹⁷ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 1 BvR 1099/10, June, 6, 2010, para. 33.

Overall, the Court only regarded the complaints against the Act on Financial Stability within the European Union (WFStG) and the StabMechG as admissible to the extent that they claimed a violation of their right to vote for the *Bundestag* on the basis of Article 38 (1) and Article 20 (2) GG in conjunction with Article 79 (3) GG.⁹⁸ In the view of the FCC, also individuals could claim that their fundamental right to vote for the *Bundestag* as stated in Article 38 (1) GG is violated if a financial obligation (such as an EU rescue fund) would result in incalculable burdens for the German budget which would limit the *Bundestag's* political discretion factually. In their view, every German citizen can legally demand that the German parliament is consulted in questions which are important for the German democracy.

Apart from this constitutional complaint, the remaining claims of the plaintiffs were found to be inadmissible by the Federal Constitutional Court, as will be explained below.⁹⁹

a. Article 14 GG

One of the plaintiff's complaints was that the two German federal laws at stake, the WFStG¹⁰⁰, a federal law that granted the authorization to provide financial aid to Greece, and the StabMechG, violate the fundamental right to property (Article 14 (1) GG).¹⁰¹ The plaintiffs argued that the fundamental right to property "guarantees the 'citizen's fundamental right to price stability'"¹⁰² and ensures protection against state policy that prompts inflation. The EU rescue measures would trigger inflation and, therewith, diminish the value of (their) property.¹⁰³

The FCC declared this claim to be inadmissible. The Court did not decide whether the purchasing power of money is included in the area of protection of the fundamental right to property. However, the Court seems to have doubts about it, at least when there is no more nuanced clarification of the concept of property in regard to the purchasing power of money. The complaints could be rejected in the view of the Court because they did not substantially prove the inflationary effects and the impairment of the value of the euro as a result of the EU rescue measures. Furthermore, the FCC clarified that – in general – it is not its task to review effects on monetary stability caused by economic and financial policy measures.¹⁰⁴

⁹⁸ The plaintiffs had claimed several violations of Article 38 GG, yet the FCC only accepted the argument about the violation of the *Bundestag's* budgetary authority. The plaintiffs had, e.g., claimed that Article 38, para. 1 GG grants the right that every instance of European integration policy has to be specifically supported by the *Bundestag* and the *Bundesrat*; for more arguments see Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 33, 34, 43-51.

⁹⁹ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 93.

¹⁰⁰ In German the law is called: 'Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik'.

¹⁰¹ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 110.

¹⁰² Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 37.

¹⁰³ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 37, 54.

¹⁰⁴ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR

b. EU legal acts

The plaintiffs did not only direct their constitutional complaint against the two federal laws but also against several EU legislative acts.¹⁰⁵ In particular, the plaintiffs attacked Council Decision from 9 May 2010 to introduce the Euro Stabilization Mechanism, Council Regulation No. 407/2010 of 11 May 2010 to establish a European Financial Stabilization Mechanism, and the purchase of government bonds of Greece or other Eurozone Member States by the ECB. They claimed that these acts are “ultra vires”, contravene the principle of democracy and infringe on the plaintiffs right under Article 38 (1) GG because they infringe German sovereignty without sufficient democratic legitimation.¹⁰⁶ The FCC considered the challenge of these EU legislative acts to be inadmissible as they were not measures of a German institution.¹⁰⁷ The FCC’s power of legal review is limited to acts from German public institutions.

In a similar vein the FCC rejected the plaintiffs’ challenge against the alleged omission of the European Commission to pre-emptively use measures against the indebtedness of Eurozone states as inadmissible. The plaintiffs made the omitted action of the European Commission responsible for the financial crisis. According to the Court, the German Constitution does not establish a duty for the European Commission (or the Federal Government) to pre-emptively intervene in such cases.¹⁰⁸

c. Article 125 TFEU (‘no-bailout clause’)

Especially interesting is the way in which the Court handled the complaint concerning the violation of Article 125 TFEU. The plaintiffs alleged that the financial assistance for Greece as well as the EFSF rescue measure violate Article 125 (1) TFEU. According to this provision, EU Member States should not be liable for the financial commitments of other EU Member States.¹⁰⁹

The FCC encountered this claim in an obiter dictum referring to the parallel requirements resulting from the TFEU and the German Constitution by saying that the „provisions of the European treaties do not conflict with the understanding of the national budget autonomy as an essential competence [...] but instead they presuppose it.“ Regardless of that, the FCC

1099/10, September 7, 2011, para. 112.

¹⁰⁵ For an enumeration of the rest of the EU legislative decision that were part of the constitutional complaint see Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para.116.

¹⁰⁶ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para.114.

¹⁰⁷ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 116.

¹⁰⁸ For more details on the point see Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 117-118.

¹⁰⁹ According to one plaintiff this violation cannot be justified through reference to the state of emergency in Article 122.2 TFEU, as “the overindebtedness of Greece and other states is not an event comparable to a natural disaster.” Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 41, 40.

pointed out the importance of respecting the stability criteria for a sound budgetary management of Articles 123-126 and Article 136 TFEU. The Court stated that although „the interpretation of these provisions in detail is not essential [for this judgment], the acceptance of liability for decisions of other Member States with financial effects which overstretches the bases of legitimation of the association of sovereign states (“Staatenverbund”) – by direct or indirect communitarisation of state debts – is to be avoided.“¹¹⁰

5. Legally relevant factual situation

None.

6. Legal questions & Arguments of the parties

The plaintiffs claimed that their right to vote for the *Bundestag* under Article 38 (1) sentence 1 GG in conjunction with the principle of democracy (Article 20 GG) and the budget autonomy of the *Bundestag* to be violated by the two German federal laws.

With regard to the last argument, the plaintiffs claimed that Article 38 (1) sentence 1 GG grants every German citizen the right that the constitutional rights of the *Bundestag* are at least in essence safeguarded. The measure at stake, however, would disregard fundamental principles of the German Constitution, such as the principle of the social welfare state (Article 20 (1) GG) or the principles of the constitutional rules governing public finances and the therewith-connected borrowing limits (Article 115 GG).¹¹¹ Furthermore, the plaintiffs claimed that via the financial commitments for Member States of the Eurozone, Germany has abandoned its budgetary sovereignty. In particular, the budget autonomy of the *Bundestag*, which is the essential element of democratic parliamentarism (as stated in Article 110 (2) GG), is severely violated by the measures at stake.¹¹²

7. Answer by the Court to the legal questions and legal reasoning of the Court

In the review of substance, the *Bundesverfassungsgericht* decided that the constitutional complaints, which were admissible, are unfounded. The Court stated that the „Bundestag has, not eroded its right to decide on the budget in a constitutionally impermissible manner.“¹¹³

Although the Court rejected the constitutional complaints as unfounded, it developed important standards of review that set the ground for subsequent euro-case rulings.

a. The Budgetary Responsibility

¹¹⁰ Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 129.

¹¹¹ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 33.

¹¹² See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 36.

¹¹³ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 133.

The link between the *Bundestag*'s budgetary responsibility and the fundamental right to vote was one of the main innovations in German constitutional law following from this case.¹¹⁴ Its constitutional basis is laid down in Article 38 (1) sentence 1, Article 20 (1) and (2) in conjunction with Article 79 (3) GG.¹¹⁵

In plain terms, the argument goes as follows: The fundamental right to vote for the *Bundestag* is violated if the *Bundestag* loses or abandons its budgetary responsibility leading to a situation in which current or future compositions of the *Bundestag* do no longer have the possibility to make political decisions about the budget because the indebtedness of the German budget caused by a prior parliamentary decision does factually not allow for such decisions.¹¹⁶ Furthermore, the political latitude as safeguarded through the core identity of the German Constitution (Article 20 (1) and (2), Article 79 (3) GG) would be violated if the *Bundestag* does not remain „the master of its decisions.“¹¹⁷ Even in a system of intergovernmental administration such as in the EU the *Bundestag* must be able to keep control of substantial budgetary decisions.

b. The ‚Mechanism’ Argument

As a result of the *Bundestag*'s budgetary responsibility, the FCC further pointed out that the *Bundestag* „may not transfer its budgetary responsibility to other actors.“¹¹⁸ In particular, the *Bundestag* may not agree to any „mechanisms with financial effect“ which may result in erratic financial burdens with budget relevance without prior parliamentary consent.¹¹⁹

According to the FCC, a violation of the *Bundestag*'s budgetary responsibility would occur if the type and amount of levies imposed on German citizens were supranationalised and the *Bundestag* deprived of its right of disposal.¹²⁰ For this reason, the FCC determined that “no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate.“¹²¹ The FCC thereby established a constitutional threshold limiting the *Bundestag*'s capability to establish supranational financial mechanisms.

¹¹⁴ See Schneider, 2013: *Yes, but...One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, p.56.

¹¹⁵ The argument is understood as a protection of the right to vote (Article 38 (1) GG), including the preservation of the principle of democracy (Article 20 (1) and (2) GG) and guaranteed in Article 79 (3) GG as part of the unchangeable identity of the constitution.

¹¹⁶ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 121.

¹¹⁷ Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 127.

¹¹⁸ Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 125.

¹¹⁹ Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 125.

¹²⁰ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 127.

¹²¹ Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 128

The premise behind this 'mechanism' argument is the concept of electoral democracy, as outlined above: If a permanent mechanism is created under an international treaty that relinquishes the *Bundestag's* budgetary responsibility, the fundamental right to vote for the *Bundestag* would be violated. Also, the political latitude as safeguarded through the core identity of the constitution would be violated if the *Bundestag* does not remain „the master of its decisions.“¹²²

The constitutional premise about the violation of Article 38 (1) GG has been well known for years, as the Court has mainly used it to assess questions arising from the formal transfer of competences of the *Bundestag* to adopt the budget of the European Union. Yet, the 'mechanism' argument is new in the sense that it is now even applied to cases without the formal transfer of budgetary competences to the EU.

c. Emphasis on StabMechG

Despite the fact that the FCC concluded that none of the challenged federal laws relinquishes the *Bundestag's* budget autonomy, the Court corrected one provision of the StabMechG. The governing coalition of Christian Democrats (CDU/CSU) and Liberals (FDP) had modified the StabMechG bill in the Budget Committee in order to attenuate the opposition's criticism. The FCC criticized one of these amendments, as it merely obliges the Federal Government to make efforts to involve the parliamentary Budget Committee before issuing guarantees.¹²³

According to the Court, this provision would not safeguard the on-going influence of the *Bundestag* with regard to the issuance of new guarantees. Notably, such marginal participation rights would affect the *Bundestag's* budget autonomy “in a manner which would adversely affect the right to vote”¹²⁴. The FCC therefore claimed that „in order to avoid unconstitutionality”¹²⁵ this norm of the StabMechG has to be interpreted to the effect that the Federal Government is “obliged” (and does not only has to “make efforts”) to obtain the prior consent of the Budget Committee if new guarantees for the EFSF are issued.

8. Legal effects and & broader political implications of the judgment

The FCC rejected all three constitutional complaints as unfounded. Nevertheless, the Court determined that the Federal Government could only issue guarantees if they are approved by the Budget Committee of the *Bundestag* beforehand. As a result of the FCC ruling, the German parliament modified the participation rights of the *Bundestag*.

IV. FCC Preliminary Ruling from 27 October 2011

¹²² Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 127.

¹²³ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 141.

¹²⁴ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 141.

¹²⁵ See Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, September 7, 2011, para. 141.

1. Name of the Court

Bundesverfassungsgericht/German Federal Constitutional Court (FCC)

2. Parties

Two MPs from the parliamentary group of the Social Democrats were the plaintiffs. The German *Bundestag* was the respondent.

3. Type of action/procedure

Application to issue an interim order in the framework of an *Organstreit* proceeding. An interim order is a measure of the FCC to interrupt the exercise of the attacked rules until there is a decision on the merits. The FCC can issue such an order if this is absolutely necessary to prevent severe disadvantages or imminent violence or another important reason of the same severity. Factually, such an interim measure is only issued in exceptional cases.

4. Admissibility & Arguments of the parties

The FCC decided that it is not excluded that the plaintiffs are infringed in one of their constitutional rights laid down in Article 38 (1) sentence 2 GG. This is why the complaint is admissible. The main reasoning behind the application of this norm had been laid down in the judgment of the *Bundesverfassungsgericht* from 7 September 2011 to which the Court referred.

5. Legally relevant factual situation

The decision to issue an interim order by the FCC was supported by seven judges, one judge did not vote in favour of this order.

6. Legal questions & Arguments of the parties

The arguments of the plaintiffs are the same as in the main proceedings (see FCC judgment from 28 February 2012 below).

Regarding the issuance of an interim order by the FCC, the plaintiffs substantiated their claim with the fact that it would be factually impossible to undo an approval of the EFSF-Committee, while preventing the EFSF-Committee of making such a decision for a limited period of time would only re-establish the situation which had existed before the enactment of the StabMechG.

7. Answer by the Court to the legal questions and legal reasoning of the Court

In general, for an interim order the FCC balances the consequences of such an order with the

consequences which would arise if this order would not be issued. In the case of the EFSF-Committee the FCC decided that the constitutional rights of the MPs could be infringed irreversibly if the Court does not issue the interim order. If the EFSF-Committee should grant its approval to an EFSF-measure Germany would be bound to it by international public law which could not be repealed by a decision of the FCC in the main proceedings. Furthermore, the German *Bundestag* would not be incapable of action if the interim order would be issued because the Budget Committee could decide about EFSF-measures. This is why the Court issued the interim order.

8. Legal effects and & broader political implications of the judgment

None.

V. FCC Judgment from 28 February 2012

1. Name of the Court

Bundesverfassungsgericht/German Federal Constitutional Court (FCC)

2. Parties

Two MPs from the parliamentary group of the Social Democrats initiated the court proceedings between governmental bodies (*Organstreit* proceedings) against the *Bundestag*. The Federal Government joined the party German *Bundestag*.

3. Type of action/procedure

Organstreit proceedings. This procedure is the main proceedings of the interim proceedings from 27 October 2011.

4. Admissibility & Arguments of the parties

In the reasons for the decision, the FCC briefly stated that the complaints are admissible because the two plaintiffs can invoke their own rights as MPs of the *Bundestag* (Article 38 para. 1 sentence 2 GG). Two regulations of the StabMechG may infringe their rights: First, in case of a particular urgency or confidentiality the parliamentary responsibility for the budget is transferred to a special committee, consisting of nine MPs (§ 3 (3) StabMechG), so-called Committee of Nine. Second, the Federal Government only has to report to this special committee (§ 5 (7) StabMechG).

5. Legally relevant factual situation

None.

6. Legal questions & Arguments of the parties

The plaintiffs referred to their constitutional rights as MPs as stated in Article 38 (1) sentence 2 GG. They argued that their right to participate in parliamentary decisions in matters concerning the Federal budget is one of the most important rights of MPs. The justifications for the Committee of Nine (urgency and confidentiality) are not convincing because the *Bundestag* already has a regulation for confidential decisions and it is possible to invite all MPs or at least the MPs who are members of the Budget Committee for EFSF-decisions. In addition, the StabMechG does not reflect the fundamental principle that Committees must reproduce the majority constellations in the plenary composition of the *Bundestag* (principle of “Spiegelbildlichkeit”) because MPs who do not belong to one of the parliamentary groups have no possibility to become a member of the EFSF-Committee. Furthermore, the rules about the EFSF-Committee are too vague which – from their point of view – is a violation of the principle of democracy. Moreover, the EFSF-Committee can decide with only five members being present which is also a violation of democratic principles. The StabMechG also contains the regulation that this Committee must decide in cases of emergency measures which include so many cases that the EFSF-Committee would be competent in general and not only – as planned – in exceptional cases. According to the StabMechG the Federal Government has the right to invoke urgency or confidentiality and there is no minority right to vote against this opinion of the government. Finally, they argued that all MPs must be informed subsequently about EFSF-measures in order to be able to control the Committee of Nine. Such an obligation is not provided for in the StabMechG.

The German *Bundestag* as the respondent rejected all arguments. The *Bundestag* highlighted that there is a parliamentary right to decide about every single EFSF-decision which could also have been in the sole competence of the Federal Government without a parliamentary approval. Installing the EFSF-Committee was necessary to guarantee the budget responsibility of the *Bundestag* in an intergovernmental system. The regulation respects the parliamentary legitimacy and its representativeness. From the point of view of the *Bundestag*, the restriction of rights of MPs in this case is justified by objective reasons of paramount importance. The *Bundestag* argued that the specific needs in EFSF-decisions make it necessary to install such a Committee because it is best suited to decide in cases of urgency or confidentiality. Furthermore, the *Bundestag* presented the argument that the competences of the EFSF-Committee are limited to the necessary degree. Moreover, there is no constitutional requirement that parliamentary minorities must have the right to vote against governmental decisions. It is only necessary to guarantee their participation in the process which is respected in the StabMechG.

The Federal Government declared its intervention in the *Organstreit* proceedings and has, therefore, the right to present its opinion in front of the FCC. In its pleading the Federal Government argued that it is essential to be able to react quickly on developments at the financial markets. This is why the number of members of the EFSF-Committee must be limited. It is the functionality of the *Bundestag* which justifies these provisions on the constitutional level and the openness of the Basic Law to international and European law. In addition, the principle of separation of powers would demand that the government must be

able to act in fields such as foreign policy. From their point of view, the EFSF-Committee does not have less democratic legitimacy than the Budget Committee because its members are also elected by the *Bundestag* as a plenary.

7. Answer by the Court to the legal questions and legal reasoning of the Court

The FCC had to decide on two legal questions. First, is a law which transfers budgetary competences of the parliament as a whole to a special committee of nine MPs in case of urgency or confidentiality in accordance with the German constitution? Second, is a law which limits the duty to report of the Federal government to the special committee in accordance with the German constitution?

a) The constitutionality of the Committee of Nine

The FCC highlighted the rights of the MPs of the *Bundestag*, e. g. the right to vote, the right to speak or the right to pose questions. Their parliamentary role is of particular importance in questions of the budget which belongs to the fundamental principles of a constitutional state to democratically shape itself. According to Article 110 (2) GG, it is only within the competence of the legislator to decide about the budget. Article 114 GG obliges the parliament to control how and whether the government executes the budget plan. Because of the high relevance of the budget for political decisions the German parliament has to remain in a position in which its budgetary decisions still have an effect. It is not in line with the German Constitution to transfer this competence – even if supported by a majority of the MPs – to another institution. Moreover, every MP has the right to criticize the budget plan and to control public spending. This is part of the freedom and equality of the mandate as a member of the *Bundestag*.

However, the *Bundesverfassungsgericht* emphasized that these rights can be limited by a legal reason of constitutional status. One of these reasons is the parliament's capability of functioning. Article 40 (1) sentence 1 GG gives the *Bundestag* the right to adopt rules of procedure in order to make sure that the parliament can effectively fulfil its role and tasks. However, the competence for self-organisation of the *Bundestag* has to take into account the principle of proportionality. It is not constitutionally excluded that the *Bundestag* establishes committees which do not consist of all MPs. Though, transferring fundamental competences of the *Bundestag* as a plenary to a committee needs a higher justification than transferring less important competences. The *Bundesverfassungsgericht* made it clear that it is important to respect two basic rules in this regard:

1. The majority rules in the *Bundestag* as a plenary must be reproduced in the committee (principle of "Spiegelbildlichkeit");
2. The possibilities to be informed for the MPs who are not members of the Committee cannot be restricted beyond the indispensable necessary degree.

§ 3 (3) *StabMechG* transferred the competence to decide about certain measures in the framework of the EFSF to the Committee in case of urgency and confidentiality. Both justifications are linked with the justification that the *Bundestag* has to remain its functionality. However, the FCC was not convinced that it is necessary to have a very small

Committee in EFSF-matters justified because of urgency. All EFSF-decisions allow for enough time to invite a bigger group of MPs, for example the Committee for Budget Affairs (41 MPs).

The justification of confidentiality was only accepted by the *Bundesverfassungsgericht* because of one reason: The planning of purchases of government securities by the EFSF. In this case, the decision and even the fact that such a decision is discussed must be kept secretly if the success of the measure shall not be endangered. All other reasons of the StabMechG were not decisions which make it necessary to install such a small Committee because the *Bundestag* already has sufficient rules for confidential decisions.

The principle of *Spiegelbildlichkeit* is not explicitly contained in the StabMechG but the law must be interpreted in this way ruled the *Bundesverfassungsgericht*. This is why the norm itself was not unconstitutional but when applying it, meaning when voting for the MPs of the Committee of Nine, the *Bundestag* has to respect this principle.

b) The duty to report of the Federal Government

The FCC used the same argument in relation to the rights of MPs to be informed about EFSF-measures. The government is only allowed to withhold information as long as the status of urgency is still existing. When the reasons for urgency are no longer persisting, the government has to inform all MPs immediately. This is an essential rule so that the *Bundestag* is able to control the Committee of Nine.

8. Legal effects and & broader political implications of the judgment

Subsequently to the judgment, the StabMechG was amended within the meaning of the FCC judgment.

IMPLEMENTATION

IV.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE EFSF, FOR EXAMPLE WITH REGARD TO DECISIONS ON AID PACKAGES (LOAN FACILITY AGREEMENT AND MEMORANDUM OF UNDERSTANDING) AND THE DISBURSEMENT OF TRANCHES, BOTH OF WHICH NEED UNANIMOUS APPROVAL BY THE SO-CALLED GUARANTORS, I.E. THE EUROZONE MEMBER STATES?

The role of the *Bundestag* in EFSF decisions is established in the StabMechG. Question IV.4 specifies the relevant provisions and controversies in more detail.

IMPLEMENTING PROBLEMS

IV.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE APPLICATION OF THE EFSF?

No political/legal difficulties in the application of the EFSF in Germany are known.

