Headnotes

to the judgment of the Second Senate of 7 September 2011

– 2 BvR 987/10 –

– 2 BvR 1485/10 –

– 2 BvR 1099/10 –

1. **Article 38 of the Basic Law protects the citizens with a right to elect the Bundestag from a loss of substance of their power to rule, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the Bundestag, above all to supranational institutions (BVerfGE 89, 155 <172>; 123, 267 <330>). The defensive dimension of Article 38.1 of the Basic Law takes effect in configurations in which the danger clearly exists that the competences of the present or future Bundestag will be eroded in a manner that legally or de facto makes parliamentary representation of the popular will, directed to the realisation of the political will of the citizens, impossible.**

2. **a)The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German Bundestag must make decisions on revenue and expenditure with responsibility to the people. In this connection, the right to decide on the budget is a central element of the democratic development of informed opinion (see BVerfGE 70, 324 <355-356>; 79, 311 <329>).**

   b) As representatives of the people, the elected Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental administration.

3. **a) The German Bundestag may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget relevance without prior mandatory consent.**

   b) 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. Every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level must be specifically approved by the Bundestag.

   c) In addition it must be ensured that there is sufficient parliamentary influence on the manner in which the funds made available are dealt with.

4. **The provisions of the European treaties do not conflict with the understanding of national budget autonomy as an essential competence, which cannot be relinquished, of the parliaments of the Member States, which enjoy direct democratic legitimation, but instead they presuppose it. Strict compliance with it guarantees that the acts of the bodies of the European Union in and for Germany have sufficient democratic legitimation (BVerfGE 89, 155 <199 ff.>; 97, 350 <373>). The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act (BVerfGE 89, 155 <205>).**

5. **With regard to the probability of having to pay out on guarantees, the legislature has a latitude of assessment which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and the economic performance capacity of the Federal Republic of Germany.**

FEDERAL CONSTITUTIONAL COURT

– 2 BVR 987/10 –
– 2 BVR 1485/10 –
– 2 BVR 1099/10 –

Pronounced
on 7 September 2011
Wolf
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. 1. of Prof. Dr. Wilhelm Hankel,

2. of Prof. Dr. Wilhelm Nölling,

3. of Prof. Dr. Karl Albrecht Schachtschneider,

4. of Prof. Dr. Dr. h.c. Dieter Spethmann,

5. of Prof. Dr. Dr. h.c. Joachim Starbatty,

- authorised representative for 1, 2, 4, 5: Prof. Dr. Karl Albrecht Schachtschneider, Treiberpfad 28, 13469 Berlin –

1) against the monetary policy of the Federal Republic of Germany (aid for Greece) for violation of the fundamental rights of the complainants under Article 38.1, Article 14.1 and Article 2.1 of the Basic Law (Grundgesetz – GG)

– 2 BVR 987/10 –,

2) against a) the Federal Republic of Germany because it agreed financial aid for the Hellenic Republic with the other members of the Eurogroup, grants financial aid for Greece, in particular by means of the Act on the assumption of guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability within the Monetary Union (Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik, Währungsunion-Finanzstabilitätsgesetz – WFStG, Act on Financial Stability within the Monetary Union) of 7 May 2010 <Federal Law Gazette (Bundesgesetzblatt – BGBl.) I p. 537>), guarantees loans from the Kreditanstalt für Wiederaufbau to the Hellenic Republic and induces the International Monetary Fund to support Greece financially,

b) agreements of the European Union, in particular of the Eurogroup, in which financial aid for the Hellenic Republic was agreed, inter alia by the Federal Republic of Germany,

c) the decision of the representatives of the governments of the Member States of the European Union, in particular of the governments of the Eurogroup, meeting within the Council of the European Union, of 10 and 9 May 2010 (Council Document 9614/10) and the decision of the Council of the European Union (Economic and Financial Affairs, ECOFIN) of 9 May 2010 to create a European Financial Stabilisation Mechanism, including the Conclusions of this Council (Rat-Dok. (Council Document) SN 2564/1/10 REV 1),

d) Council Regulation (EU) no. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118/1),

e) the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – StabMechG – Euro Stabilisation Mechanism Act) of 21 May 2010 (Federal Law Gazette I p. 627),

f) the EFSF Framework Agreement between the Member States of the Eurogroup and the European Financial Stability Facility, EFSF, of 7 June 2010,

g) the establishment of the special purpose vehicle (European Financial Stability Facility, EFSF, a société anonyme incorporated in Luxembourg, with its registered office in Luxembourg) to handle the rescue measures for ailing state budgets of members of the Eurogroup and Germany’s participation in this special purpose vehicle,

h) the practice of the European Central Bank of buying up government bonds of the members of the Eurogroup and refinancing government bonds of every kind of the members of the Eurogroup,

– 2 BVR 1485/10 –,

II. of Dr. Peter Gauweiler,

- authorised representatives: 1. Prof. Dr. Dietrich Murswiek, Lindenaustraße 17, 79199 Kirchzarten,
2. Prof. Dr. Wolf-Rüdiger Bub, Promenadeplatz 9, 80333 München –

against a) the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism of 22 May 2010 (Federal Law Gazette I p. 627),

b) the cooperation of the Federal Government in the intergovernmental decisions of the representatives of the governments of the euro area member states meeting within the Council of the European Union and of the representatives of the governments of the 27 EU Member States of 10 May 2010 (Council Document 9614/10) and in the decision of the Council of the EU of 9 May 2010 to create a European Stabilisation Mechanism (Conclusions of the Council [Economic and Financial Affairs] of 9 May 2010, Rat-Dok. SN 2564/1/10 REV 1 of 10 May 2010, p. 3) and in the decision of the Council on Council Regulation No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118/1),