BILATERAL SUPPORT

IV.8

IN CASE GERMANY PARTICIPATED IN PROVIDING FUNDING ON A BILATERAL BASIS TO OTHER EU MEMBER STATES DURING THE CRISIS, WHAT RELEVANT PARLIAMENTARY DEBATES OR LEGAL ISSUES HAVE ARISEN?

Germany did not participate in bilateral funding other than the first aid package for Greece of 2010.

MISCELLANEOUS

IV.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND THE EFSM/EFSF?

No further relevant information.

V TREATY AMENDMENT ARTICLE 136 (3) TFEU

At the 16/17 December 2010 European Council a political decision was taken to amend the Treaties through the simplified revision procedure of article 48(6) TFEU. On March 25, 2011 the European Council adopted the legal decision to amend article 136 TFEU by adding a new third paragraph: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

The process of approval of this decision by the member states in accordance with their respective constitutional requirements as prescribed by article 48(6) has been completed and the amendment has entered into force on 1 May 2013.

NEGOTIATION

V.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE NEGOTIATION OF THE AMENDMENT OF ARTICLE 136 TFEU?

The ‘German Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union’ (EUZBBG) demands in its section 9 that in case of an amendment of the contractual foundations of the EU the Federal Government shall refer to the *Bundestag*’s right to deliver an opinion under section 8 of this Act. Section 9 (2) reads as follows: Before the final decision in the Council or in the European Council, the Federal Government is to reach agreement with the *Bundestag*. This shall not prejudice the right of the Federal Government, in awareness of the *Bundestag*’s opinion, to take divergent decisions for good reasons of foreign or integration policy.

This is why the Federal Government had to obtain approval by the *Bundestag* before consenting to the treaty amendment on the EU level. The head of states had generally agreed on the amendment at their meeting on 16/17 December 2010. The formal approval by all Member States was made on 25 March 2011 via a European Council Decision.¹²⁶ The Federal Government informed the *Bundestag* about the intended treaty amendment on 14 December 2010 and alluded to the right of the parliament to make representations.¹²⁷ In addition, the government informed the parliamentary Committee for European Affairs during its meeting on 23 February 2011.¹²⁸

The Greens from the opposition criticized that the Federal Government had not tried to receive a parliamentary approval before the summit in December 2010. They were of the opinion that the government is obliged to ask for the approval by the *Bundestag* before deciding about a treaty amendment together with the other Member States.¹²⁹ The government, in contrast, was of the opinion that such a parliamentary approval is only necessary for the formal decision which took place in March 2011. The *Bundestag* gave its approval to the amendment of Article 136 TFEU by the simplified treaty amendment procedure under certain conditions.¹³⁰ In contrast to the declaration added to the *Bundestag* approval which was based on the application of the government coalition of

¹²⁶ See European Council Decision 2011/199/EU, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011D0199&qid=1432554732168&from=DE>

¹²⁷ See Deutscher Bundestag, printed matter No. 17/5094, 16 March 2011, p. 3, <http://dipbt.bundestag.de/dip21/btd/17/050/1705094.pdf>

¹²⁸ See Deutscher Bundestag, printed matter No. 17/5094, 16 March 2011, p. 9, <http://dipbt.bundestag.de/dip21/btd/17/050/1705094.pdf>

¹²⁹ See Deutscher Bundestag, printed matter No. 17/4880, 23 February 2011, p. 2,

¹³⁰ See for the catalogue of postulations Deutscher Bundestag, printed matter No. 17/4880, 23 February 2011, p. 2-3, <http://dipbt.bundestag.de/dip21/btd/17/048/1704880.pdf>

Christian Democrats (CDU/CSU) and Liberals (FDP), the parliamentary groups forming the opposition (Social Democrats (SPD)¹³¹, the Greens (Bündnis 90/Die Grünen)¹³² and the Left (Die Linke)¹³³) demanded stronger participation rights of the German parliament. In addition, the Left was of the opinion that the Treaty amendment must be based on Article 48 (2) TEU and not on Article 48 (6) TEU.¹³⁴ The discussion about the amendment of Article 136 TFEU was linked to the establishment of the ESM.

APPROVAL

V.2

HOW HAS THE 136 TFEU TREATY AMENDMENT BEEN APPROVED IN GERMANY AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The *Bundestag* adopted the Treaty amendment of Article 136 (3) TFEU on 29 June 2012 by the ‘Law Amending Article 136 of the Treaty on the Functioning of the European Union’, which was a federal law. In the plenary session 604 MPs casted a ballot. 504 MPs voted in favour, 97 against the law and one MP abstained. The approval was given by MPs of the parliamentary groups of the Christian Democrats (CDU/CSU) and the Liberals (FDP) from the government as well as the Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) from the opposition. Against the law voted all MPs from the parliamentary group the Left (Die Linke) as well as 16 MPs from CDU/CSU, 8 MPs from the FDP, one MP from the SPD and one MP from the Greens. One MP from CDU/CSU abstained.¹³⁵

This law had to be approved by the *Bundestag* and the *Bundesrat* based on section 2 of the federal ‘Law about the Integration Responsibility of the Bundestag and the Bundesrat in matters of the European Union’¹³⁶ (IntVG) and on Articles 23 (1), 59 (2) sentence 1 GG. Article 23 (1) sentence 2 and 3 GG rule that „the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs 2 and 3 of Article 79.“ Article 59 (2) sentence 1 GG establishes that “[T]reaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law [...].“

¹³¹ See Deutscher Bundestag, printed matter No. 17/4881, 22 February 2011, <http://dipbt.bundestag.de/dip21/btd/17/048/1704881.pdf>

¹³² See Deutscher Bundestag, printed matter No. 17/4883, 23 February 2011, <http://dipbt.bundestag.de/dip21/btd/17/048/1704883.pdf>

¹³³ See Deutscher Bundestag, printed matter No. 17/4882, 22 February 2011, p. 3, <http://dipbt.bundestag.de/dip21/btd/17/048/1704882.pdf>

¹³⁴ See Deutscher Bundestag, printed matter No. 17/4882, 22 February 2011, p. 2, <http://dipbt.bundestag.de/dip21/btd/17/048/1704882.pdf>

¹³⁵ Deutscher Bundestag, plenary protocol 17/188, 29 June 2012, p. 22747 et seq., <http://dipbt.bundestag.de/dip21/btp/17/17188.pdf>

¹³⁶ In German the title for this law is: Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz, IntVG). The Law was adopted on 22 September 2009.

RATIFICATION DIFFICULTIES

V.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER DURING THE APPROVAL OF THE 136 TFEU TREATY AMENDMENT?

I. General Facts and Modus of Examination

In Germany, the adoption of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (known as the Fiscal Compact), the European Stability Mechanism (ESM Treaty), and the Treaty amendment of Article 136 (3) TFEU was carried out in one single legislative procedure, starting on 20 March 2012 with the introduction of three legislative proposals¹³⁷ by the parliamentary groups of Christian Democrats (CDU/CSU) and Liberals (FDP) who supported the government at that time. Ab initio, these ‘European’ crisis measures were discussed controversially, but the level of controversy peaked on 29 June 2012 when the bills had to be voted on. The showdown that day resulted from the fact that Merkel had agreed to controversial modifications of the ESM Treaty at the Euro Summit the night before.

The subsequent analysis will describe and evaluate the legislative negotiations of these three crisis measures in more detail. The Fiscal Compact, the ESM Treaty, and the Treaty amendment of Article 136 (3) TFEU were not only introduced and voted on in the same plenary session but also debated as a package. Due to these procedural and substantial ties they will be described conjointly below.

Similar to the previous analysis of the EFSM/EFSSF, the protocols of the plenary debates as well as the reports and recommendations of the respective Lead Committees will be the main sources for the below description and evaluation (see also question IV.4, under no.I).

In total, the adoption of the three crisis measures required the adoption of five federal laws:

First, on 29 June 2012 the *Bundestag* adopted the ‘Law to the Contract on 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union’¹³⁸ (hereinafter Fiscal Compact Law) in order to ratify and implement the Fiscal Compact.

Second, in order to ratify and implement the ESM Treaty the *Bundestag* had to adopt three federal laws:

- The *Bundestag* ratified the ESM Treaty through the ‘Law to the Contract on 2 February

¹³⁷ Act on the financial participation at the ESM (ESMFinG): Deutscher Bundestag, printed matter 17/9048, 20 March 2012, <http://dipbt.bundestag.de/dip21/btd/17/090/1709048.pdf>; Act on the Decision of the European Council about the amendment of Article 136 TFEU concerning a Stability Mechanism for the Member States whose currency is the Euro (Artikel 136-G): Deutscher Bundestag, printed matter 17/9047, 20 March 2012, <http://dipbt.bundestag.de/dip21/btd/17/090/1709047.pdf>; Act on the Treaty from 2 February 2012 for the establishment of the ESM (ESMG): Deutscher Bundestag, printed matter 17/9045, 20 March 2012, <http://dipbt.bundestag.de/dip21/btd/17/090/1709045.pdf>

¹³⁸ The German title of the law is: ‘Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion’.

2012 on the Establishment of the European Stability Mechanism'¹³⁹ (hereinafter ESM-Ratification Law) on 29 June 2012.

- In order to authorize the payment of capital to the ESM, the 'Act on Financial Participation in the European Stability Mechanism'¹⁴⁰ (ESMFinG) was adopted on 29 June 2012.
- Finally, the ESM Treaty required its members to change their national debt management laws through the inclusion of so-called 'collective action clauses' (CACs). Such clauses aim to facilitate an agreement between a government and its creditors if debt restructuring becomes necessary. The *Bundestag* included such CACs in the 'Act Amending the Federal Debt Management Law'¹⁴¹ (hereinafter BSWG) adopted on 29 June 2012.

Third, on 29 June 2012 the *Bundestag* adopted the Treaty amendment of Article 136 (3) TFEU through the 'Law to the Decision of the European Council Decision of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for the Member States whose Currency is the Euro'¹⁴² (hereinafter Law Amending Article 136 of the Treaty on the Functioning of the European Union)

In addition to these five federal laws, two additional ones had to be adopted for a full transformation of the 'European' rescue measures into German law. However these two laws were not part of the legislative procedure that will be described below.

- The 'Supplementary Budget Law for 2012'¹⁴³ (hereinafter NHG 2012), through which the acquisition of new debt was decided, was adopted by the *Bundestag* on 14 June 2012. Due to the German share of ESM called-in capital, new debt up to the amount of Euro 6 billion (rising from Euro 26.1 billion to Euro 32.1) had to be acquired.
- Finally, a revised version of the 'Law on the Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union' (EUZBBG) was adopted by the *Bundestag* on 18 April 2013.

II. Short Chronology of Events

Due to the complexity of this legislative process, the chronology of events on the European and national level will be shortly explained, followed by a description of the position of the Federal Government and the opposition in the negotiations.

¹³⁹ The German title of the law is: 'Gesetzes zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus'

¹⁴⁰ The German title of the law is: 'Gesetzes zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz – ESMFinG)'

¹⁴¹ The German title of the law is: 'Gesetzes zur Änderung des Bundesschuldenwesengesetzes'

¹⁴² The German title of the law is: 'Gesetzes zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist'

¹⁴³ The German title of the law is: 'Nachtragshaushalt 2012'

1. 'European' Crisis Measures

The ESM Treaty was signed by all 17 Eurozone Member States on 2 February 2012. Its lending capacity was initially restricted to Euro 500 billion but has been increased to Euro 700 billion through the amalgamation with the EFSF in June 2013.¹⁴⁴ Overall, the capital stock of the ESM is divided into paid-in capital and callable capital.¹⁴⁵

The paid-in capital has to be provided by ESM Member States in five installments and amounts up to an amount of Euro 80 billion in total.¹⁴⁶ Under normal circumstances the ESM should accumulate its needed capital through paid-in capital as well as outside capital.¹⁴⁷ In special circumstances ESM Member States might have to pay the so-called callable capital up to an amount of Euro 620 billion in total.¹⁴⁸ The ESM Member States' contribution is based on the ECB contribution key, which is 27.15 % for Germany. This corresponds to Euro 22 billion in paid-in capital and Euro 168 billion in callable capital.

One obstacle on the path towards ratification of the ESM Treaty was the doubt of some Eurozone countries (especially Germany) on the Treaty's legality under EU law. It was discussed whether the ESM Treaty complies with Article 125 TFEU that prohibits EU Member States from giving financial assistance to each other (the so-called 'no bailout'-clause).¹⁴⁹ In order to dissipate these doubts, EU Member States agreed to amend Article 136 TFEU.

The Fiscal Compact was signed on 2 March 2012 by all EU Member States, except the United Kingdom and the Czech Republic. It aims at strengthening fiscal discipline for Eurozone Member States through establishing a balanced budget rule. It complements the Stability and Growth Pact (SGP) of 1997 that is known to have become ineffective.

2. Legislative Procedure in Germany

Below, a brief chronology of the legislative procedure in Germany for the adoption of the Fiscal Compact, the ESM Treaty, and the Treaty amendment of Article 136 (3) TFEU will be provided.

On 29 March 2012 the federal bills adopting the Fiscal Compact, the ESM Treaty, and the

¹⁴⁴ During the Eurogroup meeting on March 30, 2012 it was decided that the EFSF would continue to be the official lending fund for Greece, Portugal and Ireland until June 2013. The combined lending capacity of the EFSF and the ESM is close to €700 billion. See Statement of the Eurogroup, March 30, 2012. Online available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/129381.pdf.

¹⁴⁵ See ESM Treaty, Article 8, par. 2.

¹⁴⁶ Two installments have to be paid after the enforcement of the ESM Treaty, another two installments have to be paid in 2012 and the final installment in the first half of 2014. See ESM-Treaty, Article 41 par. 1.

¹⁴⁷ Article 21, par.1 of the ESM Treaty specifies that the ESM can borrow *outside capital* through borrowing from capital markets, financial institutions and other persons for its purposes. This also included the ESM borrowing money through issuing ESM bonds to private investors, See ESM Treaty, Article 21, par. 1, ESM Borrowing Guidelines, October 9, 2012. Online available at: <http://www.esm.europa.eu/pdf/ESM%20borrowing%20guidelines.pdf>.

¹⁴⁸ See ESM Treaty, Article 8, par. 2.

¹⁴⁹ See de Witte, 2012, International Treaties on the Euro and the EU Legal Order, p. 9.

Article 136 TFEU amendment were introduced in the first plenary session of the *Bundestag*, followed by a legislative debate between the governing parties and the opposition. One day later, on 30 March 2012, the Ecofin Council decided to increase the lending capacity of the ESM from Euro 500 billion to Euro 700 billion from June 2013 onwards.

During the subsequent weeks the *Bundestag* Committees modified the introduced bills in order to find a common denominator between the government and the opposition. Due to the Fiscal Compact being an international agreement it was necessary to have a 2/3 majority according to Article 23 (1) in conjunction with Article 79 (2) GG (see also question IV.2). The consent of the opposition parties was thus inevitable. The ESM Treaty required a simple majority in the *Bundestag* (see for further information question VIII.2).¹⁵⁰ Yet the Federal Government tried to get a 2/3 majority in order to prevent constitutional problems. The ‘Law Amending Article 136 TFEU required a simple majority in the *Bundestag* (see question V.2).¹⁵¹

On 7 May 2012, an expert hearing took place in the Budget Committee which was the Lead Committee dealing with the Fiscal Compact and the ESM Treaty.¹⁵² The Committee on European Affairs, which was the Lead Committee for the ‘Law Amending Article 136 TFEU’, refrained from organizing an expert hearing.

On 14 June 2012 the *Bundestag* adopted the ‘Supplementary Budget Law for 2012’ (hereinafter NHG 2012), through which the acquisition of new debt (necessary for the German shares of the ESM Fund) was decided (see also question VIII.5).

On 19 June 2012, the FCC issued a judgment which was initiated by the Greens (Bündnis 90/Die Grünen). The Court found that the Federal Government had violated its information obligations towards the *Bundestag* when negotiating the ESM Treaty and the Euro Plus Pact. According to the Court, the Federal Government has to inform the *Bundestag* “in matters concerning the European Union fully and [...] as soon as possible.”¹⁵³ (see question VIII.4)

On 21 June 2012, the government agreed conjointly with the Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) on the ‘Pact For Sustainable Growth and Employment’, which included a plan to introduce a Financial Transaction Tax (FTT) and an economic stimulus package. This Pact was a concession of the government in exchange for the opposition’s votes for the adoption of the European crisis measures.

The same day the ‘Pact For Sustainable Growth and Employment’ was adopted, The Left

¹⁵⁰ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p.6.

¹⁵¹ Deutscher Bundestag. Gesetzesentwurf der Fraktionen der CDU/CSU und FDP. Entwurf eines Gesetzes zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist. Drucksache 17/9047. 20.03.2012, p.4.

¹⁵² Deutscher Bundestag. Haushaltsausschuss, Protokoll Nr. 17/88, 88. Sitzung, 7.Mai 2012. Online available at: http://www.bundestag.de/bundestag/ausschuesse17/a08/anhoerungen/Fiskalpakt_und_ESM/088_Protokoll.pdf

¹⁵³ Bundesverfassungsgericht [BVerfG –Federal Constitutional Court], 2 BvE 4/11, June 19, 2012.

(Die Linke) together with Germany's former Justice Minister Herta Däubler-Gmelin (SPD) issued an emergency appeal at the FCC claiming the unconstitutionality of the bills ratifying and/or adopting the Fiscal Compact, the ESM Treaty, and the Article 136 TFEU amendment. The FCC asked Federal President Joachim Gauck on 28 June 2012 to wait signing the bills to be adopted by the *Bundestag* and *Bundesrat* on 29 June 2012 until there will be a decision by the FCC.

On 29 June 2012, all five bills described above were adopted by *Bundestag* and *Bundesrat*. The date of the voting session (Friday afternoon for the *Bundestag* and Friday evening for the *Bundesrat*) was very unusual for a parliamentary gathering and can be contributed to the fact that the bills were supposed to be adopted before the summer break. On 12 September 2012, the FCC confirmed the legality of the five bills (see questions V.4, VIII.4, and IV.7) and so President Gauck signed them. On 13 September 2013 they entered into force through their publication in the German Law Gazette.

It is important to stress that the FCC judgment from 12 September 2012 was only a preliminary ruling, meaning that a final judgment still needed to be issued. In addition to the former Justice Minister Herta Däubler-Gmelin (SPD) many other citizens filed constitutional complaints against the three measures at stake. Overall, this case had the largest number of plaintiffs in a German Constitutional Complaint procedure ever (about 37.000) (for more details and the final reasoning of the Court, see questions V.4, VIII.4, IX.7).¹⁵⁴

III. Parliamentary Negotiations

1. The First Plenary Session on 29 March 2012

a. Position of the Government

On 19 March 2012, all five bills adopting the three European crisis measures were introduced and debated in the *Bundestag*. Federal Minister of Finance Wolfgang Schäuble held the first plenary speech and pointed out the three 'building blocks' of the Federal Government's crisis management strategy. Such 'building blocks' have been repeatedly pointed out by the Federal Government when justifying European rescue measures.

First, Schäuble highlighted that the government favors the approach to provide "help for self-help"¹⁵⁵, meaning that countries with financial difficulties are offered financial help under the condition that they implement structural reforms. This "growth-friendly deficit reduction policy"¹⁵⁶ has in the past been successful in Germany and is already yielding fruits in Ireland, Portugal, and Greece. The government opposed Eurobonds because they contradict the idea of providing "help for self-help", Schäuble said. The pooling of financial liabilities in the EU

¹⁵⁴ See Bundesverfassungsgericht, Pressemitteilung Nr. 9/2014 of February 7, 2014. <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg14-009.html>

¹⁵⁵ The translation of the famous slogan is: „Hilfe zur Selbsthilfe leisten“.

¹⁵⁶ Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20210 C.

would set wrong incentives, as it would render structural reforms unnecessary.¹⁵⁷

Second, Schäuble emphasized the necessity of stricter fiscal measures, as included in the Fiscal Compact. What is really needed for the stabilization of the Euro is the elimination of high levels of debt, he said.¹⁵⁸ Through the Fiscal Compact a “constant stability union”¹⁵⁹ is created, as member states agreed to introduce debt brakes in the constitutions and to allow the European Commission to monitor their economic and monetary policies.

According to Schäuble, the third strategy of the government is to build up financial firewalls until a more stable union is being created. After the stabilization of the union, high firewalls are not necessary anymore. At the moment, however, it is indispensable to increase the ESM lending capacity from Euro 500 billion to Euro 700 billion, he said. The following day, such increase of the ESM lending capacity was agreed on in an informal meeting of the Ecofin Council in Copenhagen through the amalgamation of the ESM with the EFSF.¹⁶⁰

The chairman of the Liberals (FDP), Rainer Brüderle, supported Schäuble’s position and added that inflation can only be prevented through low levels of debt.¹⁶¹ He justified the crisis measures by saying that “monetary stability is silent social policy”.¹⁶² This rhetoric of depicting economic policy as social policy is very typical for the governing coalition of Christian Democrats (CDU/CSU) and Liberals (FDP). The most famous statement in this respect is the slogan “what creates work is social policy” that has repeatedly been used by the coalition partners in their election campaigns.¹⁶³

b. Position of the Opposition Parties

The parliamentary leader of the Social Democrats (SPD), Frank-Walter Steinmeier, reminded the Federal Government that it depends on the consent of the opposition to adopt some of the crisis measures. According to him, the coalition should not assume that the consent of his party would “just fall into their laps”.¹⁶⁴ Both the Social Democrats and the Greens (Bündnis 90/Die Grünen) demanded from the Federal Government to complement the Fiscal Compact with “elements for economic growth” that should be financed through a Financial Transaction Tax (FTT).¹⁶⁵

Furthermore, Steinmeier criticized the government for combating the crisis with “half-truths” and “throwing sand in the eyes of the citizens”.¹⁶⁶ He accused the Federal Government of

¹⁵⁷ See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20210 D.

¹⁵⁸ See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20211 B–p. 20212B.

¹⁵⁹ Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20211 A.

¹⁶⁰ See ZeitOnline, ‘Euro-Zone erweitert Rettungsfonds auf 800 Milliarden’, 30.03.2012. Online available at: <http://www.zeit.de/wirtschaft/2012-03/euro-rettungsfonds-ausweitung>.

¹⁶¹ See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20217 C.

¹⁶² Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20217 C.

¹⁶³ The coalition partner have repeatedly used this slogan in election campaigns („Sozial ist was Arbeit schafft“).

¹⁶⁴ Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20215 A.

¹⁶⁵ See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20215–2016, See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20223 A–C.

¹⁶⁶ Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20214 A.

constantly drawing financial ‘red lines’ by stating that there will be no additional money for Greece or no increase of the ESM lending capacity, only to revise these ‘red lines’ a couple of months later. The government’s “red lines have become wandering sand dunes”¹⁶⁷, Steinmeier said. In the same vein, Jürgen Trittin from the Greens accused the government of suffering from “political dyscalculia, a chronic mathematical disorder.”¹⁶⁸ Such criticism by Steinmeier and Trittin was extensively quoted in the news coverage and dominated the debate on the ESM.¹⁶⁹ Opposition towards an increase of the ESM lending capacity also came from within the governing coalition (especially the Christian Social Union (CSU) from Bavaria).¹⁷⁰

The parliamentary leader of the the Left (Die Linke), Gregor Gysi, emphasized the fact that the crisis measures violate the German Constitution in several regards. The Fiscal Compact, e. g., does not only violate the budget competence of the Bundestag but also not in conformity with the eternity clause of Article 79 (3) GG because the Fiscal Compact does not provide for a cancellation option.¹⁷¹

Furthermore, Gregor Gysi criticized the Federal Government for building up "a Europe of banks and hedge funds."¹⁷² Banks should be nationalized and made smaller and the banking sector (and not the taxpayers) should pay for the rescue measure. Finally, Gysi addressed all members of the *Bundestag* and urged them to “listen to us and stop marginalizing us. It’s worthwhile to discuss and think about the things I have said.”¹⁷³ The background to this claim is that the parliamentary group the Left (Die Linke) has been excluded from many informal meetings between government and opposition, as nobody was willing to work with them.

c. Treaty Amendment Article 136 (3) TFEU

Interestingly, the ‘Law Amending Article 136 of the Treaty on the Functioning of the European Union’ was not part of the above-summarized debate, although it was amongst the bills debated. Yet, only the Fiscal Compact and the ESM Treaty were explicitly discussed.

A couple of parliamentarians and the parliamentary group the Left introduced a petition ‘Implementing Fundamental Reforms of the EU Treaties and Preventing the Modification of Article 136 TFEU’. In summary, it urged the Federal Government not to amend the TFEU but

¹⁶⁷ Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20214 A.

¹⁶⁸ Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20222 C.

¹⁶⁹ The full statement of Steinmeier was: „Kein Cent für Griechenland – wir erinnern uns gut. Kein permanenter Rettungsschirm – wir erinnern uns gut. Auf keinen Fall Hebelungen – haben sie auch her am Podium gesagt. Und ganz sicher waren Sie sich: Keine Aufstockung des ESM. Keine dieser Zusagen hat länger als drei Monate Bestand gehabt. Aus Ihren roten Linien sind im Verlaufe der Diskussion in Wahrheit Wanderdünen geworden.“

¹⁷⁰ See Stern.de, ‘Merkel will mit noch mehr Geld den Euro retten’, 26.03.2012. Online available at: <http://www.stern.de/politik/deutschland/efsf-und-esm-merkel-will-mit-noch-mehr-geld-den-euro-retten-1805287.html>

¹⁷¹ The argument goes as follows: The Compact changes Article 109, 155, 143 GG without providing a cancellation option of the Compact, thus making the changed Articles in the GG irrevocable. As Article 79(3) GG determines only principles laid down in Article 1 and Article 20 to be irrevocable, the Fiscal Compact is unconstitutional. See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20219 B-D.

¹⁷² Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20220 A.

¹⁷³ See Deutscher Bundestag. Plenarprotokoll 17/172, 172. Sitzung, 29.03.2012, p. 20222 A.

to “engage at the EU level for a fundamental reform of the treaties.”¹⁷⁴ This petition was not mentioned in the debate (not even by the Left).

2. Negotiations between Government and Opposition

As explained above, several of the bills at stake had to be adopted by a 2/3 majority, thus making the consent of the opposition indispensable (the Fiscal Compact required a 2/3 majority; the bills adopting the ESM Treaty only required a simple majority but the Federal Government explicitly aimed for a 2/3 majority to prevent constitutional problems). Social Democrats and the Greens clarified that they are in favour of the crisis measures under the condition that the involvement of the Bundestag would be strengthened, an economic stimulus package adopted, and a FTT introduced.¹⁷⁵

In order to get the opposition parties ‘on board’, the coalition parties thus had to modify the legislative proposals during the committee proceedings. Additionally they would have to find a solution to the additional demands of the opposition that were unrelated to the bills. For that purpose the ‘Pact For Sustainable Growth and Employment’ was negotiated.¹⁷⁶ Below, the main substance of this Pact will be described, followed by an analysis of the revision and modification of all the bills in the respective committees of the *Bundestag*.¹⁷⁷ Finally, the role of the parliamentary group the Left (Die Linke) in the negotiations will be shortly explained.

a. Pact For Sustainable Growth and Employment

On 21 June 2012, the Federal Government agreed together with the Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) on the ‘Pact For Sustainable Growth and Employment’, which consisted of three elements: first, the introduction of a Financial Transaction Tax (FTT), second, the promotion of economic growth, and third, the commitment to further strengthen financial stability in the EU. The agreement to engage for a FTT was the most prominent part of the Pact, as Merkel had opposed a FTT for a long time but was eventually persuaded of its benefits. The Liberals (FDP) were still not in favour of the tax but agreed to it in order to get the opposition parties ‘on board’.

The Pact states that “we want to introduce a financial transaction tax”¹⁷⁸, which should be imposed on all financial instruments, including stocks, bonds, foreign currency transactions

¹⁷⁴ See Deutscher Bundestag. Antrag. Grundlegende Reformen der EU-Verträge umsetzen – Änderung von Artikel 136 des Vertrags zur Arbeitsweise der Europäischen Union verhindern. Drucksache 17/9148. 27.03.2012. Online available at <http://dipbt.bundestag.de/dip21/btd/17/091/1709148.pdf>.

¹⁷⁵ See statements of the opposition parties in the Budget Committee the ESM-Treaty: Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 6; see also statement of the parties in the opposition parties in Budget Committee on the Fiscal Compact: Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10171. 27.06.2012, p. 4-7.

¹⁷⁶ See Bundesregierung. Pakt für nachhaltiges Wachstum und Beschäftigung. Nummer 212/12. 21.06.2012. Online available at: http://www.bundesregierung.de/Content/DE/Anlagen/2012/06/2012-06-21-wachstum-pakt.pdf;jsessionid=75422B17932C0932903BABA9340EB26D.s4t2?_blob=publicationFile&v=3.

¹⁷⁷ The bills necessary for the adoption of the *ESM Treaty* and the *Fiscal Compact* were forwarded to the Budget Committee. The Committee on the Affairs of the European Union was in charge of the bill for the *Treaty amendment Article 136(3) TFEU*. Below, the modification of the bills will be explained in more detail.

¹⁷⁸ See Bundesregierung. Pakt für nachhaltiges Wachstum und Beschäftigung. Nummer 212/12. 21.06.2012, p.1.

and derivative contracts.¹⁷⁹ The agreement further specifies that if not all 27 Member States of the EU can be persuaded to adopt such a tax, the Federal Government obliges itself to look for different ways of introducing it.¹⁸⁰ Finally, the Pact outlined ways to stimulate economic growth and proposed ways to fight financial instability in the EU.¹⁸¹

b. Committee Amendments

i. ESM Treaty

The German parliament had to adopt three federal laws in order to ratify the ESM Treaty: the ESM-Ratification Law, the ESMFinG and the BSWG. In the Budget Committee, these bills were amended which mainly aimed at strengthening the participation rights of the *Bundestag*. One amendment concerned the voting procedure of a bill.

Voting Procedure

In relation to the first bill, the ESM-Ratification Law, Christian Democrats (CDU/CSU) and the Liberals (FDP) from the government at that time introduced a resolution requiring the adoption of the ESM-Ratification Law with a 2/3 majority, although it only required a simple majority (see also question VIII.2). In the report of the Budget Committee, the coalition parties referred to the FCC judgment from 19 June 2010 (see also question V.4) and explained that they believed a 2/3 majority is necessary in order to avoid constitutional risks. In particular, they argued that the ESM Treaty is substantially and politically very closely connected to the Fiscal Treaty, which could only be ratified with a 2/3 majority. In the end, the resolution was agreed upon by all parties, except the Left (Die Linke) and some members of the Social Democrats.¹⁸² However, it was only a recommendation for the plenary and did not become part of the ESM-Ratification Law.

Most legislative amendments concerned a strengthened involvement of the *Bundestag* which was a special concern of the opposition parties, also because of the constitutional requirements defined by the *Bundesverfassungsgericht*. With regard to the ESM-Ratification Law, an amendment specified that the German representative at the ESM Board of Governors is only allowed to consent to changes of the financial rescue measures pursuant to Article 19 of the ESM-Treaty (TESM) if he has been authorized by a federal law. This amendment was introduced by the coalition parties and agreed upon by all parties, except the Left and some members of the Social Democrats.¹⁸³

¹⁷⁹ In a footnote, the Pact makes a reference to a EU Commission proposal suggesting a tax rate of 0.1 and 0.01 % per financial transaction.

¹⁸⁰ See Bundesregierung. Pakt für nachhaltiges Wachstum und Beschäftigung. Nummer 212/12. 21.06.2012, p. 2.

¹⁸¹ See Bundesregierung. Pakt für nachhaltiges Wachstum und Beschäftigung. Nummer 212/12. 21.06.2012, p. 3-6.

¹⁸² See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 8.

¹⁸³ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 8/10.

The ESMFinG, the law that authorizes the issuance of German shares for paid-in and callable capital to the ESM Fund, underwent most modifications (see also question VIII.5). During the Budget Committee stage, four paragraphs concerning the involvement of the *Bundestag* were added which were in total longer than the bill itself. The amendments were either introduced conjointly by Christian Democrats (CDU/CSU) and Liberals (FDP) from the Government as well as Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) from the opposition or separately by the parliamentary groups.¹⁸⁴ These amendments were consented to by all parliamentary groups, except the Left and some members of the Social Democrats).¹⁸⁵

These were the most important amendments to the ESMFinG: First, the new § 4 guarantees that ESM decisions affecting the budgetary responsibility of the *Bundestag* always require the approval by the plenary of *Bundestag* (see also question VIII.6). Three major fields are identified in which ESM matters touch upon the budget responsibility of the *Bundestag*: first, the issuance of rescue measures pursuant to Article 13 (2) TESM; second, matters and agreement about the EFSF; third, changes of the guarantee volume of the ESM Treaty.¹⁸⁶ In the report of the Budget Committee, this amendment was justified by referring to the FCC judgment from 28 February 2012, in which the Court had highlighted the special role of the plenary (see also question IV.5).¹⁸⁷

Second, § 5 determines that all other ESM measures that concern the *Bundestag* and in which the consent of the plenary is not intended according to § 4 have to be adopted in consent with the Budget Committee of the *Bundestag*. Amongst others, this applies to changes to the procedure to retrieve capital from the ESM or to the acceptance of changes in the guidelines for the implementation conditions of financial rescue measures.¹⁸⁸

Third, one of the most important (and in the media controversially discussed)¹⁸⁹ amendments to the ESMFinG concerned the establishment of a so-called special-body ('Sondergremium'). In contrast to the Committee of Nine ("Neuner-Gremium") pursuant to the StabMechG (see Question, II.4) the ESMFinG dedicated a separate paragraph for this special body and explained its role in detail. Paragraph 6 specifies that in case of special confidentiality, such as the purchase of government securities on the secondary market pursuant to Article 18 TESM, the 'Sondergremium' is supposed to take a decision instead of the *Bundestag* in its plenary constellation.¹⁹⁰ In the report of the Budget Committee, the establishment of the 'Sondergremium' was explained by referring to the FCC judgment from 28 February 2012. In this judgment the Court had declared a 'Sondergremium' to be unconstitutional, except for

¹⁸⁴ 17(8)4442 was introduced by BÜNDNIS 90/DIE GRÜNEN, 17(8)4410 by CDU/CSU and FDP and 17(8)4549 by the coalition parties and the SPD.

¹⁸⁵ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 9.

¹⁸⁶ See Law of May, 13 1012, Bundesgesetzblatt Teil I, 2012, Nr. 43, 18.09.2012 S. 1918. Online available at: http://www.bgbl.de/Xaver/stArticlexav?startbk=Bundesanzeiger_BGBL#_Bundesanzeiger_BGBL_%2F%2F*%5B%40attr_id%3D'bgbl112s1918.pdf'%5D_1376232252506.

¹⁸⁷ Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 11.

¹⁸⁸ See Law of May, 13 1012, Bundesgesetzblatt Teil I, 2012, Nr. 43, 18.09.2012 S. 1918.

¹⁸⁹ See e.g. Heribert Prantl, 'Neun Hansel sind nicht das Parlament', in: Süddeutsche.de, 28.10.2011.

<http://www.sueddeutsche.de/politik/euro-rettungsschirm-neun-hansel-sind-nicht-das-parlament-1.1175819>.

¹⁹⁰ See Law of May, 13 1012, Bundesgesetzblatt Teil I, 2012, Nr. 43, 18.09.2012 S. 1918.

instances in which the *Bundestag* has to consent to confidential matters such as the ESM purchase of government securities.¹⁹¹ (see also question VI.5, under III)

Finally, § 7 of the ESMFinG strengthened the information obligations of the Federal Government towards the *Bundesrat* and the *Bundestag*, one of the central demands from the Greens and the Social Democrats.¹⁹² The amendment clarified that the *Bundestag* has to be informed about ESM matters at “the earliest possible point of time.”¹⁹³

ii. Fiscal Compact

Involvement of the Parliament

Also the amendments to the Fiscal Compact Law mainly concerned the participation rights of the *Bundestag*. In reference to the FCC Judgment from 19 June 2012 (see also question IX.9), the *Bundestag* decided that the ‘Law on the Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union’ (EUZBBG) has to be adapted to the Fiscal Compact Law. The original version of the EUZBBG was adopted in 1993 with the ratification of the Maastricht Treaty. In the end, all parties in the Budget Committee (except the Left) agreed to the amendment of the Fiscal Compact Law via modifications of the EUZBBG. Furthermore, it was agreed to more generally revise the EUZBBG by the end of 2012.¹⁹⁴

iii. Article 136 (3) TFEU-amendment

Like in the first plenary session, the ‘Law Amending Article 136 TFEU’ was not intensively discussed in the Committee on EU Affairs (the Lead Committee). An objection came from the parliamentary group the Greens (Bündnis 90/Die Grünen) pointing out that the amendment was not necessary because a teleological interpretation of Article 122 TFEU would have been sufficient to justify the EU rescue measures. Nevertheless, the party voted in favour of the bill due to it being a “preferable clarification.”¹⁹⁵

Opposition to the bill only came from the parliamentary group the Left (Die Linke) that had introduced the petition ‘Implementing Fundamental Reforms of the EU Treaties and Preventing the Modification of Article 136 TFEU’. Yet, this petition was neither debated nor

¹⁹¹ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 13.

¹⁹² See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 6-8.

¹⁹³ Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 13.

¹⁹⁴ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10171. 27.06.2012, p. 4.

¹⁹⁵ Deutscher Bundestag. Beschlussempfehlung und Bericht des Ausschusses für die Angelegenheiten der Europäischen Union (21. Ausschuss) zu dem Gesetzesentwurf der Fraktionen CDU/CSU und FDP - Drucksache 17/9047 - und zu dem Gesetzesentwurf der Bundesregierung – Drucksachen 17/9373, 17/9670, Drucksache 17/10159, 27.06.2012, p. 7.

consented to in the committee.¹⁹⁶

Finally, it should be mentioned that the Committee on EU Affairs did not organize an expert hearing. In the report of the Committee this was justified by the fact that the amendment of Article 136 TFEU is closely connected to the adoption of the ESM Treaty for which an expert hearing took place in the Budget Committee.¹⁹⁷

Overall, the expert hearing in the Budget Committee on 7 May 2012 brought forth a wide range of positions about the effectiveness of the EU rescue measures. The view that the lending capacity of the ESM is not sufficient for its purposes was shared by a majority of the participants. Professor Bofinger (University Würzburg) said that the ESM Fund is “better than nothing”¹⁹⁸ but insufficient to fully mitigate the risk. The chief economist of Deutsche Bank, Thomas Mayer, stressed that the ESM must have emergency access to loans from the ECB so that large liquidity crises could be overcome.¹⁹⁹ Finally, Silke Tober from the Institute for Macroeconomic Research, believed that neither the ESM Treaty nor the Fiscal Compact is helpful in overcoming the crisis. According to her only time has been bought so far.²⁰⁰

d. Opposition of the Left (Die Linke)

Overall, the parliamentary group the Left (Die Linke) vehemently opposed all introduced bills, as it believed that the crisis measures change the spirit of the German Basic Law to such an extent that a national referendum is necessary. The Left was part of the negotiations about the ‘Pact For Sustainable Growth and Employment’ but did not agree to it. Overall, it introduced three petitions to the *Bundestag* always aiming at preventing the adoption of the Fiscal Compact, the ESM Treaty and the Article 136 TFEU amendment.²⁰¹ All three petitions were rejected.

Nevertheless, the Left (Die Linke) found another way to prevent the (at least immediate) adoption of the crisis measures. Together with Germany’s former Justice Minister Herta Däubler-Gmelin (Social Democrats), the Left applied for emergency appeals to the Bundesverfassungsgericht on 21 June 2012, claiming the unconstitutionality of the measures. Because of these applications the FCC pleased the Federal President Joachim Gauck to wait

¹⁹⁶ See Deutscher Bundestag. Beschlussempfehlung und Bericht des Ausschusses für die Angelegenheiten der Europäischen Union (21. Ausschuss) zu dem Gesetzesentwurf der Fraktionen CDU/CSU und FDP - Drucksache 17/9047 - und zu dem Gesetzesentwurf der Bundesregierung – Drucksachen 17/9373, 17/9670, Drucksache 17/10159, 27.06.2012, p. 1-8.

¹⁹⁷ Resulting, the Committee on the Affairs of the EU took part in the expert hearing of the Budget Committee on May 7, 2012 and the expert hearing of the Bundesrat on April 25, 2012. See Deutscher Bundestag. Beschlussempfehlung und Bericht des Ausschusses für die Angelegenheiten der Europäischen Union (21. Ausschuss) zu dem Gesetzesentwurf der Fraktionen CDU/CSU und FDP - Drucksache 17/9047 - und zu dem Gesetzesentwurf der Bundesregierung – Drucksachen 17/9373, 17/9670, Drucksache 17/10159, 27.06.2012, p.7.

¹⁹⁸ Deutscher Bundestag. Haushaltsausschuss, Protokoll Nr. 17/88, 88. Sitzung, 7.Mai 2012, p. 13.

¹⁹⁹ See Deutscher Bundestag. Haushaltsausschuss, Protokoll Nr. 17/88, 88. Sitzung, 7.Mai 2012, p. 13.

²⁰⁰ Deutscher Bundestag. Haushaltsausschuss, Protokoll Nr. 17/88, 88. Sitzung, 7.Mai 2012, p. 16.

²⁰¹ These are the introduced petitions: ‘*Rejection of the Ratification of the Fiscal Compact - Initiation of cause-oriented Policies for Crises Management*’ (Drucksache 17/9147); ‘*Rejection of the ESM-Treaty – Initiation of a European Investment Program*’ (Drucksache 17/9246) and finally ‘*Implementing Fundamental Reforms of the EU Treaties and Preventing the Modification of Article 136 TFEU*’ (Drucksache 17/9148).

signing the bills on 29 June 2012. The Federal President agreed to this request (see questions V.3, VIII.3, and IX.3)

3. Governmental Declaration of Merkel on 27 June 2012

After the committee sessions and briefly before the parliamentary vote on all the five bills, Merkel gave a Governmental Declaration in the *Bundestag* on 27 June 2012. The main purpose of this speech was to clarify her position concerning the further crisis measures to be discussed at the EU Summit on 28-29 June 2012.

At first, Merkel warned that there should not be too high expectations regarding the EU Summit: “Because I know the expectations and hopes with regard to the upcoming Summit, I repeat again, something which cannot be said often enough: there are no quick and there are no easy solutions. There is no magic formula or a coup with which the crisis can be solved.” According to Merkel, the crisis can only be overcome by a process of successive steps.²⁰² In this vein, she emphasized the importance of the adoption of the Fiscal Compact and the ESM Treaty by the *Bundestag* which will send a “strong signal internally and externally.”²⁰³

Overall, Merkel mainly focused on explaining the growth incentives to be adopted at the EU Summit. The most important part of her speech concerned Eurobonds, as they had been repeatedly demanded by other Eurozone Member States. Merkel also clarified that she will not discuss the introduction of Eurobonds at the EU Summit. The path to sustainable growth in the EU cannot be guaranteed through joint liabilities but only through structural reforms. In a previous parliamentary meeting Merkel had even said that there would not be Eurobonds “as long as I live.”²⁰⁴ This comment was later extensively quoted in the media.

Frank-Walter Steinmeier, leader of the parliamentary group of the Social Democrats (SPD) at that time, attacked Merkel by saying that she is “not part of the solution but rather part of the problem.”²⁰⁵ The only reason why the Social Democrats will vote in favour of the ESM Treaty and the Fiscal Compact is because the SPD has managed to change the “direction of the impact.”²⁰⁶ Finally, Steinmeier urged Merkel to “ensure that the results of our negotiations will be adopted at the EU Summit.”²⁰⁷

4. The Second and Third Plenary Session on 29 June 2012

a. The EU Summit on 28 June 2012

The level of controversy concerning the EU rescue measures peaked on Friday, 29 June 2012,

²⁰² Deutscher Bundestag. Plenarprotokoll 17/186, 186. Sitzung. 27.06.2012. p. 22221 D.

²⁰³ Deutscher Bundestag. Plenarprotokoll 17/186, 186. Sitzung. 27.06.2012. p. 22222 B.

²⁰⁴ See Spiegel Online, ‘*The Coming EU Summit Clash: Merkel Vows ‘No Euro Bonds as Long as I Live’*’. 27.06.2014. Online available at: <http://www.spiegel.de/international/europe/chancellor-merkel-vows-no-euro-bonds-as-long-as-she-lives-a-841163.html>.

²⁰⁵ Deutscher Bundestag. Plenarprotokoll 17/186, 186. Sitzung. 27.06.2012. p. 22226 A.

²⁰⁶ Deutscher Bundestag. Plenarprotokoll 17/186, 186. Sitzung. 27.06.2012. p. 22226 D.

²⁰⁷ Deutscher Bundestag. Plenarprotokoll 17/186, 186. Sitzung. 27.06.2012. p. 22227 C.

when the *Bundestag* and the *Bundesrat* had to vote on the bills. For a while it looked as if the 2/3 majority, which the government had worked on for the previous three months, was lost. The reason for this was that Chancellor Merkel had to make controversial concessions at the EU Summit with regard to the ESM Treaty. As a result, politicians from the Social Democrats (SPD), the Left (Die Linke) and even some members of Merkel's coalition partner the Liberals (FDP) requested to postpone the vote.²⁰⁸

Nobody had expected the outcome of the EU Summit, where Italian Prime Minister Mario Monti and the Spanish Prime Minister Mariano Rajoy had convinced their Eurozone partners to facilitate the access to the ESM Fund. First, the summit participants agreed that states fulfilling the budgetary rules laid down by the European Commission could receive ESM loans without having to accept strict austerity measures. Second, the heads of state agreed that the ESM could directly assist banks, however only after a European banking supervision mechanism has been established under the auspices of the ECB.²⁰⁹

On the eve of the EU Summit, Merkel insisted that she would not make any concessions. Her advisors even explicitly ruled out the possibility of allowing easier access to the ESM Fund. Resulting, Merkel's concessions were depicted as a personal defeat in the media. The weekly magazine 'Der Spiegel' even published an article titled 'The night in which Merkel was defeated'.²¹⁰

b. Government Declaration by Merkel on 29 June 2012

The concessions Merkel made at the EU Summit and the negative media coverage led to much insecurity on the part of many parliamentarians in the *Bundestag*. This became especially clear in the plenary session the next day, where the *Bundestag* was supposed to vote on the crisis measures. After Merkel's Government Declaration, in which she explained the measures taken the day before, a very emotional and heated debate erupted.

Merkel commented positively on the crisis measures to be voted on.²¹¹ In the major part of her speech, Merkel explained the outcomes of the EU Summit. She praised the economic stimulus package and the agreements taken in relation to the FTT. In addition, she explained the new decisions concerning the ESM Fund and repeatedly pointed out that these decision are not related to the five bills voted on today and that the *Bundestag* could still veto the EU

²⁰⁸ See Spiegel Online, 'SPD- und FDP- Politiker wollen Abstimmung verschieben', 29.06.2012. Online available at <http://www.spiegel.de/politik/deutschland/esm-abstimmung-politiker-von-spd-und-fdp-fordern-verschiebung-a-841744.html>.

²⁰⁹ See Euro Area Summit Statement, Brussels, 29 June 2012, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf

²¹⁰ See Volkery, Carsten, 'Die Nacht, in der Merkel verlor', in: Spiegel Online, 29.06.2012. Online available at: <http://www.spiegel.de/politik/ausland/angela-merkel-erleidet-bei-eu-gipfel-niederlage-a-841653.html>

²¹¹ She said that the *Fiscal Compact* is a "groundbreaking integration step" as it is the first time that EU nations unite to keep the common currency as stable as possible. Furthermore, she depicted the close integration of the *ESM Treaty* and the *Fiscal Compact* as a legal link between "solidarity and solidity." Finally, she thanked all *Bundestag* parties for their cooperation and stated that the adoption of the EU measures Germany will send a "signal of unity and determination [...] that clarifies that we see our future in Europe."

Summit decisions at a later point of time.²¹²

Merkel's coalition party, the Liberals (FDP), were in a difficult situation because many of their MPs disagreed with most of the decisions taken at the EU Summit, including the FTT. The opposition used this situation to scorn Merkel's coalition partner. Jürgen Trittin from the Greens, e. g., said that the fact "that the FDP consented to the introduction of a FTT is as if the Pope and Volker Beck [a LGBT-member from the Greens] demonstrate at the Christopher Street Day."²¹³

c. Position of the Opposition Parties

The chairman of the Social Democrats (SPD), Sigmar Gabriel, sharply criticized the Federal Government.²¹⁴ Due to the high level of youth unemployment "Europe is about to produce a lost generation"²¹⁵ for which Merkel is responsible, Gabriel said. The economic stimulus package should have been adopted much earlier. Moreover, he heavily criticized Merkel for giving in at the EU Summit.

Nevertheless, the Social Democrats will vote in favour of the bills because "Europe is more important to us than the party political profiling,"²¹⁶ Gabriel said. According to him, Germans "are the net winners of the European Union!" and that's why we have an obligation to return some of our money.²¹⁷ The parliamentary group the Greens (Bündnis 90/Die Grünen) repeated Gabriel's accusation towards the government.

Dagmar Enkelmann from the parliamentary group the Left (Die Linke) as one of the opposition parties, criticized the government for not giving the parliamentarians more time to decide about the EU measures. That the government ignores this demand is the "arrogance of power" and renders the legislative process into "bullshit". Sarah Wagenknecht, also from the Left, called the government "puppets"²¹⁸ of the banks, the ESM a "grave of billions of Euro" and Merkel the "gravedigger of the Euro."²¹⁹

III. Voting Behavior

The *Bundestag* consisted of 620 MPs at that time whereas the governing coalition of Christian Democrats (CDU/CSU) and Liberals (FDP) had 330 seats in total. An absolute majority could be reached with 311 votes. A 2/3 majority could be reached with 414 votes.²²⁰ After the second plenary session, the parliamentarians voted on the five federal bills adopting the Fiscal

²¹² See Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22700 B.

²¹³ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22715 B.

²¹⁴ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22702 C.

²¹⁵ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22703 D.

²¹⁶ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22705 D.

²¹⁷ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22706 B.

²¹⁸ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22708 D.

²¹⁹ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22708 A.

²²⁰ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p. 22734 C.

Compact, the ESM Treaty and the Article 136 TFEU amendment. Most of the votes were conducted as roll-call vote which usually happens when the *Bundestag* has to decide on controversial issues.

In the end, the necessary 2/3 majority was reached but the governing coalition missed the so-called ‘Kanzlermehrheit’ in the Bundestag when voting on the Fiscal Compact Law, the ESM-Ratification Law and the ESMFinG. A ‘Kanzlermehrheit’ would have been reached if all members of the governing coalition, consisting of all MPs from the Christian Democrats (CDU/CSU) and the Liberals (FDP), would have voted for the bills. Although the ‘Kanzlermehrheit’ was not necessary, it was negatively commented on in the media coverage the subsequent day.²²¹

At first, the Fiscal Compact Law was voted on with a roll-call. The adoption of this bill required a 2/3 majority according to Article 23 (1) in conjunction with Article 79 (2) GG which was finally reached. 604 members of the *Bundestag* casted their vote, 491 parliamentarians voted in favour of the bill, 111 voted against it and 6 MPs abstained.²²²

Second, the ESM-Ratification Law was voted on, for which the Federal Government also demanded a 2/3 majority (see question VIII.2). In the end, 604 MPs casted their vote, 493 parliamentarians voted in favour of the bill, 106 voted against it and 6 MPs abstained. Therewith, the required 2/3 majority was reached.²²³

Third, the ESMFinG, which only required a simple majority, was voted on through a roll-call vote. 603 MPs casted their vote, 497 parliamentarians voted in favour of the bill, 101 voted against it and 5 MPs abstained.²²⁴ Hence, the bill was adopted with a 2/3 majority, although it only required a simple majority.

Fourth, the Act Amending the Federal Debt Management Law (BSWG) was voted on. It was adopted with a simple majority and voted on without a roll-call.²²⁵

Finally, the Law Amending Article 136 TFEU, which only required a simple majority, was voted on through a roll-call vote. 602 MPs casted their vote, 504 parliamentarians voted in favour of the bill, 97 voted against it and 1 MP abstained.²²⁶ Hence, the bill was adopted with a clear 2/3 majority, although it only required a simple majority.

The same day, all five federal bills were adopted by the *Bundesrat*. However, due to pending cases at the FCC the bills were not immediately signed by Federal President Joachim Gauck but only on 13 September 2012 and announced in the Federal Law Gazette on 18 September 2012.

²²¹ See for instance: Focus, ‘Merkel verfehlt bei ESM drei Mal Kanzlermehrheit’. 20.06.2012. Online available at: http://www.focus.de/tagesthema/eu-merkel-verfehlt-bei-esm-drei-mal-kanzlermehrheit_aid_775400.html.

²²² See Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p.22736 C.

²²³ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p.22740 C.

²²⁴ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p.22744 D.

²²⁵ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p.22743 D.

²²⁶ Deutscher Bundestag. Plenarprotokoll 17/188, 188. Sitzung, 29.06.2012, p.22747 B.

IV. Federal President's signature

In June 2012, several constitutional complaints against the bills ratifying and adopting the Fiscal Compact, the ESM Treaty, and the Article 136 TFEU amendment led to a deferral of the legislative procedure. On 29 June 2012, all five laws described above were adopted by the *Bundestag* and *Bundesrat*. One day before, on 28 June 2012, the FCC had asked Federal President Joachim Gauck to wait signing the laws due to the constitutional complaints which had not been decided at that time.

The signature of the Federal President is the last constitutional requirement of the ratification process of a German law. Article 82 (2) GG determines that “[l]aws enacted in accordance with the provisions of this Basic Law shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette.“ Federal President Gauck accepted the request of the *Bundesverfassungsgericht* by saying that he “intends to respect this request [of the *Bundesverfassungsgericht*] in accordance with the established state practice between German constitutional organs and out of respect for the constitutional court.”²²⁷.

On 12 September 2012 the *Bundesverfassungsgericht* did not see sufficient concerns regarding the constitutionality of the German laws adopting the three EU rescue measures that it would issue an interim order. As a result President Gauck signed the laws adopting and ratifying the Fiscal Compact, the ESM Treaty, and the Article 136 TFEU amendment on 13 September 2012. They entered into force on 19 September 2012.

CASE LAW

V.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT IN GERMANY ON THE 136 TFEU TREATY AMENDMENT?

I. Judgment on 19 June 2012 (ESM Treaty, Euro-Plus-Pact)

1. Name of the Court

Bundesverfassungsgericht/German Federal Constitutional Court (FCC)

2. Parties

The applicant in this constitutional court proceeding was the parliamentary group the Greens (Bündnis 90/Die Grünen), represented by its chairpersons Renate Künast and Jürgen Trittin. The respondent was the Federal Government of Germany, represented by Chancellor Angela Merkel.

²²⁷ See http://www.bundespraesident.de/SharedDocs/Pressemitteilungen/DE/2012/06/120621-Mitteilung.html;jsessionid=3CBAD287936F1B888E06090F0A4B6009.2_cid388

3. Type of action/procedure

The proceeding was an *Organstreit* pursuant to Article 93 (1) No. 1 GG in conjunction with §§ 13 No. 5, 63 et seq. German Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, or briefly BVerfGG).

4. Admissibility & Arguments of the parties

The *applicant* claimed that the Government had infringed the parliamentary rights to participation laid down in Article 23 (2) GG since it has neither sufficiently nor in good time informed the parliament about the negotiations concerning the ESM and the Euro Plus Pact. The constitutionally guaranteed rights of the German Bundestag are concretised in §§ 4 et seq. of the ‘Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union’ (EUZBBG). These provisions provide that the government informs the *Bundestag* in matters concerning the EU at the earliest possible date. The obligation to give the German *Bundestag* comprehensive information is intended to put the *Bundestag* in the position to exercise its rights of participation effectively, and it therefore also covers preparatory papers of the European Commission and the Council, including unofficial documents.

ESM-Treaty (TESM)

In the view of the *applicant*, the government failed to inform the *Bundestag* in the period before and after the meeting of the European Council of 4 February 2011 comprehensively, at the earliest possible date and at regular intervals of the structuring of the ESM. In addition, the government did not send the TESM-draft at the latest on 6 April 2011 which – in the view of the applicant – constituted a further infringement of the obligation to inform parliament.

Euro Plus Pact

The *applicant* also argued that the instruments of the Euro Plus Pact extend the right of supranational surveillance of Articles 121 and 126 TFEU. In light of the content and the procedures which are recognisably based on Article 121 TFEU, the Euro Plus Pact is a European matter in the sense of Article 23 (2) GG. Pursuant to § 5 (2) EUZBBG, the Federal Government is obliged to inform the German *Bundestag* of the government’s initiatives by sending comprehensive documents and information at the earliest possible date. The Euro Plus Pact has its origin in a German-French initiative of 4 February 2011. This initiative was introduced to the European Council by the Federal Chancellor Merkel together with the President of France, M. Hollande, without the German *Bundestag* having been informed of it in advance. The requirement of comprehensive information at the earliest possible date excludes the possibility of informing the German *Bundestag* only after the event. In this respect, a German initiative is only possible after a consultation between the government and the parliament. Describing the initiative as a “personal” initiative of the Federal Chancellor would circumvent the obligation to inform under Article 23 (2) sentence 2 GG. The Federal Government also breached its duty to inform the German *Bundestag* in the further course of the negotiation process on the Pact – argued the applicant.

The *Bundesverfassungsgericht* decided that the applications are admissible. In general,

parliamentary groups such as the applicant are entitled to claim infringements of the *Bundestag* as a whole by using the legal construction of representative action. This instrument is a mechanism to safeguard the control function of the parliament and the parliamentary minority rights. Applications are, however, restricted to infringements of constitutional rights of the *Bundestag* which is why legal provisions of statutory law can only be invoked as far as they reflect constitutional obligations of the government. The applicant's need for legal review is not excluded because the government has made good its omission to inform the *Bundestag*. The procedure aims at objectively determining infringements of constitutional rights and does not depend on the on-going existence of an infringement. Its function is also to publicly announce constitutional violations caused by a constitutional organ.

5. Legally relevant factual situation

None.

6. Legal questions & Arguments of the parties

The *Federal Government* as respondent argued that the planned ESM is an international financial construction outside the EU-framework and therefore it is not a European matter within the meaning of Article 23 (2) GG. In the case of actions under international law outside the framework of the supranational European Union, the German *Bundestag* has a right of final decision under Article 24 GG and/or Article 59 (2) GG, and therefore the need for comprehensive information is not of the same intensity.

ESM

In addition, the *Federal Government* was of the opinion that it had always informed the German *Bundestag* on the negotiations concerning the ESM comprehensively and at the earliest possible date. Committees of the *Bundestag* were regularly informed orally, the Committee on European Affairs was provided with a term sheet on the principles of the ESM as a room document and the German *Bundestag* received a document as early as 23 March 2011 which summarised the ideas on the ESM discussed at the meeting of the European Council on 24/25 March 2011. On 18 May 2011, the chairpersons of the Budget Committee and the Committee on the Affairs of the European Union received the English version and an unofficial German translation of the TESHM-draft.

Euro Plus Pact

In the view of the *Federal Government* the Euro Plus Pact is not a European matter within the meaning of Article 23 (2) GG because it is merely intended to supplement the coordination mechanisms provided for in European Union law (in particular Article 121 TFEU) in areas of economic and social policy, which are completely in the competence of the Member States. The goals to be agreed are without exception voluntary self-commitments on an intergovernmental basis. Notwithstanding this, the Federal Government has always informed the German *Bundestag* of the Euro Plus Pact at an early date, comprehensively and at regular intervals. The Federal Government had no obligation to provide information on the deliberations in the Federal Government or between the Federal Government and the French

government, which were as yet not agreed on, at an earlier date than it did so. Nor is there a duty to give information on the internal forming of decisions which is not yet completed.

7. Answer by the Court to the legal questions and legal reasoning of the Court

The *Bundesverfassungsgericht's* reasoning took into account the Federal Government's argument that the ESM and the Euro Plus Pact are not European matters in the sense of Article 23 (2) GG. It interpreted this provision of the Basic Law and ruled that agreements under international law, irrespective of whether they are directed towards a formal amendment of the treaty foundations of the European Union (Article 23 (1) sentence 3 GG), are European Union matters if they supplement, or stand in another particular proximity to, the law of the European Union. It cannot be determined on the basis of a single and at the same time clear-cut characteristic when such a relationship exists. Instead, the crucial factor is an overall consideration of the circumstances, including planned contents, objectives and effects of the legislation, which, depending on their respective weight, may be decisive individually or collectively. Article 23 (2) GG is therefore intended to give the *Bundestag* sufficient time for a decision as to whether and, if so, how it wishes to participate in the national development of informed opinion. This question arises not only with regard to participation in law-making within the meaning of Articles 288 et seq. TFEU, but also for other initiatives and proposals which are important for the development and the actions of the European Union.

The Court added that it is also of importance for the interpretation and handling of Article 23 (2) sentence 2 GG that the obligation to inform serves not only to make possible the rights of participation of the German *Bundestag* under Article 23 (2) sentence 1 GG. At the same time it guarantees on a national level that the German *Bundestag* can fulfil the duties allocated to it in Article 12 TEU and in Articles 1 and 2 of the Protocol on the role of the national parliaments in the European Union and in Article 4 of the Protocol on the application of the principles of subsidiarity and proportionality. The interpretation and application of Article 23 (2) GG must further take account of the fact that this provision also serves the public nature of the parliamentary process, which is firmly founded in the principle of democracy. In the European context, the public parliamentary forming of decisions at the same time increases the responsiveness of European decisions to the interests and convictions of the citizens. It is only the public nature of deliberation which creates the conditions for review by the citizens. This also applies where parliamentary deliberation, whether in a participatory or a supervisory role, relates to the decision process. Parliamentary responsibility to the citizens is the essential condition for the effective influence of the people on the exercise of state power which is called for by Article 20 (2) sentence 2 GG. Limits to the obligation to inform follow from the principle of separation of powers. The system of functions of the German Constitution proceeds on the basis that the government has a core area of specifically executive responsibility which includes an area of initiative, consultation and action which is fundamentally confidential. Such a confidential core area is recognised by the *Bundesverfassungsgericht* in connection, for example, with the investigations of parliamentary committees of inquiry and with parliamentary rights to ask questions. In relation to the way in which information must be given to the *Bundestag*, the

Bundesverfassungsgericht highlighted that Article 23 (2) sentence 2 GG provides that the provision of information to the *Bundestag* must, with regard to the facts, be comprehensive, with regard to time, occur at the earliest possible date, and be structured in a manner appropriate to its purpose.

After having clarified the standards the *Bundesverfassungsgericht* held the applications as well-founded. The Federal government had violated the rights of the German *Bundestag* under Article 23 (2) sentence 2 GG both with regard to the establishment of the European Stability Mechanism and with regard to the agreement to the Euro Plus Pact.

ESM-treaty (TESM)

The *Bundesverfassungsgericht* made it clear that the ESM is an European Union matter in the sense of Article 23 (2) sentence 1 GG. According to the *Bundesverfassungsgericht* an overall survey of the ESM's dominant characteristics shows substantial points of contact with the integration programme of the European treaties. The establishment of the ESM is to be made possible and guaranteed under EU law by an amendment of the Treaty on the Functioning of the European Union. The insertion of Article 136 (3) TFEU which is planned in this connection must be made by a treaty amendment under Article 48 TEU.

In addition, a number of bodies of the European Union are allocated new competences by the TESM. Together with the International Monetary Fund and in consultation with the European Central Bank, the European Commission determines the actual financing requirements of the Member State benefiting. Authorised by the Board of Governors, the European Commission negotiates a macro-economic programme of adjustment and monitor compliance with the political conditions, again with the International Monetary Fund and the European Central Bank, which already work together in conducting the debt sustainability analysis. Article 13 (1) of the TESM-draft also provides that the Chair of the Board of Governors may assign duties to the European Commission. If the borrower remains a debtor of the European Stability Mechanism after the termination of the programme, the Board may order continuing surveillance. After discussion by the Board of Governors, it may, on the proposal of the Commission, resolve to carry out surveillance after the programme is completed; this may be continued as long as a specific amount of the financial aid has not yet been repaid. Finally, under Article 273 TFEU, the European Court of Justice is to decide on the interpretation and application of the Treaty on the European Stability Mechanism.

In the view of the *Bundesverfassungsgericht*, the allocation to European Union matters is not called into question by the fact that the ESM only calls on the bodies of the European Union by way of *Organleihe*. Substantively, in this way further duties and powers are transferred to the bodies, albeit not in the procedure actually intended for this under Article 48 (1) TEU. Every allocation of duties and powers to the European Union and/or its bodies is therefore substantively a transfer of sovereign powers, which is even the case if the bodies are called on to carry out a duty and are granted powers "only" by way of *Organleihe*.

Finally, the *Bundesverfassungsgericht* decided that the ESM is to serve to safeguard an area of policy which is allocated to the exclusive competence of the European Union. The TESM-

draft supplements the economic and monetary policy. With the addition of a paragraph 3 to Article 136 TFEU, which subjects financial aid to strict conditions and permits the ESM to act only when it is indispensable to stabilise the currency area as a whole (Article 3 of the TESM-draft), a link is made to the economic and monetary policy laid down in Title VIII of the European Treaties (Article 119 et seq. TFEU) and it is made clear that the provisions are intended to safeguard the monetary policy and in particular the stability of the euro currency area. In this way an area of policy is supplemented, which the Treaty on the Functioning of the European Union places in the exclusive competence of the European Union (Article 3 (1) letter c TFEU). The ESM therefore directly serves to realise the objectives of the European Union (Article 3 (4) TEU).

The fact that the ESM is to be established under a separate agreement under international law outside the previous structure of EU law does not alter this result – argued the *Bundesverfassungsgericht*. In their view, the wording “European Union matters” also includes projects which are to be realised intergovernmentally if they are in a supplementary relationship or another relationship of particular proximity to European Union law. At least because of its blending with supranational elements, the ESM has a hybrid nature, which makes it a European Union matter.

The fact that an European Union matter is concerned, makes it necessary that the German *Bundestag* is informed. The *Bundesverfassungsgericht* emphasized the importance of this obligation: In view of the complexity and the importance of the ESM for the overall budgetary responsibility of the German *Bundestag*, it is necessary for the German *Bundestag* to be involved in a manner which puts it in the position – including specifically in public debate – to critically consider the topic in detail and to clarify the necessity and scope of the measures to be adopted. Only in this way can it be guaranteed that the German *Bundestag* is the place which makes decisions on revenue and expenditure on its own responsibility, including decisions with regard to the obligations associated with the ESM. The *Bundesverfassungsgericht* underlined that it is important that strict requirements with regard to quality, quantity, timeliness and usefulness of the information on the negotiations on the ESM which follow from the requirement of comprehensive information at the earliest possible date are respected by the Federal Government. The information must in particular comprise the complete forwarding of the official materials and documents of all bodies and other groups and authorities of the EU and other Member States. The Federal Government must also send information on informal processes and on those not documented in writing, as well as information on the subject, course and results of the meetings, and deliberations of all bodies and groups of the EU in which it is represented, plus information on bilateral and multilateral actions of Member States on the level of international law. Last but not least, Article 23 (2) sentence 2 GG requires the Federal Government to inform the German *Bundestag* about its own initiatives and positions in European Union matters relating to the ESM. This is the only way to prevent the German *Bundestag* from finding itself in the role of merely following along.

The *Bundesverfassungsgericht* decided that the German Federal Government had failed to comply with the information obligation of Article 23 (2) sentence 2 GG in two cases

concerning the ESM. First, the Federal Government did not send the German *Bundestag* a text of the European Commission which was in its possession on 21 February 2011 on the establishment of the ESM; this text was the subject of the deliberations on the elements of the Stability Mechanism in the Council. Second, the draft-TESM had not been sent to the German *Bundestag* by the Federal Government at the earliest possible date.

According to the *Bundesverfassungsgericht* later oral or written information which at this date had already been discussed in the extended Eurogroup, does not alter the fact that there was a violation of Article 23 (2) sentence 2 GG. The Federal Government has an obligation to send to the *Bundestag* not merely a treaty text the deliberations on which have been completed or which has even already been decided. It must send the *Bundestag* at the earliest possible date interim results and text versions in its possession, such as the draft-TESM dated 6 April 2011. The fact that drafts are changed and therefore updates are necessary, and that such information therefore may have “a short half-life”, does not justify deferring written information until a date at which the results have already been reached. The fact that the two documents might have been confidential, does not remove the requirement to forward them. In particular, the Federal Government may not invoke fundamental confidentiality in the specific format of the extended Eurogroup, which meets informally. Negotiations preceding agreements under international law which are aimed at binding the Federal Republic of Germany and which are intended to be given the status of law are from the outset not confidential vis-à-vis the *Bundestag*. If, under exceptional circumstances, there were reasons for keeping individual information or documents confidential from the public, the Federal Government would have a duty to send the documents to the German *Bundestag* with an indication that they must be handled confidentially. The *Bundestag* created the conditions for this when it adopted its Rules on Document Security.

Euro Plus Pact

The *Bundesverfassungsgericht* began its reasoning about the Euro Plus Pact by stating that agreeing on the Euro Plus Pact is a European Union matter within the meaning of Article 23 (2) sentence 2 GG. An overall survey of its characteristics shows that the Pact has substantial points of contact with the integration programme laid down in the European treaties. The very circumstance that the Euro Plus Pact or the earlier initiative to decide on a Competitiveness Pact is directed at the EU-Member States indicates that it is directed towards the European Union integration programme. Substantively, in view of the objectives of the Pact to achieve a qualitative improvement of economic policy and the public budget situation and to reinforce financial stability, the Pact is directed towards a policy area of the European Union laid down in the European treaties. Bodies of the European Union are involved in the realisation of the objectives of the Pact, as is already shown by the planned annual assessment by the European Commission, the Council and the Eurogroup of the reform and stability programmes undertaken by the Member States of the Euro Plus Pact to fulfil their self-commitments. There is also a substantive point of contact with the European Union integration programme in the partial implementation of the Euro Plus Pact by provisions of secondary legislation. Thus, for example, Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination

of economic policies, which was adopted as part of the “Six-Pack”, increases the “extent of review” of the European Semester, which it made part of secondary legislation, to the objectives of the Euro Plus Pact, too.

This is why – following the *Bundesverfassungsgericht* – the Federal Government also had to inform about the negotiations about the Euro Plus Pact. Specifically the self-commitments in areas which are under the legislative competence of the Member States, such as for example tax law and social welfare law, and in which the legislature will in future be subject to surveillance by bodies of the European Union, relate to parliamentary responsibility and are capable of restricting the legislature’s options. The *Bundestag* had a strong interest in learning in advance about, discussing and participating in the decision as to whether and if so in what areas a coordination should be promised and what assessment criteria should be envisaged.

The *Bundesverfassungsgericht* defined the cases in which the Federal Government had failed to comply with this information obligation: The Euro Plus Pact originated in a German-French initiative which the governments of both Member States made the subject of the meeting of the European Council of 4 February 2011 and which the Federal Chancellor, together with the French President, presented to the public at this meeting. The Federal Government should have informed the German *Bundestag* of this plan at the latest on 2 February 2011. If – as the Federal Government asserts – before 4 February 2011 there was not yet a finally agreed position on the envisaged contents of an increased economic policy coordination in the euro currency area within the Federal Government, this fact would not have released the Federal Government from its obligation to inform. In this case, the subject of the necessary information was not (yet) the agreement on a Competitiveness Pact as such, but solely the respondent’s intention to initiate a process to draft it (§ 5 (2) sentence 1 EUZBBG). On this subject, the government spokesman had, at the press conference of 2 February 2011, announced an agreed position of the Federal Government. The forming of decisions within the Federal Government was therefore completed to the extent that it could present its initiative to the public and intended to enter a process of consultation with other governments with its own position. The Federal Government therefore had an obligation to inform the German *Bundestag* before the beginning of the meeting of the European Council of at least the fundamental outlines of the initiative (§ 5 (5) sentences 1 and 2 EUZBBG).

In addition, the Federal Government did not send to the German *Bundestag* an unofficial document from the Presidents of the European Commission and the European Council of 25 February 2011 entitled “Enhanced Economic Policy Coordination in the Euro Area – Main Features and Concepts”, which described essential contents of the Competitiveness Pact – later the Euro Plus Pact. Despite express request, the respondent did not supply the German *Bundestag* with this document (§ 5 (3) EUZBBG). It was only on 11 March 2011 that it forwarded the official draft of a Competitiveness Pact. At this time, the German *Bundestag* no longer had an opportunity to discuss its contents and to influence the Federal Government by an opinion, because the heads of state and government of the Member States of the euro currency area agreed on the Pact on the same date, 11 March 2011. As a result, from this date concrete self-commitments came into being, for the Federal Republic of Germany and other Member States, without the German *Bundestag* having been able to influence their contents or

to prevent them.

8. Legal effects and & broader political implications of the judgment

No legal effects which go beyond the reasoning of the Court. The judgment reminded the Federal Government of its information obligations towards the Bundestag which will probably be taken more into account in future negotiations in EU matters.

II. FCC Preliminary Ruling on 12 September 2012 (ESM Treaty, Fiscal Compact, Article 136 TFEU Amendment)

On 12 September 2012, the FCC rejected the applications to issue an interim order which interdicts the German Federal President to sign the national laws ratifying and adopting the Fiscal Compact, the ESM Treaty, and the Article 136 TFEU amendment.

1. Name of the Court

Bundesverfassungsgericht/German Federal Constitutional Court (FCC)

2. Parties

On the side of the plaintiffs were several individuals (about 12.000) and the parliamentary group of the Left (Die Linke). In the framework of this proceeding the laws were defended by the German *Bundestag* and the German Federal Government.

3. Type of action/procedure

This decision was initiated by several constitutional complaints and an *organstreit* proceeding by the parliamentary group the Left (Die Linke). The *Bundesverfassungsgericht* combined all of them for joint decision.

4. Admissibility & Arguments of the parties

The individual *plaintiffs* argued that the respective laws infringe their fundamental right to vote for the German *Bundestag* (Article 38 (1) in conjunction with Article 79 (3), Article 20 (1), (2) GG). Some of them also claimed that the laws would infringe the right to equality before the law (Article 3 (1) GG), the right to property (Article 14 (1) GG) and the right to resist (Article 20 (4) GG).

The *parliamentary group the Left* (Die Linke) argued that the German laws would infringe rights of MPs and of the *Bundestag* (Article 38 (1) sentence 2 GG in conjunction with Article 20 (1) and (2), Article 23 (1) and (2), Article 79 (3) and Article 23 (2) sentence 1 GG).

In the view of the *plaintiffs*, it is necessary to issue an interim order because the ratification of the Treaties would bind the German State on the international level which would lead to an

irreversible status.

The *German Federal Government* represented the opposite point of view. Following their argumentation, it would have massive negative consequences if the German ratification of the ESM – being the most important because of the capital contribution of 27 % – would be delayed.

The *German Bundestag* was of the opinion that the complaints based on Article 3 (1), Article 14 and Article 20 GG are not admissible. The same applies to the complaints against the German law requiring approval for the Article 136 TFEU amendment.

The *Bundesverfassungsgericht* decided that it must make a summary review of the complaints at an early stage because the ratification of the Treaties in question would bind Germany as a state which could not be withdrawn in case of non-compliance with the German Constitution. Such a procedure is necessary if infringements of subjects of protection in the sense of Article 79 (3) GG (basic principles of the German Constitution and fundamental rights) are at stake. The Court added that economic and political disadvantages which may arise from a delayed entry into force of the challenged statutes may be of great weight, but at the same time they cannot be weighed against democracy which is the interest protected by Article 79 (3) GG. The Court declared that the complaints arguing that the respective laws infringe the rights laid down in Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG are admissible because it is possible that the laws take incalculable risks, shift democratic decision processes to the supranational or intergovernmental level and that it is no longer possible for the German *Bundestag* to exercise overall budgetary responsibility. The other complaints were inadmissible because of the following reasons:

a) Article 3 GG (right to equality before the law)

The plaintiffs could not plead that their right to equality is infringed by the personal immunity of office holders laid down in Article 35 TFSM. The plaintiffs assert a general claim to the enforcement of a statute. Such a claim can be derived neither from the general principle of equality before the law nor from Article 19 (4) GG or Article 2 (1) GG.

b) Article 14 GG (right to property)

The right to property can only be invoked against financial and economic decisions if a clear reduction of monetary value is likely to follow from such a decision.

c) Article 20 (4) GG (right to resist)

This right is a subsidiary exceptional right which cannot be asserted in cases such as the present one.

d) Article 38 (1) sentence 2 (right of MPs)

As far as the plaintiffs refer to Article 38 (1) sentence 2 GG claiming that the simplified treaty amendment procedure infringed their rights as MPs because they would have the right to participate in a convention which decides about the amendment, the FCC did not follow the plaintiffs' argumentation. Since there is no norm in EU-law which determines that national parliaments have the competence to consult concerning the choice of the treaty amendment procedure.

5. Legally relevant factual situation

None.

6. Legal questions & Arguments of the parties

The plaintiffs, the *Bundestag* as the respondent and the German Federal Government as joined respondent presented several arguments. They are presented in relation to the three EU-measures which were attacked.

a) Article 136 TFEU Amendment

In the view of the *plaintiffs*, the new paragraph 3 of Article 136 TFEU would obliterate the bail-out-prohibition in Article 125 TFEU which would limit the freedom to decide about budgets of national parliaments. Essential foundations of the Economic and Monetary Union would be eliminated. In addition, the new norm is completely indetermined – from their point of view. Furthermore, this amendment could not have been based on the Article 48 para. 6 TEU-procedure.

The *German Federal Government* countered that the amendment of Article 136 TFEU does not remove the no bail-out-clause but is rather a clarification of the existing legal situation. The measures of stability support are not measures of monetary policy but measures of economic policy, for which the Member States are competent.

The *German Bundestag* supplemented that Article 125 TFEU is not opposed to voluntary grant of assistance. The new paragraph would not establish a transfer union but is dominated by a strict proportionality principle which is why financial assistance under Article 136 (3) TFEU is only possible in sufficiently clear situations for a limited period of time. Moreover, the amendment would not enlarge the competences of the EU.

b) ESM

The *plaintiffs* argued that the ESM would not be in conformity with the basic principles of the *Grundgesetz*, in particular with the principle of democracy. Essential competences of the *Bundestag* in the field of budget autonomy would be transferred to an international institution because the ESM creates a liability automatism which cannot be turned back by the present or a future *Bundestag*. The liability volume goes beyond the degree which is constitutionally allowed. The obligations resulting from the ESM would also violate the debt brake (golden rule) of the German Constitution (Article 109 (3), Article 115 (2) GG). Moreover, the liability volume is not determined in the ESM-Treaty because the Treaty contains a clause (Article 9 (2) and (3), Article 25 (2) TESM) which obliges all Member States to make additional payments if one of the other Member States is bankrupt. Furthermore, in its Article 4 (8) the ESM-Treaty contains the possibility that voting rights of the Member States can be automatically removed which is a severe violation of the principle of democracy. The members of the ESM-organs are subject to a duty of professional secrecy (Article 34 TESM) which is not in conformity with the obligation to inform parliament laid down in Article 23 (2) GG – argued the plaintiffs. The non-terminability of the ESM-Treaty would also infringe the

German Statehood (“Staatlichkeit”). Finally, the immunity of the members of the ESM-organs (Article 35 TESM) would infringe the right to equality before the law (Article 3 (1) GG).

In contrast, the *German Federal Government* was of the opinion that the overall budget responsibility of the German *Bundestag* is safeguarded because the Federal Finance Minister is sent to the Board of Governors and a Permanent Secretary to the Board of Directors of the ESM. The maximum amount for which Germany would be liable is approximately Euro 190 billion, so that there is no uncertainty about the risks which arise by becoming member of the ESM. In fact, the alternative to the ESM would not be without risks. The ESM would also not be the beginning of transfer union. Long-term payments similar to financial equalisation remain out of the question.

The *German Bundestag* supported the point of view of the German Federal Government and added that the ESM contains clear conditions which burdens it creates. Most importantly, the ESM is of permanent nature, but the assistance measures are not. Even if all the paid in-capital given to the ESM by Germany would be devaluated, the burdens arising from this would merely increase German state deficit by approximately eight percentage points. The German parliament would still have enough latitude to take political decisions. Furthermore, abstaining from the ESM would lead to developments which would result in burdens for the present and for future budget legislatures which would be equally large or even larger. Finally, there would be no democratic deficit because all decisions must be approved by the *Bundestag* and the German representatives in the ESM-organs are under parliamentary scrutiny.

c) Fiscal Compact

Legal objections against the Fiscal Compact were raised by the *plaintiffs* because it would oblige the German State to keep the debt brake permanently. The obligations following from the Fiscal Compact would not make it necessary to change the German Constitution but it would receive a new legal quality. Furthermore, the automatic correction mechanism is an intervention into the German sovereignty. Article 4 of the Fiscal Compact obliges Germany to make an annual reduction of debt in the amount of Euro 26 billion. The plaintiffs argued that this is incompatible with Article 109 (3), Article 115 (2), Article 143d (1) GG and requires to change the German Constitution because the budget law governs only the reduction of deficit but not the reduction of public debt. Moreover, the budget autonomy is eroded because the European Commission is empowered to approve budget and economic programmes (Article 5 of the Fiscal Compact). Finally, the non-terminability of the Fiscal Compact is against the German Constitution because it involves an irreversible economic policy.

The *German Federal Government* replied that the Fiscal Compact does not create fundamental new obligations for Germany but must rather be seen as a concretization of regulations being already in force. This is why there is no material new restriction of the budget autonomy. Concerning the missing of a terminability-clause in the Fiscal Compact, the Government pointed to the fact that this is not unusual for international contracts. However, these contracts could be terminated, for example on the basis of Article 62 of the Vienna

Convention on the Law of Treaties.

The *German Bundestag* agreed with the German Federal Government and, additionally, pointed to the fact that sanctions of the EU-institutions could only be addressed to the federal level and not to the Länder. By integrating the ECJ into the Fiscal Compact the Treaty would not transfer competences to another body with sovereign power. Article 8 of the Fiscal Compact merely grants the Court of Justice the competence with regard to compliance with Article 3 (2) of the Fiscal Compact to decide legal actions of the Contracting Parties and in the case of a violation to impose a penalty payment on a Contracting Party.

7. Answer by the Court to the legal questions and legal reasoning of the Court

The *Bundesverfassungsgericht* judged that the complaints against the German laws requiring approval for the Article 136 TFEU Amendment, the ESM-Treaty and the Fiscal Compact were – after a summary review – unfounded. The reasons are presented in relation to the three laws.

a) Article 136 TFEU Amendment

The *Bundesverfassungsgericht* was of the opinion that the amendment of Article 136 TFEU constitutes a fundamental reshaping of the existing economic and monetary union and that it is detached, if not completely, from the principle of independence of the national budgets which has up to now characterised the monetary union. Nonetheless, the introduction of the new paragraph 3 of Article 136 TFEU does not mean abandoning the stability-directed orientation of the monetary union. Article 136 (3) TFEU does not provide release from the obligation of budgetary discipline. Only in the field of exclusions of liability laid down in Article 125 (1) TFEU does the new norm introduce changes but they are restricted to the purpose of authorisation and the nature of the provision as an exceptional provision. The possibility of active measures of stabilization complements the existing rules aiming at stability of the monetary union. In this regard, the Court respects the latitude of assessment of other competent constitutional institutions which chose the model for stability after a risk assessment.

Furthermore, the new Article 136 (3) TFEU is based on a democratic decision because all national parliaments – including the German – will have to approve the amendment. The norm is also precise enough. Since it does not transfer sovereign competences from the national to the European level, the German Constitution does not require restrictive criteria.

b) ESM-Treaty

All in all, the *Bundesverfassungsgericht* declared that approving the German participation of the ESM would not violate the German Basic Law but in some cases this is only possible when Germany notifies before the ratification that only a certain interpretation of ESM-Treaty norms is valid.

The ESM-Treaty contains rules which would enable a higher amount of liability, in particular the competence to issue shares of the European Stability Mechanism's authorised capital stock higher than at par (Article 8 (2) sentence 4 TESM), the competence to call in authorised

capital (Article 9 (2) and (3) TESM) and the possibility of a revised increased capital call (Article 25 (2) TESM). The Court states that these rules must be interpreted in light of the general rule which determines the upper limit of liability obligations (Article 8 (5) sentence 1 TESM). This upper limit can never be exceeded by other measures in the framework of the ESM-Treaty. A higher sum of liability must be approved by national parliaments in the framework of an ESM-Treaty amendment.

The ESM-Treaty norms concerning the inviolability of all official papers and documents (Article 32 (5) TESM), the professional secrecy of the members of the ESM-organs (Article 34 TESM) and the immunity from legal proceedings (Article 35 (1) TESM) do not infringe the principle of democracy and parliamentary control because they do not exclude that national parliaments can and must be informed comprehensively. The *Bundesverfassungsgericht* highlights that Germany must make sure before the ratification that the German parliament receives all necessary information concerning decisions taken at the ESM-level.

The ESM-Treaty contains the suspension of Members' voting rights if the respective Member State does not fully meet its obligations to make payment that it has vis-à-vis the European Stability Mechanism. In the view of the **Bundesverfassungsgericht**, this does not infringe Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG because it belongs to the constitutional obligations of the *Bundestag* (Article 110 (1) GG) to make sure that the payments can be made on time and up to its full amount. As long as the Federal Republic of Germany fulfills its Treaty obligations, there is no threat that the German voting rights are suspended.

The total German sum of liability amounts up to Euro 190.024.800.000. This does not lead to a complete failure of budget autonomy even if one adds the obligations arising from the participation at the EFSF, the bilateral aid measures for the Hellenic Republic and the risks resulting from the participation at the ESCB and the IMF. It is within the legislators' assessment to take risks which is not replaced by the FCC's own evaluation of the risk assessment. Since the assumptions of the Government are not evidently erroneous, the German participation of financial assistance is not incompatible with the German Constitution.

The German *Bundestag*'s overall budget responsibility is not impaired by the fact that there is no express right of resignation or termination. Since there is an upper limit for the liability sum, there is no need to include regulations about the resignation or termination.

The Court did not finally decide whether the rights of participation of the *Bundestag* were respected by the German laws requiring approval for the participation at the ESM. It highlighted that this question must not be checked in detail in this decision because it can be left to the main proceedings. The ratification of the ESM-Treaty does not exclude that national laws are changed in order to make sure that the parliamentary responsibility is respected. In the view of the *Bundesverfassungsgericht*, the ESM-Treaty itself does not exclude that national laws safeguard that national parliaments are informed about ESM-

measures, that they control the national members of the ESM-organs and that they give instructions to them.

c) Fiscal Compact

In general, the *Bundesverfassungsgericht* was of the opinion that the rules of the Fiscal Compact correspond to those in the German Constitution. This is the main reason why there is no infringement of Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG. The rules of the Fiscal Compact concerning the budget discipline partly conform to Article 109, 115 and 143d GG. The rules of the Fiscal Compact concretise the regulations about the national budgets in the European Treaties, in particular Article 126 TFEU.

Both the Fiscal Compact and the German Constitution require that the budget – in general – must be financed without loans. The structural compatibility of the rules is not upset by the fact that the German debt brake refers to the budgets of the Federal Government and the Länder while the European debt brake also includes the budgets of local governments and social security funds. The limited reasons for which a national budget can deviate from the aim of a balanced budget are also similar in the Fiscal Compact and the German Constitution. Moreover, there are procedures when European institutions – in particular the Commission – is involved in the planning of the national budget but there is no direct “reach-through” of the bodies to national budget legislation. The fact that the ECJ is competent to decide in Fiscal Compact matters does not include the control about the concrete application in the Member States but is limited to the codification of the Fiscal Compact rules in national law. The competence is comparable to the treaty violations proceedings. In its last paragraph the judgment mentions which possibilities exist to resign from the contract: The FCC refers to Article 62 of the Vienna Convention on the Law of Treaties which allows the withdrawal from an international treaty when there was a fundamental change of the circumstances which applied when the treaty was entered into. Additionally, leaving the European Union or the Eurozone would also have the effect that the respective Member State would no longer be obliged by the Fiscal Compact rules.

8. Legal effects and & broader political implications of the judgment

No relevant effects and/or implications.

III. Judgment on 18 March 2014 (ESM Treaty, Fiscal Compact, Article 136 TFEU Amendment)

1. Name of the Court

Bundesverfassungsgericht/German Federal Constitutional Court (FCC)

2. Parties

The parties are the same as in the FCC Preliminary Ruling from 12 September 2012 (see above).

3. Type of action/procedure

The type of actions are the same as in the FCC Preliminary Ruling from 12 September 2012 (see above).

Though, in a court order from 17 December 2013 the FCC has separated the procedures which are related towards the decision of the ECB-Council concerning Outright Monetary Transactions (OMT) and the acquisition of government bonds at the secondary market.

In the course of the oral hearing, representatives of the European Stability Mechanism, the European Central Bank and the German Bundesbank were heard as expert third parties (§ 27a Federal Constitutional Court Act). The German *Bundestag*, the Federal President, the German *Bundesrat*, the Federal Governments and all *Länder* governments had the opportunity to submit statements.

4. Admissibility & Arguments of the parties

The individual plaintiffs referred to basic rights of the German Constitution, the parliamentary group to institutional provisions of the *Grundgesetz*. They used the arguments already mentioned in the *Bundesverfassungsgericht's* Preliminary Ruling from 12 September 2012 (see above). However, in this proceeding additional arguments were presented.

In general, all of the *plaintiffs* using the constitutional complaint proceeding referred to Article 38 (1) sentence 1 GG in conjunction with Article 79 (3) and Article 20 (1), (2) GG. These provisions contain the democratically founded right to vote for the German *Bundestag* which is violated in their point of view by the fact that the power to take decisions of the *Bundestag* is severely limited by the financial obligations laid down in the national laws approving European fiscal agreements. In addition, individuals claimed the infringement of the right to equality (Article 3 (1) GG). Moreover, other plaintiffs referred to the right to property (Article 14 (1) GG) and the right to resistance (Article 20 (4) GG). One of their main argument was that the right to vote for the *Bundestag* is infringed because the European character of the assistance mechanisms makes it legally and factually impossible to influence the decisions taken at the European level which results in a substantial reduction of the *Bundestag's* discretion and its democratic function in Germany.

The *parliamentary group the Left* (Die Linke) claimed that the laws in question infringe rights of the parliamentary group and of the *Bundestag* laid down in Article 38 (1) sentence 2, Article 20 (1), (2), Article 23 (1), (2) and Article 79 (3) GG.

The *Federal Government* argued that the constitutional complaints are inadmissible to the extent that they challenge the division of tasks between the plenary and the budget committee as envisaged in the ESM Financing Act (ESMFinG). Based on Article 38 (1) GG, the *Bundesverfassungsgericht* had acknowledged the voters' protection against the erosion of the right to vote in the form of a depletion of the *Bundestag's* responsibilities through the delegation of powers to international or supranational institutions, but it did not give them the right to take action on behalf of the individual parliamentarians for their rights under Article

38 (1) sentence 2 GG – argued the Federal Government.

The *German Bundestag* supported the point of view of the Federal Government. With regard to the accompanying legislation on the ESM, in particular the division of competences between the plenary and the budget committee, the constitutional complaints are inadmissible. In their point of view, there can be no violation of the complainants' rights under Article 38 (1) GG in conjunction with Article 20 (1) and (2) and Article 79 (3) GG in this context, which means that they are not entitled to lodge a constitutional complaint. Unlike the transfer of sovereign powers to the European Union, the division of responsibilities within the *Bundestag* cannot erode the substantive content of the right to vote under Article 38 (1) GG. An individual right of complaint against the allocation of competences in parliament is also incompatible with the German *Bundestag*'s right to self-organisation.

The *Bundesverfassungsgericht* decided that the constitutional complaints are admissible to the extent that the complainants submit that through the Article 136 (3) TFEU amendment, the ESM, and Fiscal Compact, and through insufficient budgetary provision for the case of capital calls, incalculable risks are taken and democratic decision processes are shifted to the supranational or intergovernmental level, so that it is no longer possible for the German *Bundestag* to exercise its overall budgetary responsibility. The legal basis is Article 38 (1) sentence 1, Article 20 (1), (2) GG in conjunction with Article 79 (3) GG.

With regard to all other aspects, the constitutional complaints are inadmissible. The *Bundesverfassungsgericht* reasoned its decision with the fact that Parliament's internal, functional allocation of responsibilities between the plenary of the *Bundestag*, its committees, and other subsidiary bodies cannot be challenged with a constitutional complaint. Regarding the complaint that Article 35 (1) TFSM violates the general principle of equality before the law (Article 3 (1) GG) the Court stated that there is no objective justification for the personal immunity from jurisdiction which is granted to the office-holders of the ESM with regard to their official acts, which is why the complainants themselves suffer no adverse effects from this provision and their constitutional constraints are inadmissible.

Furthermore, there is no general right to have the laws enforced ("allgemeiner Gesetzesvollziehungsanspruch"), which can be derived neither from the general principle of equality before the law (Article 3 (1) GG) nor from Article 19 (4) GG or Article 2 (1) GG. To the extent that complainants claim a violation of their fundamental right under Article 14 (1) GG (right to property) with regard to inflationary developments as a result of the ESM and the accompanying legislation, they have not sufficiently substantiated their claims.

The claim of the complainants that their right under Article 20 (4) GG (right to resist any person seeking to abolish this constitutional order), which is equivalent to a fundamental right, has been violated, is inadmissible because they are not entitled to make such a claim. The right to resist any person seeking to abolish the constitutional order is a subsidiary, exceptional right which cannot be asserted in the very proceedings in which a judicial remedy against the alleged abolition of the constitutional order is sought.

Moreover, the complainants have not shown how and to what extent the implementation of the TARGET2-system could impair the overall budgetary responsibility of the German *Bundestag*, and thus their rights under Article 38 (1) sentence 1 GG. Also the alleged various omissions of German constitutional organs in regard to TARGET2 were inadmissible. The

constitutional complaint is also inadmissible to the extent that it challenges measures of the European Central Bank in connection with the refinancing programmes of commercial banks because this claim has not been substantiated enough.

In the submission that the “Six Pack” violates the German Constitution, complainants did not state that their right to vote pursuant to Article 38 (1) sentence 1 GG has been violated by an interference with the constitutional identity protected under Article 79 (3) GG or by a failure of German state organs to react to qualified ultra vires acts. The general allegation that the six acts of secondary legislation of the “Six-pack” establish an economic government of the European Union neither suffices to substantiate that the right to vote is eroded because the German *Bundestag* loses indispensable powers to decide, nor to substantiate a possible right to a declaration that the European Union acted ultra vires.

To the extent that complainants challenge Regulation (EU) No 1176/2011, they did not sufficiently substantiate a possible violation of Article 38 (1) sentence 1 GG.

The application of complainants for a declaration that their rights have been violated by the Euro Plus Pact was also unsubstantiated.

The application in the *Organstreit* proceedings is only admissible to the extent that the applicant asserts that through the challenged legislative acts, the German *Bundestag* divests itself of its overall budgetary responsibility. Allocating a parliamentary obligation to a committee does not violate a right of the German *Bundestag* which the applicant could assert on its behalf via representative action, even if the allocation did not satisfy the constitutional requirements and therefore violated the principle of democracy. The principle of democracy, which is protected by Article 20 (1) and (2) GG, is not a right of the German *Bundestag*, not even to the extent that Article 79 (3) GG declares it inviolable

5. Legally relevant factual situation

In relation to the situation in Germany, there were no relevant facts regarding this decision which are legally relevant for the procedure or the reasoning of the court.

6. Legal questions & Arguments of the parties

All arguments of the parties are presented in relation to the European rescue measure concerned.

Article 136 TFEU

The *complainants* argued that the introduction of Article 136 (3) TFEU factually eliminates the no bail-out clause (Article 125 TFEU) and consequently the discretion of the national parliaments in budgetary questions. By introducing Article 136 (3) TFEU and, in the consequence, the ESM, the Monetary Union is fundamentally restructured into a community of comprehensive joint liability and stability, which is incompatible with Article 79 (3) GG. In addition, Article 136 (3) TFEU would deepen the connectedness of the euro currency area to such a degree that a federal state is created and Germany's statehood and sovereignty are largely terminated. This would violate the principle of democracy, the rule of law and the principle of a social state, as well as the guarantee of sovereign statehood, and at the same

time Article 146 GG, because it paves the road to a further consolidation of the European Union, while the German people was not given an opportunity to approve this by voting on a new Constitution.

The *Federal Government* argued that Article 136 (3) TFEU merely clarifies that the assistance measures of the ESM are measures of economic policy, for which the Member States are competent, and that Article 136 (3) TFEU does not change the orientation of the monetary union. In addition, the financial assistance measures, which are subject to strict conditionality, are designed as a last resort to ensure the financial stability, and are thus compatible with Article 125 TFEU.

The *German Bundestag* was of the opinion that in the unanimous agreement of the Member States of the European Union, Article 125 TFEU does not prevent the voluntary granting of assistance. Article 136 (3) TFEU would clarify this once more and also be sufficiently precise. The provision would serve to safeguard the stability of the monetary union and specifically not make it possible to introduce a comprehensive liability and transfer union, but instead give selective authorisation for assistance measures for a limited period of time in a situation which is sufficiently clearly defined. In addition, it would respect the requirements of strict conditionality. Finally, Article 136 (3) TFEU would not expand the competence of the European Union.

ESM-Treaty (TESM)

The *complainants* argued in relation to the ESM-Treaty that it could – in conjunction with the ESM Financing Act – lead to incalculable burdens on the federal budget that are not controlled and accounted for by the *Bundestag*, and would thus be incompatible with the *Bundestag's* overall budgetary responsibility. This would be true, in particular, because of the obligation under international law to possible capital increases and re-capitalisations which removes the *Bundestag's* right to decide autonomously about such a question which is – in their point of view – an infringement of the principle of democracy. A further point was that capital calls pursuant to Article 9 (2) and (3) TESH can be made without the *Bundestag's* approval. It would have no opportunity to influence the loss risks which follow from the operations of the ESM. It can only indirectly influence policy matters via the guidelines which the Board of Directors adopts.

In addition, the *Bundestag* would have no means of enforcing a conduct of the ESM institutions that adheres to these guidelines. With regard to the Director and alternate Director to be appointed by Germany, they are not bound by the decisions of the *Bundestag* in a sufficiently reliable manner, and their accountability to parliament is not sufficiently ensured. In order to do so, a permanent legal protection of Germany's veto position in the institutions of the European Stability Mechanism would be necessary, which is not the case because other states can join the euro area and the ESM Treaty any time while Germany does not have a veto position against such an accession.

The plaintiffs also argued that the participation of parliament is not precisely enough regulated with regard to the issuance of shares of the capital stock of the ESM on terms other than at par pursuant to Article 8 (2) sentence 4 TESH.

Moreover, shifting decision-making powers from the plenary to the budget committee which

the ESM Financing Act stipulates would violate the principle of holding meetings in public, a vital element of representative democracy covered by Article 79 (3) GG.

Furthermore, the provisions on immunity in Article 35 (1) TESM for the members of the ESM-bodies would lead to arbitrary and thus, with regard to Article 3 (1) GG, unconstitutional unequal treatment.

In addition, there must be – from their point of view – a guarantee in the German law safeguarding that awarding financial assistance is only permissible if the expression “indispensable to safeguard the financial stability of the euro area as a whole”, laid down in the ESM-Treaty, is interpreted in a narrow sense. This had not been the case in the assistance to Cyprus in 2013.

Moreover, it is seen as being not in conformity with the *Grundgesetz* that the German authorities take part in negotiations with Member States which applied for financial assistance and concluded a Memorandum of Understanding because in these cases the German *Bundestag* can no longer decide freely whether it wants to vote in favour or against such a decision. There is a *fait accompli* with regard to foreign policy and massive, inescapable pressure to approve for the *Bundestag*.

Furthermore, problematic constitutional effects are reinforced by the fact that the ESM Treaty contains no termination clause.

In addition, the complainants argued that the stability principle applying to monetary policy (Article 88 sentence 2 GG), which is based on the principle of a social state and laid down in the “debt brake” of Article 109 (3) and Article 115 (2) GG, is repealed. The principle of a social state would be violated because the social benefits and pension payments for Germans have to be cut.

The right to property under Article 14 (1) GG is also infringed from their point of view because Germany's financial obligations will lead to inflationary developments.

The complainants also criticized that it is not clear how the Federal Government can satisfy its duties to provide information pursuant to Article 23 (2) GG, given the duty of professional secrecy (Article 34 TESM) imposed on the members of the bodies of the European Stability Mechanism.

The *Federal Government* was of the opinion that the ESM Treaty does not constitute a transfer union in the sense of a European financial equalisation system; the overall budgetary responsibility of the German *Bundestag* would remain intact and the amount of German liability limited. Furthermore, the additional participation of the *Bundestag* in case of an accession of a new member of the ESM would be unnecessary because the accession would not expand the existing liability of the “old” ESM Members. The German law safeguards that the overall budgetary responsibility of the *Bundestag* is safeguarded and only in the exceptional constellation of a purchase of government securities, that has to be kept confidential, the plenary’s right of information is dispensed, and pursuant to § 6 ESMFinG, the decision is transferred to a special committee consisting of members of the budget committee. The implementation of the decisions of the *Bundestag* in the Board of Directors of the ESM would be guaranteed by posting a State Secretary to the Board who has to accept instructions by the Federal Government. The mere possibility that the German share could be reduced by future developments to the degree that Germany would lose its veto power does at least currently not lead to any interference with the principle of democracy- argued the

German Federal Government. Currently, it would not be realistic that an accession occurs which reduces the German share dramatically and such an accession would need the unanimous approval of all Eurozone members.

The *German Bundestag* argued that its overall budgetary responsibility is not affected. For the most important decisions of the ESM, in particular for decisions pursuant to Article 10 TESM (increase of capital stock) and Article 13 (2) TESM (decision on the award of grants), the involvement of the plenary is provided. The parliamentary budget committee is only responsible for the less significant, more technical decisions below the threshold under the “Wesentlichkeitsdoktrin” (threshold relevant for the requirement of parliamentary approval). In addition, as far as internal organisation and procedures are concerned, the margin of appreciation of the German *Bundestag* has to be respected. Overall, the involvement of a democratically legitimised organ in internal procedures of the ESM goes – albeit for good reasons – beyond the standards for parliamentary scrutiny of public financial institutions at the national level. The possibility of issuing new shares of the ESM-capital would be unproblematic with regard to the overall budgetary responsibility because pursuant to Article 4 (7) TESM, the voting rights in the Board of Governors and the Board of Directors are based on the number – and not the value – of the shares which have been allocated to each party to the Treaty pursuant to Annex II of the ESM Treaty. Therefore, the weight of the German vote would not be affected. The possible suspending of voting rights (Article 4 (8) TESM) would also not affect the overall budgetary responsibility because the German budget law and its institutions are able to provide capital within the required time frame.

Fiscal Compact (TSCG)

Even though the Fiscal Compact did not introduce stricter rules than already contained in the German Constitution, the approval to such a treaty violates – in the view of the *plaintiffs* – the Constitution because it takes away the freedom to decide whether it wants to abolish rules such as the “debt brake”. The Fiscal Compact would introduce new unchangeable rules affecting the German Constitution. The Fiscal Compact would violate the fundamental right of all German citizens to decide on the Constitution because Germany is obliged to make an annual reduction of debt of Euro 26 billion which is incompatible with Article 109 (3), Article 115 (2), and Article 143d (1) GG and would require an amendment of the German Basic Law, because the budget law governs only the reduction of deficit but not the reduction of public debt. Another argument was that the loss of budgetary sovereignty lies in the fact that the parties that go through an excessive deficit procedure henceforth have to get their “budgetary and economic programs” approved by the European Union. This would result in a lasting loss of the *Bundestag*’s legislative discretion. The obligation to never remove the “debt brake” from the Constitution, without including it in the eternity clause, would violate the constitutional identity of the Basic Law.

In the view of the *Federal Government* the (European) limitation of government borrowing would be compatible with the Basic Law, since it only defines a framework to be filled by the Member States and this framework corresponds to the model of the German “debt brake”. The proposals, which the European Commission is to make pursuant to Article 3 (2) TSCG, on common principles for national correction mechanisms and on the time-frame for

convergence towards the medium-term budget objective under Article 3 (1) letter b sentence 3 TSCG are merely interpretation guidelines putting the provision in specific terms. The indefinite duration of the Treaty would not be a violation of the German Constitution. A treaty entered into for an indefinite period of time may be terminated at any time by all contracting parties by mutual agreement. In addition, in the case of fundamental changes of circumstances, a party may withdraw from the treaty on the basis of Article 62 of the Vienna Convention on the Law of Treaties.

The *German Bundestag* added that due to the federal structure of the Federal Republic of Germany, the Treaty differs in some respects from the “debt brake” in the Basic Law, but these differences do not result in a substantially different legislative concept. The path to debt reduction provided in the Basic Law is defined by Article 143d (1) GG, while the Fiscal Compact leaves it to be put into specific terms by the European Commission. The Bundestag admits that it is not certain that the European Commission will ultimately decide on an identical path to debt reduction to that provided in the Basic Law; however, the Commission would have a duty to take into account country-specific risks and in this respect may orient itself towards the legal position of the Member State in question. From their point of view, it is true that Article 7 TSCG with its “reverse” rule on a qualified majority is an innovation, but this would have no constitutional relevance to the budgetary sovereignty of the national parliaments; the agreement on a particular voting behaviour would not modify the excessive deficit procedure in substance. There would also be no transfer of substantive legislative powers to other bodies with sovereign power. Article 8 TSCG merely grants the Court of Justice the power, with regard to compliance with Article 3 (2) TSCG, to decide legal actions of the Contracting Parties and in the case of a violation to impose a penalty payment on a Contracting Party.

Further arguments

An additional argument by the complainants was that by failing to work towards a change of the TARGET2-system and of the framework for the creation of money the plaintiffs’ right to participate in the legitimation of state power (Article 38 (1) GG) would be infringed. The constant growth of the TARGET2-balances would show that the system allows a Member State of the euro currency area to take out “overdraft loans” in unlimited amounts at the expense of other Member States to fund its own imports. The European System of Central Banks would violate the sovereignty of the Member States, and thus also the individuals’ right to vote, by expanding the money supply, in particular by granting loans at low interest rates while accepting insufficient collateral, and by the TARGET2 system.

The acts of secondary legislation contained in the so-called “Six-pack” and the Euro Plus-Pact would interfere with the complainants’ rights under Article 38 (1) GG because they introduce an economic government of the European Union over all Member States of the euro currency area. The Federal Republic of Germany thus would become a constituent state of the federal Union State and lose at the same time its fiscal, financial and economic sovereignty, and thus its sovereignty as a whole which would require the adoption of a new Constitution (Article 146 GG).

Regulation (EU) No 1176/2011 would lack an authorisation under primary law and it impermissibly would affect the inviolable economic and budgetary competence of the

Bundestag by establishing a European economic government.

7. Answer by the Court to the legal questions and legal reasoning of the Court

The *Bundesverfassungsgericht* confirmed its prior judgments stating that Article 38 (1) GG is violated in particular if the German *Bundestag* relinquishes its budgetary responsibility with the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget on its own. It follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag*'s control and influence. No permanent mechanism may be created under international treaties which is tantamount to accepting liability for decisions of other states, above all if they entail consequences which are hard to calculate. The German *Bundestag* cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions with budgetary implications for which it is accountable. The principle of democracy under Article 20 (1) and (2) GG therefore requires that the German *Bundestag* is able to have access to the information which it needs to assess the relevant background and consequences of its decision. Notwithstanding the principle of democracy, which aims at legal reversibility, it is not from the outset anti-democratic for the budget-setting legislature to be bound by a particular budget and fiscal policy. It is primarily for the legislature to weigh whether and to what extent, in order to preserve some discretion for democratic management and decision-making, one should enter into commitments regarding future spending behaviour and therefore – correspondingly – accept a restriction of one's discretion for democratic management and decision-making in the present. In this context, the *Bundesverfassungsgericht* may not with its own expertise usurp the place of legislative bodies, which are first and foremost entrusted with this.

Article 136 TFEU amendment

The *Bundesverfassungsgericht* made it clear that Article 136 (3) TFEU neither starts a mechanism with financial effect, nor does it transfer budgetary authorisations to other actors. Article 136 (3) TFEU merely enables the Member States of the euro currency area to establish a stability mechanism to grant financial assistance on the basis of an international agreement. To this effect, Article 136 (3) TFEU confirms that the Member States remain the masters of the Treaties. The introduction of Article 136 (3) TFEU and the establishment of the ESM constitute a fundamental reshaping of the existing EMU because it detaches its concept, albeit to a limited extent, from the principle of independence of the national budgets which had characterised it before. This does not mean that the stability-directed orientation of the EMU is abandoned. Parts of the monetary union, which are essential under constitutional law, such as the independence of the ECB, its commitment to the paramount goal of price stability, and the prohibition of monetary financing of the budget, are unaffected. Article 136 (3) TFEU does not release the Member States from the obligation of budgetary discipline and it has clearly been designed as an exceptional provision.

ESM-Treaty (TESM)

The *Bundesverfassungsgericht* ruled that the German law ratifying the ESM-Treaty satisfies the requirements of Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG. The absolute amount of the payment obligations does not exceed the ultimate limits which could, at most, be derived from the principle of democracy. In the view of the court, the legislature's assessment that the payment obligations arising from the participation in the ESM do not lead to an effective failure of budget autonomy is at any rate not evidently erroneous and must therefore be accepted by the *Bundesverfassungsgericht*. With regard to the provisions on revised increased capital calls (Article 9 (2) and (3) sentence 1 in conjunction with Article 25 (2) TESM), it seemed possible at first to interpret the wording of the Treaty in a way from which a violation of the *Bundestag's* overall budgetary responsibility could have been inferred. Such an interpretation was, however, effectively precluded by the joint interpretative declaration of the parties to the Treaty establishing the ESM of 27 September 2012 and the identical unilateral declaration of the Federal Republic of Germany.

Moreover, the necessary legitimation of ESM-decisions is ensured by the fact that they cannot be taken against the vote of the German representative in the bodies of the ESM. In case of accession of new Member States, the present majority requirements could be adapted in such a way that Germany's present veto position, which is required under constitutional law, will also be maintained under changed circumstances. Pursuant to Article 44 TESM, accession to the ESM requires an unanimous decision by the Board of Governors. This enables, and if necessary, obliges the Federal Government to make its approval of an application for membership contingent on an amendment of Article 4 (4) sentence 2 and (5) TESM in order to safeguard the *Bundestag's* overall budgetary responsibility.

Article 32 (5), Article 34 and Article 35 (1) TESM, which stipulate the inviolability of all official papers and documents of the ESM and the professional secrecy and immunity of the members of its bodies and its staff, ultimately do not violate Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG and the German *Bundestag's* right under Article 23 (2) sentence 2 GG to be informed comprehensively and at the earliest possible date. They are to be interpreted in such a way that they do not stand in the way of sufficient parliamentary control of the ESM by the German *Bundestag*.

The possibility provided for in Article 8 (2) sentence 4 TESM of issuing shares of the ESM's authorised capital stock on terms other than at par also does not stand in the way of the limitation of the amount of payment obligations. The *Bundestag's* overall budgetary responsibility can be affected by decisions pursuant to Article 8 (2) sentence 4 TESM if the issuance of shares in the capital stock higher than at par entails additional payment obligations. The *Bundestag's* overall budgetary responsibility, however, is at any rate ensured because a decision pursuant to Article 8 (2) sentence 4 TESM cannot be taken against the vote of the German representative in the competent ESM body.

The abstract possibility that the ESM might generate financial losses also does not impair the *Bundestag's* overall budgetary responsibility. With regard to the question whether and if so, to what extent, losses can be expected to arise from the operations of the ESM, the legislature has a margin of appreciation which the *Bundesverfassungsgericht* must generally respect. Possible losses are the result of conscious decisions of the *Bundestag* because it can participate in the decision on the amount, on the terms and conditions, and on the duration of stability support in favour of Members seeking help, so that it can decisively influence the

probability and the amount of possible later capital calls.

Concerning the possibility to suspend voting rights (Article 4 (8) TESM), the suspension of the German voting rights would – in the view of the *Bundesverfassungsgericht* – mean that the decisions taken in this period would not be legitimised and monitored by the German *Bundestag*. In order to avoid a suspension of voting rights, the *Bundestag* must not only include the Federal Republic of Germany's share in the initial capital, which is set out in Article 8 (2) sentence 2 TESM, in the budget, but it must also comprehensively ensure to the extent necessary that in the event of calls pursuant to Article 9 TESM, if necessary in conjunction with Article 25 (2) TESM, it will be possible at any time to pay in Germany's further shares in the authorised capital stock pursuant to Article 8 (1) TESM fully and in a timely manner. Therefore, the national institutions to pay the German participation sum must work efficiently and in a timely manner. This was assured by the German government and the *Bundesverfassungsgericht* accepted this factual statement. In addition, it highlighted that the German Budgetary Law allows for expenses which were not foreseen in the annual budgetary law in case of excess of budgetary appropriations or for purposes not contemplated by the budget (Article 112 GG). This ensures that Germany will be able to pay increases of the ESM so that the German voting rights are not suspended.

The fact that termination is not expressly provided for in the ESM-Treaty does not violate the overall budgetary responsibility of the *Bundestag*. The limitation of liability sufficiently ensures that the ESM-Treaty does not establish an automatic and irreversible procedure regarding payment obligations or liability commitments; therefore, it is not required to provide a special right of termination in the Treaty. Apart from this, it is possible for Members to withdraw even though there is no express regulation.

The provisions of the Act on the Treaty Establishing the European Stability Mechanism and the ESM Financing Act, at least if they are interpreted in conformity with the Constitution, also meet the requirements under Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG regarding the way the German *Bundestag*'s rights to participate and opportunities to exert influence need to be designed in order to ensure democratic governance of the ESM and in order to ensure its overall budgetary responsibility. The *Bundesverfassungsgericht* clarified how certain provisions of the ESM Financing Act must be interpreted in order to safeguard that the parliamentary participation is sufficiently guaranteed. The rights to information of the German *Bundestag* contained in the ESM Financing Act satisfy the requirements of Article 23 (2) sentence 2 GG. The provisions of the ESM-Treaty, in particular Article 34 TESM, do not stand in the way of an information of the *Bundestag* in accordance with the requirements of Article 23 (2) sentence 2 GG. Under the aspect of democratic legitimation of the activity of the ESM, which Article 20 (1) and (2) GG requires, the structuring of Germany's representation in the ESM-bodies is in line with this basic principle, in particular because the ESM Financing Act clearly assumes that the German representatives are bound by the decisions of the *Bundestag* and are accountable to it.

Fiscal Compact (TSCG)

The Fiscal Compact does not violate Article 38 (1), Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG. Its essential content conforms to requirements of constitutional law (in particular Article 109, Article 109a, Article 115 and Article 143 GG) and of European

Union law (in particular Article 126 TFEU). The competences of the European Commission following from the Fiscal Compact do not grant it authority to impose specific substantive requirements for the structuring of the budget. This follows in particular from the fact that the correction mechanism to be established pursuant to Article 3 (2) sentence 3 TSCG for the reduction of public deficit is subject to the reservation that the parliamentary prerogatives shall be respected. Nor can the Court of Justice of the European Union review the application of the correction mechanisms.

Due to the evaluation provision under Article 16 TSCG and the general rules of international law concerning the possibilities of terminating a treaty, the lack of an explicit right of termination in the Treaty is at any rate not objectionable under constitutional law.

8. Legal effects and & broader political implications of the judgment

The judgment confirmed the participation of Germany in the European rescue mechanisms. At the same time, the role of the *Bundestag* was strengthened which makes every new decision for financial assistance a highly political decision.

MISCELLANEOUS

V.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND THE 136 TFEU TREATY AMENDMENT?

No relevant information.

VI EURO-PLUS-PACT

On March 11, 2011 the Heads of State or Government of the Eurozone endorsed the Pact for the Euro. At the 24/25 March 2011 European Council, the same Heads of State or Government agreed on the Euro Plus Pact and were joined – hence the ‘Plus’ - by six others: Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania (leaving only the UK, Czech Republic, Sweden and Hungary out).

The objective of the pact is to foster competitiveness, foster employment, contribute to the sustainability of public finances and reinforce financial stability. In the Euro-Plus-Pact the Heads of State or Government have entered into commitments on a number of policy areas, in which member states are competent.

(http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf)

NEGOTIATION

VI.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE NEGOTIATION OF THE EURO-PLUS-PACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE PACT FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

No difficulties known.

MISCELLANEOUS

VI.2

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND THE EURO-PLUS-PACT?

See question V.4.

VII SIX-PACK

The 'Six-Pack' is a package of six legislative measures (five regulations and one directive) improving the Economic governance in the EU. The Commission made the original proposals in September 2010. After negotiations between the Council and the European Parliament, the package was adopted in November 2011 and entered into force on December 13, 2011. Part of the 'Six-Pack' measures applies only to the Eurozone member states (see the individual titles below).

The 'Six-Pack' measures reinforce the Stability and Growth Pact (SGP), among others by introducing a new Macroeconomic Imbalances Procedure, new sanctions (for Eurozone member states) and reversed qualified majority voting. Also, there is more attention for the debt-criterion.

(http://ec.europa.eu/economy_finance/economic_governance/index_en.htm)

NEGOTIATION

VII.1

WHAT POSITIONS DID GERMANY ADOPT IN THE NEGOTIATION OF THE 'SIX-PACK', IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE 'SIX-PACK' FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

No positions known.

DIRECTIVE 2011/85/EU

Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States

IMPLEMENTATION

VII.2

WHAT MEASURES ARE BEING TAKEN TO IMPLEMENT DIRECTIVE 2011/85/EU ON REQUIREMENTS FOR BUDGETARY FRAMEWORKS (REQUIRED BEFORE 31 DECEMBER 2013, ARTICLE 15 DIRECTIVE 2011/85/EU)?

The directive was implemented by the 'Law on the domestic implementation of the Fiscal Compact' from 15 July 2013 (see question IX.4).

IMPLEMENTATION DIFFICULTIES

VII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE IMPLEMENTATION PROCESS, IN PARTICULAR IN RELATION TO IMPLICATIONS OF THE DIRECTIVE FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No particular discussions known.

MACROECONOMIC AND BUDGETARY FORECASTS

VII.4

WHAT INSTITUTION WILL BE RESPONSIBLE FOR PRODUCING MACROECONOMIC AND BUDGETARY

FORECASTS (ARTICLE 4(5) DIRECTIVE 2011/85/EU)? WHAT INSTITUTION WILL CONDUCT AN UNBIASED AND COMPREHENSIVE EVALUATION OF THESE FORECASTS (ARTICLE 4(6) DIRECTIVE 2011/85/EU)?

The forecasts regarding tax revenues is made by a working committee of the Federal Ministry of Finance which exists since 1955. This institution consists of one representative from the Federal Ministry of Finance, one from the Federal Ministry for Economic Affairs, representatives of five institutes for economic research, one from the Federal Statistics Office, one from the German *Bundesbank*, one from the German Council of Economic Experts, one from the Finance ministries of the *Länder* and one from the federal union of the communalities.

The macroeconomic forecast is developed by the Federal government.

FISCAL COUNCIL

VII.5

DOES GERMANY HAVE IN PLACE AN INDEPENDENT FISCAL COUNCIL (ARTICLE 6(1) DIRECTIVE 2011/85/EU: ‘INDEPENDENT BODIES OR BODIES ENDOWED WITH FUNCTIONAL AUTONOMY VIS-À-VIS THE FISCAL AUTHORITIES OF THE MEMBER STATES’)? WHAT ARE ITS MAIN CHARACTERISTICS? DOES GERMANY HAVE TO CREATE (OR ADAPT) A FISCAL COUNCIL IN ORDER TO IMPLEMENT DIRECTIVE 2011/85/EU?

Yes. This function is fulfilled by the stability council (“Stabilitätsrat”) pursuant to Article 6 of the Stability Council Law. The Stability Council consists of the Federal Finance Minister, the Federal Minister for Economic Affairs as well as the Finance Ministers of the 16 *Länder*. In order to fulfil the requirement of an independent body the stability council has an independent advisory council which can issue reports and comments on the development of the public deficit (§ 7 of the Stability Council Law). The advisory council consists of one representative from the *Bundesbank*, one representative from the German Council of Economic Experts, one representative from the research institutes which participate, two experts nominated by the Federal Republic and the *Länder*, one expert nominated by the communalities and one expert nominated by the social insurances.

REGULATION NO 1176/2011 ON THE PREVENTION AND CORRECTION OF MACROECONOMIC IMBALANCES

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1176:EN:NOT>

MEIP DIFFICULTIES

VII.6

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

The parliamentary group the Left (Die Linke) from the opposition demanded that the social

implications of such measures must be taken into account and that one of the reactions to the increase of public spending must be the consideration of higher wages. In addition, they pleaded for the establishment of a European Bank for public securities whose role would be to buy public securities from money borrowed from the ECB.²²⁸

REGULATION No 1175/2011 ON STRENGTHENING BUDGETARY SURVEILLANCE POSITIONS

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1466:20111213:EN:PDF>)

MTO PROCEDURE

VII.7

WHAT CHANGES TO THE RULES ON THE BUDGETARY PROCESS ARE MADE TO ACCOMMODATE THE AMENDED MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) PROCEDURE?

See question IX.4.

EUROPEAN SEMESTER

VII.8

WHAT CHANGES HAVE TO BE MADE TO THE RULES AND PRACTICES ON THE NATIONAL BUDGETARY TIMELINE TO IMPLEMENT THE NEW RULES ON A EUROPEAN SEMESTER FOR ECONOMIC POLICY COORDINATION (SECTION 1-A, ARTICLE 2-A CONSOLIDATED REGULATION 1466/97)?

See question IX.4.

MTO DIFFICULTIES

VII.9

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

The parliamentary group the Left (Die Linke) asked the Federal Government not to vote in favour of the Regulation but to campaign for a “European Compensation Union” (“Europäische Ausgleichsunion”) which is entitled to impose penal interests on accumulated current account surpluses in order to finance a structure and cohesion fund for the promotion of a structural change in the deficit countries to increase the productivity. Moreover, the German *Bundestag* shall develop a draft legislative act which increases the wages (including a minimum wage of Euro 10 per hour), increases public investments and promotes the social

²²⁸ German Bundestag, printed matter 17/5905, 25 May 2011, <http://dipbt.bundestag.de/doc/btd/17/059/1705905.pdf>

state.²²⁹

RESPECT MTO

VII.10

HOW IS RESPECT OF THE MEDIUM-TERM BUDGETARY OBJECTIVE INCLUDED IN THE NATIONAL BUDGETARY FRAMEWORK (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)?

It is laid down in Article 51 (2) of the Law on the budgetary principles (“Haushaltsgrundsätze-gesetz”).

CURRENT MTO

VII.11

WHAT IS GERMANY’S CURRENT MEDIUM-TERM BUDGETARY OBJECTIVE (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)? WHEN WILL IT BE REVISED?

The 2014 MTO was at 1.1 % of the GDP.

ADOPTION MTO

VII.12

BY WHAT INSTITUTION AND THROUGH WHAT PROCEDURE IS GERMANY’S MEDIUM-TERM BUDGETARY OBJECTIVE ADOPTED AND INCORPORATED IN THE STABILITY PROGRAMME (EUROZONE, ARTICLE 3(2)(A) CONSOLIDATED REGULATION 1466/97)?

See question IX.4.

REGULATION No 1177/2011 ON THE EXCESSIVE DEFICIT PROCEDURE

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF>)

EDP DIFFICULTIES

VII.13

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

See question VII.9.

REGULATION No 1173/2011 ON EFFECTIVE ENFORCEMENT OF BUDGETARY SURVEILLANCE

²²⁹ German Bundestag, printed matter 17/5904, 25 May 2011, <http://dipbt.bundestag.de/doc/btd/17/059/1705904.pdf>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT>

SANCTIONS

VII.14

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

See question VII.9.

GENERAL CHANGES

VII.15

WHAT FURTHER CHANGES HAVE TO BE MADE TO THE RULES ON THE BUDGETARY PROCESS IN ORDER TO COMPLY WITH THE SIX-PACK RULES?

No necessary amendments known.

MISCELLANEOUS

VII.16

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND THE SIX-PACK?

The decision of the German Federal Constitutional Court (see question V.4).

VIII ESM TREATY

The European Stability Mechanism (ESM) Treaty was signed on July 11 2011. It was later renegotiated and a new ESM Treaty was signed on February 2, 2012. The Treaty provides a permanent emergency fund that is intended to succeed the temporary emergency funds. It entered into force on September 27, 2012 for 16 contracting parties (Estonia completed ratification on October 3). The 17 contracting parties are the member states of the Eurozone, but the ESM Treaty is concluded outside EU law.

(<http://www.european-council.europa.eu/eurozone-governance/esm-treaty-signature?lang=it> and <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf>)

NEGOTIATION

VIII.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE NEGOTIATION OF THE ESM TREATY, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

See question V.1 and IX.1.

RATIFICATION

VIII.2

HOW HAS THE ESM TREATY BEEN RATIFIED IN GERMANY AND ON WHAT LEGAL BASIS/ARGUMENTATION?

As outlined in question V.3, the *Bundestag* adopted the ESM Treaty through three federal laws on 29 June 2012. The first law, the ESM-Ratification Law only required a simple majority but the Federal Government aimed for a 2/3 majority in order to prevent possible constitutional problems. Finally, the ESM-Ratification Law was adopted on the basis of Article 59 (2), sentence 1 GG. Pursuant to Article 105 (3) GG the consent of the *Bundesrat* was also necessary as revenues were concerned that are usually entitled for the *Länder* according to Article 106 (2), (3) and (6) GG.²³⁰

In order to authorize the payment of capital to the ESM, the ‘Act on Financial Participation in the European Stability Mechanism’²³¹ (ESMFinG) was adopted on 29 June 2012 as well. As a federal law it only required a simple majority. This law was based on Article 115 (1) GG according to which “[t]he borrowing of funds and the assumption of surety obligations, guarantees, or other commitments that may lead to expenditures in future fiscal years shall require authorisation by a federal law.” (see also question VIII.5)

²³⁰ See Deutscher Bundestag. Gesetzesentwurf der Fraktionen der CDU/CSU und FDP. Entwurf eines Gesetzes zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus. Drucksache 17/9045. 20.03.2012, p.4.

²³¹ The German title of the law is: ‘Gesetzes zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz – ESMFinG)’

RATIFICATION DIFFICULTIES

VIII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER DURING THE RATIFICATION OF THE ESM TREATY?

See question V.3 above.

CASE LAW

VIII.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE ESM TREATY?

See question V.4 above.

CAPITAL PAYMENT

VIII.5

WHAT IS THE ROLE OF PARLIAMENT IN THE PAYMENT OF THE (FIRST INSTALMENT OF) PAID-IN CAPITAL REQUIRED BY THE ESM TREATY (ARTICLE 36 ESM TREATY)? WHAT RELEVANT DEBATES HAVE ARISEN IN RELATION TO THIS PAYMENT?

In order to authorize the payment of capital to the ESM, the ‘Act on Financial Participation in the European Stability Mechanism’²³² (ESMFinG) was adopted on 29 June 2012. The ESMFinG, the law that authorizes the German share of paid-in and callable capital to the ESM Fund, underwent most modifications. During the Budget Committee negotiations, four paragraphs on the involvement of the *Bundestag* were added, which were in total longer than the bill itself. The amendments were either introduced together by the Christian Democrats (CDU/CSU) and the Liberals (FDP) from the government as well as from the Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) or separately by the parliamentary groups.²³³ These amendments were consented to by all parliamentary groups (except the parliamentary group of the Left (Die Linke and some members of the Social Democrats)).²³⁴

On 14 June 2012 the *Bundestag* adopted the ‘Supplementary Budget Law for 2012’ (hereinafter NHG 2012), through which the acquisition of new debt (necessary for the German shares of the ESM Fund) was allowed (see also question V.3).

APPLICATION & PARLIAMENT

VIII.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE ESM TREATY, FOR EXAMPLE WITH REGARD TO DECISIONS TO GRANT FINANCIAL ASSISTANCE AND THE DISBURSEMENT OF

²³² The German title of the law is: ‘Gesetzes zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz – ESMFinG)’

²³³ 17(8)4442 was introduced by BÜNDNIS 90/DIE GRÜNEN, 17(8)4410 by CDU/CSU and FDP and 17(8)4549 by the coalition parties and the SPD

²³⁴ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 9.

TRANCHES, WHICH BOTH REQUIRE UNANIMOUS ADOPTION BY THE BOARD OF GOVERNORS COMPOSED OF THE NATIONAL FINANCE MINISTERS?

See also question V.3.

§ 4 of the ESMFinG guarantees that ESM-decisions affecting the budgetary responsibility of the *Bundestag* always require the approval by the *Bundestag* in its plenary composition. Three major fields are identified in which ESM matters touch upon the budgetary responsibility of the *Bundestag*: first, the issuance of rescue measures pursuant to Article 13(2) TESM; second, matters and agreement about the EFSF; third, changes of the guarantee volume of the ESM-Treaty.²³⁵ In the report of the Budget Committee, this amendment was justified by reference to the *Bundesverfassungsgericht's* judgment from 28 February 2012, in which the Court highlighted the specific position of the plenum (see also question IV.5).²³⁶

§5 of the ESMFinG determines that all other ESM-measures that concern the *Bundestag* and in which the consent of the plenary is not intended according to § 4 of the ESMFinG have to be adopted in consent with the Budget Committee of the *Bundestag*. This relates to issues such as changes in how capital can be retrieved from the ESM or the acceptance of changes in the guidelines for the implementation conditions of financial rescue measures.²³⁷

One of the most important (and in the media controversially discussed)²³⁸ amendments of the ESMFinG concerned the establishment of the so-called special-body ('Sondergremium'). Different from the Committee of Nine ("Neuner-Gremium") in the StabMechÄndG (see Question, II.4) the ESMFinG dedicated a separate paragraph to this special body and explained its role in detail. Paragraph 6 specified that in cases of special confidentiality, such as the purchase of government securities on the secondary market pursuant to Article 18 TESM, the 'Sondergremium' is supposed to take a decision instead of the *Bundestag* in its plenary composition.²³⁹ In the report of the Budget Committee the establishment of the 'Sondergremium' was explained by reference to the judgment of the *Bundesverfassungsgericht* from 28 February 2012. In this judgment, the Court had declared the Committee of Nine to be unconstitutional, except for instances in which the *Bundestag* has to consent to confidential matters such as the ESM-purchase of government securities.²⁴⁰ (see also question VI.5)

§ 7 of the ESMFinG strengthened the information requirements of the Federal Government towards the *Bundesrat* and the *Bundestag* which has been of specific interest of the Greens (Bündnis 90/Die Grünen) and of the Social Democrats (SPD).²⁴¹ The amendment explicitly

²³⁵ See Law of May, 13 1012, Bundesgesetzblatt Teil I, 2012, Nr. 43, 18.09.2012 S. 1918.

²³⁶ Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 11.

²³⁷ See Law of May, 13 1012, Bundesgesetzblatt Teil I, 2012, Nr. 43, 18.09.2012 S. 1918.

²³⁸ See e.g. Heribert Prantl, 'Neun Hansel sind nicht das Parlament', in: Süddeutsche.de, 28.10.2011. <http://www.sueddeutsche.de/politik/euro-rettungsschirm-neun-hansel-sind-nicht-das-parlament-1.1175819>.

²³⁹ See Law of May, 13 1012, Bundesgesetzblatt Teil I, 2012, Nr. 43, 18.09.2012 S. 1918.

²⁴⁰ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 13.

²⁴¹ See Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172.

obliges the Federal Government to inform the *Bundestag* about ESM-matters at “the earliest possible point in time.”²⁴²

APPLICATION DIFFICULTIES

VIII.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE APPLICATION OF THE ESM TREATY?

See question V.3.

IMPLEMENTATION

VIII.8

HAVE THERE BEEN ANY RELEVANT CHANGES IN NATIONAL LEGISLATION IN ORDER TO IMPLEMENT OR TO COMPLY WITH REQUIREMENTS SET BY THE ESM-TREATY?

See question V.3.

MISCELLANEOUS

VIII.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND THE ESM TREATY?

No relevant information.

27.06.2012, p. 6-8.

²⁴² Deutscher Bundestag. Bericht des Haushaltsausschusses (8. Ausschuss). Drucksache 17/10172. 27.06.2012, p. 13.

IX FISCAL COMPACT

The Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was signed on March 2, 2012. Negotiations on this Treaty began between 26 member states of the EU (all but the UK) after the 8/9 December 2011 European Council. 25 contracting parties eventually decided to sign the Treaty (not the Czech Republic).

After ratification by the twelfth Eurozone member state (Finland) in December 2012, the Fiscal Compact entered into force on 1 January 2013. For several contracting parties the ratification is still on-going.

(<http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>)

NEGOTIATION

IX.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER IN THE NEGOTIATION OF THE FISCAL COMPACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

Since the German Constitution already contained a balanced budget rule (see question IX.4), the introduction of such a rule was not seen as a difficulty per se. However, there was some criticism regarding the ratification of the treaty outside the EU law framework. At the negotiation stage, this was rather a discussion about the conformity of this Treaty with EU law but not about national (constitutional) law. Nonetheless, the way in which the German parliament ratified the Fiscal Compact raised some constitutional concerns (see question IX.3). The Social Democrats (SPD) from the opposition criticized that the government had failed to let the German *Bundestag* participate early enough and in a comprehensive manner in the negotiations of the Fiscal Compact.²⁴³ They accused the government of breaching the German Constitution because the negotiations of the Fiscal Compact have led to rules which are partly contradictory to the rules of the debt brake on the national level which would have made the participation of the parliament mandatory at the negotiation stage. Since this had not been made possible by the Federal government, the constitutionally guaranteed participation rights of the *Bundestag* had been infringed.

In the view of the parliamentary group the Left (Die Linke), the ratification of the Fiscal Compact had been a violation of the principle of democracy as laid down in Article 20 (2) GG.²⁴⁴ The parliament was not allowed to adopt the law approving the German participation in the Fiscal Compact because Article 79 (3) GG prohibits that the principle of democracy is eliminated, even by the parliament. Binding the Federal Republic of Germany by treaties of international public law to a contract which contains strict rules about the new indebtedness limits the decision-making authority of the *Bundestag* and as a consequence its role as a democratically elected institution. In addition, the social state principle had been infringed by the parliamentary approval to the Fiscal Compact because the consequences resulting from the Fiscal Compact will have negative consequences for the social system in Germany.

²⁴³ Bundestag, 17/10171, p. 4, <http://dipbt.bundestag.de/dip21/btd/17/101/1710171.pdf>

²⁴⁴ Bundestag, 17/10171, p. 5, <http://dipbt.bundestag.de/dip21/btd/17/101/1710171.pdf>

RATIFICATION

IX.2

HOW HAS THE FISCAL COMPACT BEEN RATIFIED IN GERMANY AND ON WHAT LEGAL BASIS/ARGUMENTATION?

On 29 June 2012 the *Bundestag* adopted the ‘Law to the Contract on March 2, 2012 on Stability, Coordination and Governance in the Economic and Monetary Union’ (Fiscal Compact Law)²⁴⁵ in order to ratify the Fiscal Compact.

The German ratification is based on two provisions of the German Constitution. First, Article 59 (2) sentence 1 GG is applied which requires that the competent authorities of the federal legislature (*Bundestag* and *Bundesrat*) have to adopt a federal law approving the German participation in the Fiscal Compact. Second, Article 23 (1) sentence 3 GG in conjunction with Article 79 (2) GG was applied which further requires the approval by a two-third majority of the *Bundestag* and the *Bundesrat*. From the point of view of the *Bundestag*, the reason for this was that the Fiscal Compact modifies the contractual foundations of the European Union which obliges the Federal Republic of Germany under international law not to change the German Constitution (in particular Article 109, Article 115 and Article 143d GG) that could conflict with the Fiscal Compact.²⁴⁶ This leads to the application of Article 23 (1) sentence 3 GG.

RATIFICATION DIFFICULTIES

IX.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID GERMANY ENCOUNTER DURING THE RATIFICATION OF THE FISCAL COMPACT?

In addition to the difficulties already mentioned in question V.3 above, there was a discussion about the appropriate legal basis in the German constitution for the ratification. The Fiscal Compact was adopted on the basis of Article 59 (2) GG and Article 23 GG. In general, these two constitutional provisions contain procedures for different types of ratification. Article 59 (2) GG is the appropriate legal basis for contracts of public international law while Article 23 GG determines specific obligations for the amendment of Treaties of the European Union. The parliament decided to base the ratification on both norms because of the ambiguous nature of the Fiscal Compact located somewhere in between EU law and public international law. The combination of both norms was seen as a practical approach of the parliament which safeguarded that there is a two-third majority to approve the ratification, but it raised some legal questions resulting from the parallel application of both norms.²⁴⁷

²⁴⁵

[http://www.bgbl.de/xaver/bgbl/stArticlexav?start=%2F%2F*\[%40attr_id%3D%27bgbl212s1006.pdf%27\]#__bgbl__%2F%2F*\[%40attr_id%3D%27bgbl212s1006.pdf%27\]__1444167259156](http://www.bgbl.de/xaver/bgbl/stArticlexav?start=%2F%2F*[%40attr_id%3D%27bgbl212s1006.pdf%27]#__bgbl__%2F%2F*[%40attr_id%3D%27bgbl212s1006.pdf%27]__1444167259156)

²⁴⁶ See Deutscher Bundestag. Gesetzesentwurf der Fraktionen der CDU/CSU und FDP. Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität Koordinierung und Steuerung in der Wirtschafts- und Währungsunion. Drucksache 17/9046. 20.03.2012. p. 6.

²⁴⁷ Möllers/Reinhardt, Verfassungsrechtliche Probleme bei der Umsetzung des Europäischen Fiskalvertrages, Juristenzeitung 2012, p. 693 et seq.

The second parliamentary chamber (*Bundesrat*) which represents the German *Länder* on the federal level mentioned that proposals of the European Commission implementing the Fiscal Compact (Article 3 (1), (2) TSCG) are not known at the time of the German ratification. It declares it necessary that the Federal Government undertakes every effort on the European level to make sure that the balanced budget rule in the German constitution and the budget autonomy of the *Länder* is not affected by future Commission proposals.²⁴⁸ In addition, the *Bundesrat* highlights that it acts on the assumption that the Federal government will make sure that the automatic correction mechanism (Article 3 (1) letter e) TSCG) is concretised in a way that the budget autonomy of the *Länder* is respected.²⁴⁹

BALANCED BUDGET RULE

IX.4

ARTICLE 3(2) FISCAL COMPACT PRESCRIBES THAT THE BALANCED BUDGET RULES SHALL TAKE EFFECT IN NATIONAL LAW 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.” HOW IS THE BALANCED BUDGET RULE (INTENDED TO BE) IMPLEMENTED IN GERMANY? WILL THERE BE AN AMENDMENT OF THE CONSTITUTION? IF NOT, DESCRIBE THE RELATION BETWEEN THE LAW IMPLEMENTING THE BALANCED BUDGET RULE AND THE CONSTITUTION. IF THE CONSTITUTION ALREADY CONTAINED A BALANCED BUDGET RULE, DESCRIBE THE POSSIBLE CHANGES MADE/REQUIRED, IF ANY.

At the point of time of the adoption of the Fiscal Compact, the German Constitution already contained a balanced budget rule which had been incorporated in 2009. Article 109 (3) GG states that the budgets of the Federation and of the *Länder* shall in principle be balanced without revenue from credits. Article 115 GG adds the limits of borrowing which are not completely identical with the one defined in the Fiscal Compact. The balanced budget rule of the Fiscal Compact and the one of the German *Grundgesetz* contain further differences. In contrast to the Fiscal Compact, the German balanced budget rule is limited to the budgets of the Federal Republic and the *Länder* and does not include the budgets of the municipalities and the social security system. This is why it had been seen necessary to amend several federal laws in order to implement the balanced budget rule.

This was realized by the adoption of the ‘Law on the domestic implementation of the Fiscal Compact’ from 15 July 2013.²⁵⁰ Therewith, Article 51 (2) of the German Law on the principles of the budget (“Haushaltsgrundsätze-gesetz”) got a new formulation which transposed the Fiscal Compact balanced budget rule into German law, however, on the level of a federal law and not on the constitutional level. The Fiscal Compact implementation law also changed the German Law on the Stability Council (“Stabilitätsratsgesetz”). The Stability Council was given the competence to control whether the upper limit of the structural budgetary deficit laid down in Article 51 (2) of the “Haushaltsgrundsätze-gesetz” is respected. The Stability Council only has the competence to make proposals in case of a breach of the

²⁴⁸ Bundesrat, Stellungnahme, 11 May 2012, 130/12, p. 2, <http://dipbt.bundestag.de/dip21/brd/2012/0130-12B.pdf>

²⁴⁹ Bundesrat, Stellungnahme, 11 May 2012, 130/12, p. 2, <http://dipbt.bundestag.de/dip21/brd/2012/0130-12B.pdf>

²⁵⁰

[http://www.bgbl.de/xaver/bgbl/stArticlexav?start=%2F%2F*\[%40attr_id%3D%27bgbl113s2398.pdf%27\]#__bgbl__%2F%2F*\[%40attr_id%3D%27bgbl113s2398.pdf%27\]__1444162600202](http://www.bgbl.de/xaver/bgbl/stArticlexav?start=%2F%2F*[%40attr_id%3D%27bgbl113s2398.pdf%27]#__bgbl__%2F%2F*[%40attr_id%3D%27bgbl113s2398.pdf%27]__1444162600202)

upper limit of the structural budgetary deficit. The third important amendment caused by the Fiscal Compact implementation law concerned the distribution of payments of the Federal Republic of Germany relating to an infringement of the budgetary rules of the Growth and Stability Pact.

DEBATE BALANCED BUDGET RULE

IX.5

DESCRIBE THE NATIONAL DEBATE ON THE IMPLEMENTATION OF THE FISCAL COMPACT/BALANCED BUDGET RULE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

A difference between the German constitution and the Fiscal compact regarding the implementation procedure of the balanced budget rule was discussed. Article 143d GG contains rules on how to implement the national balanced budget rule. In its first paragraph the provision lays down the following: Articles 109 and 115 GG in the version in force as from 1 August 2009 shall apply for the first time to the 2011 budget; debt authorisations existing on 31 December 2010 for special trusts already established shall remain untouched. In the period from 1 January 2011 to 31 December 2019, the *Länder* may, in accordance with their applicable legal regulations, deviate from the provisions of paragraph (3) of Article 109 GG. The budgets of the *Länder* are to be planned in such a way that the 2020 budget fulfils the requirements of the fifth sentence of paragraph (3) of Article 109 GG. In the period from 1 January 2011 to 31 December 2015, the Federation may deviate from the provisions of the second sentence of paragraph (2) of Article 115 GG. The reduction of the existing deficits should begin with the 2011 budget. The annual budgets are to be planned in such a way that the 2016 budget satisfies the requirement of the second sentence of paragraph 2 of Article 115 GG; details shall be regulated by federal law.

This provision is complemented by the second paragraph of Article 143d GG which states: As assistance for compliance with the provisions of paragraph 3 of Article 109 GG after 1 January 2020, the *Länder* of Berlin, Bremen, Saarland, Saxony-Anhalt, and Schleswig-Holstein may receive, for the period 2011 to 2019, consolidation assistance from the federal budget in the global amount of Euro 800 million annually. The respective amounts are Euro 300 million for Bremen, Euro 260 million for Saarland, and Euro 80 million each for Berlin, Saxony-Anhalt, and Schleswig-Holstein. The assistance payments shall be allocated on the basis of an administrative agreement under the terms of a federal law requiring the consent of the *Bundesrat*. These grants require a complete reduction of financial deficits by the end of 2020. The details, especially the annual steps to be taken to reduce financial deficits, the supervision of the reduction of financial deficits by the Stability Council, along with the consequences entailed in case of failure to carry out the step-by-step reduction, shall be regulated by a federal law requiring the consent of the *Bundesrat* and by an administrative agreement. There shall be no simultaneous granting of consolidation assistance and redevelopment assistance on the grounds of an extreme budgetary emergency. In contrast, the Fiscal Compact cedes the competence to decide about the implementation of the balanced budget rule to the Commission.

Furthermore, it was emphasized that the participation of the German *Bundestag* must also be guaranteed in relation to the Fiscal Compact. Even if the Fiscal Compact was concluded

outside the EU institutional framework, its close relation with EU law makes it necessary to apply Article 23 GG which is important regarding the participation of the German parliament. It has to be safeguarded that the so-called “integration responsibility” of the Parliament is respected. This could make a participation in Article 7 TSCG-procedures necessary.

RELATIONSHIP BBR AND MTO

IX.6

WHAT POSITIONS, IF ANY, ARE TAKEN IN THE NATIONAL DEBATE ABOUT THE RELATIONSHIP BETWEEN THE BALANCED BUDGET RULE OF ARTICLE 3(1)(B) FISCAL COMPACT AND THE MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) RULE IN THE SIX-PACK (SECTION 1A, ARTICLE 2A REGULATION 1466/97, ON WHICH SEE ABOVE QUESTION VII.10)?

There is no debate known concerning the relationship between the Medium-term budgetary objective (MTO) in the Six-Pack and the balanced budget rule of the Fiscal Compact.

CASE LAW

IX.7

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE FISCAL COMPACT/IMPLEMENTATION OF THE BALANCED BUDGET RULE?

See question V.4.

NON-EUROZONE AND BINDING FORCE

IX.8

HAS GERMANY DECIDED TO BE BOUND BY PARTS OF THE FISCAL COMPACT ON THE BASIS OF ARTICLE 14(5) FISCAL COMPACT ALREADY BEFORE JOINING THE EURO AREA, OR HAS THIS OPTION BEEN DEBATED?

Not applicable.

MISCELLANEOUS

IX.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO GERMANY AND THE FISCAL COMPACT?

The amendments to the Fiscal Compact Law implementing the Fiscal Compact mainly concerned the involvement of the *Bundestag*. In reference to the Judgment of the *Bundesverfassungsgericht* from 19 June 2012 (see also question V.3), the *Bundestag* parties decided that the ‘Law on the Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union’ (EUZBBG) has to be adapted to the Fiscal Compact Law. The original version of the EUZBBG was adopted in 1993 with the ratification of the Maastricht Treaty. In the end, all parliamentary groups in the Budget Committee (except the parliamentary group the Left (Die Linke)) agreed to amend the Fiscal Compact Law through an adaption of the EUZBBG.

X QUESTIONS ABOUT MEMBER STATES RECEIVING FINANCIAL SUPPORT

A number of member states have received direct financial assistance through balance of payments support (Hungary, Rumania, Latvia), bilateral agreements/IMF (Greece), the temporary emergency funds/IMF (Ireland, Portugal, Greece), and the permanent emergency fund (Spain and Cyprus).

(http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm)

Several member states have (also) indirectly benefited through the Securities Markets Programme (SMP) created in May 2010, a bond-buying programme of the European Central Bank that was replaced in September 2012 by the Outright Monetary Transactions (OMT) programme (Greece, Ireland, Portugal, Italy, Spain).

(<http://www.ecb.int/mopo/liq/html/index.en.html#portfolios>)

CONTEXT

X.1

IF RELEVANT, DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT OF THE FORMAL REQUEST OF DIRECT FINANCIAL ASSISTANCE.

Germany has not received financial assistance.

XI GREEK AID PACKAGE IN 2015

Germany participated in the aid package for Greece in 2015. On 17 August 2015 the German Ministry for Finance proposed the German Bundestag to give its approval to an ESM-agreement with Greece about a financial facility (pursuant to Article 4 (1) No. 2 of the ESMFinG) and on a Memorandum of Understanding (pursuant to Article 13 (4) TESM). In addition, the Ministry applied the approval for a pay-out of a first tranche of Euro 26 billion to Greece. Annexed to this application of the Ministry were several documents: Eurogroup statement on the ESM programme for Greece from 14 August 2015, Draft of the MoU with Greece for a three-year ESM-programme from 11 August 2015, Report of the European Commission on Greece's compliance with the draft MOU commitments and the commitments in the Euro Summit statement of 12 July 2015 from 14 August 2015, Debt sustainability analysis by the European Institutions, an Assessment of Greece's financing needs and a statement by IMF Managing Director Christine Lagarde on Greece from 14 August 2015.

On 19 August 2015, the German Bundestag adopted the application.²⁵¹ Out of 584 valid votes, 453 voted in favour and 113 voted against the application. 18 MPs abstained. The no-votes came from 63 MPs from the governing party of the Christian Democrats (CDU/CSU), the party of Chancellor Merkel. 4 no-votes came from MPs of the governing party of the Social Democrats (SPD). One member of the oppositional parliamentary group the Greens (Bündnis 90/Die Grünen) voted against the application. All members of the oppositional parliamentary group the Left (die Linke) voted against the application. 3 MPs from the Christian Democrats, 8 MPs from the Greens and 7 MPs from the Left abstained.

Before the adoption, on the same day, the MPs of the German Bundestag discussed the application about the financial aid assistance to Greece via the ESM. Gregor Gysi, member of the opposition party the Left criticized that the aid package is only there to repay former debts but is not intended to foster economic growth in Greece.²⁵² Furthermore, he criticized that pensions and the social security system in Greece are reduced.²⁵³ He also mentioned that the influence of the European Institutions in Greece is too strong which would be in contradiction to the principle of a parliamentary democracy.²⁵⁴ Anton Hofreiter from the oppositional parliamentary group the Greens (Bündnis 90/Die Grünen) referred to the discussions prior to the MoU and criticized that the behavior of the German government in these discussions had harmed Europe.²⁵⁵ Furthermore, he demanded that the German government has to present a concept how to solve the debt crisis and not only react to sudden crisis events.²⁵⁶ He also mentioned democratic, social and economic problems with the aid package, however without clarifying what was meant by this.²⁵⁷

²⁵¹ Plenary debate of the German Bundestag, 19 August 2015, p. 11487 et seq., <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>

²⁵² Plenary debate of the German Bundestag, 19 August 2015, p. 11459 et seq., <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>

²⁵³ Plenary debate of the German Bundestag, 19 August 2015, p. 11461, <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>

²⁵⁴ Plenary debate of the German Bundestag, 19 August 2015, p. 11461, <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>

²⁵⁵ Plenary debate of the German Bundestag, 19 August 2015, p. 11464, <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>

²⁵⁶ Plenary debate of the German Bundestag, 19 August 2015, p. 11465, <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>

²⁵⁷ Plenary debate of the German Bundestag, 19 August 2015, p. 11465, <http://dipbt.bundestag.de/dip21/btp/18/18118.pdf#P.11455>