c) the decisions of the Council of the European Union named under b) and the Council Regulation named under b),

d) the purchase of government bonds of Greece and other euro area Member States by the European Central Bank,

e) the cooperation of the Federal Government in the extra-treaty supplementation of the concept, laid down in the Treaty on the Functioning of the European Union, to ensure the price stability of the euro; this cooperation consists in the acts named under b) of cooperating in the decisions of the EU or of the Member States on the European Stabilisation Mechanism in conjunction with the cooperation in the decisions made within the European Union or between the euro area Member States on the Greek rescue package, the German part of which was implemented in the Act on the assumption of guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability within the Monetary Union (Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik, Währungsunion-Finanzstabilitätsgesetz – WFStG, Act on Financial Stability within the Monetary Union) of 7 May 2010 (Federal Law Gazette I p. 537),

f) the failure of the Commission and the Council of the European Union to use the measures provided in the Treaty on the Functioning of the European Union against the overindebtedness of euro area Member States and against its disregard of the budgetary discipline laid down in the Treaty and in this way to prevent the coming into existence of a state of emergency which is now used to justify the rescue packages which are incompatible with the Treaty (Greek rescue package and European Stabilisation Mechanism),

g) the failure of the Federal Government to take measures against the speculators who in its representation speculate so aggressively against the euro or against particular euro area Member that the rescue packages are necessary to preserve the stability of the currency

– 2 BVR 1099/10 –

the Federal Constitutional Court – Second Senate – with the participation of

Justices Voßkuhle (President),
Di Fabio,
Mellinghoff,
Lübbe-Wolff,
Gerhardt,
Landau,
Huber, and
Hermanns

on the basis of the oral hearing of 5 July 2011 by

Judgment

holds as follows:

1. The proceedings are dealt with together for a joint decision.
2. The constitutional complaints are rejected as unfounded.

Grounds:

A.

The constitutional complaints challenge German and European legal instruments and further measures which are related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union. 1

I.

1. The Treaty on European Union (Maastricht Treaty) of 7 February 1992 (OJ C 191/1; Federal Law Gazette II p. 1253) provided for a common monetary policy of the Member States, which was in stages to create a European monetary union and finally to communitarise the monetary policy in the hands of a European System of Central Banks (ESCB) (for an earlier decision on the following facts, see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 125, 385 ff.). In the third stage, the euro was introduced in 2002 as the single currency. In order to guarantee financial discipline to support the uniform monetary policy, at the same time the Stability and Growth Pact (Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997, OJ C 236/1) entered into force; in the interest of the stability of the euro, this provides for new borrowing at a maximum rate of 3% of the gross domestic product (GDP) and a maximum level of indebtedness of 60% of the GDP. 2

2. The Hellenic Republic (hereinafter Greece) has since 2001 been a member of the group of 16 (since January 2011: 17) of the 27 Member States of the European Union (Council Decision 2000/427/EC of 19 June 2000 in accordance with Article 122(2) of the Treaty on the adoption by Greece of the single currency on 1 January 2001, OJ L 167/19) whose single currency is the euro (Eurogroup). The details of the size of the Greek budget deficit in the year 2009 had to be corrected from 5% to almost 13% of the GDP, for 2010, an increase of the national debt to 125% of the GDP and thus more than twice the reference level of 60% of the GDP was expected (see press release of the Economic and Financial Affairs Council <ECOFIN Council>, 16 February 2010). 3

3. Against this background, the European Council of the heads of state and government met in Brussels on 11 February 2010 in order to deliberate on possible measures relating to Greece. On this occasion, the European Council announced that it would take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole (see Statement by the Heads of State or Government of the European Union, 11 February 2010). On 16 February 2010 the ECOFIN Council tightened the excessive deficit procedure against Greece which had been in- 4

troduced in April 2009 and called for the deficit to be reduced by 4 percentage points within one year (from 12.7% in the year 2009 to 8.7% in the year 2010) and to further reduce it by 2012 to a maximum of 3% of the GDP (see press release of the ECOFIN Council, 16 February 2010). Following growing unrest on the financial markets, on 25 March 2010 the heads of state and government of the euro countries declared that they were prepared to support Greece in addition to financing by the International Monetary Fund (IMF) with their own bilateral loans (see Statement by the Heads of State and Government of the Euro Area, 25 March 2010). Evidently this statement also failed to convince the financial markets with lasting effect. After the Fitch Ratings Agency downgraded its rating for Greece to BBB- on 9 April 2010 and the risk surcharges on Greek government bonds rapidly reached record levels, on 11 April 2010 the Euro area finance ministers reached agreement on the structure of the aid for Greece, to be granted in the form of bilateral loans from states in the euro area, and on its extent and the interest rate. In order set incentives for Greece to return to market financing, the IMF's pricing formula, with certain adjustments, was to be used as the reference rate to determine the conditions of the bilateral state loans. On 12 April 2010, the EU Commission, in consultation with the European Central Bank (ECB), entered into negotiations with the IMF and Greece, in which the conditions of the Greek rescue package were specified. The support was to be activated at the moment when it was actually needed, and needed above all to satisfy its liabilities on the bond markets. The participating states were then to decide on the disbursements (see Statement on the support to Greece by Euro area Member States, 11 April 2010).

4. On 23 April 2010, Greece applied for financial aid from the EU and the IMF (see Joint statement by European Commission, European Central Bank and Presidency of the Eurogroup on Greece, IP/10/446, 23 April 2010). Thereupon, on 2 May 2010, the states of the Eurogroup declared that they were ready, in the context of a three-year IMF programme with an estimated total financing requirement in the amount of 110 billion euros, to provide up to 80 billion euros as financial aid to Greece in the form of coordinated bilateral loans, up to 30 billion euros of which would be provided in the first year (see Statement by the Eurogroup, 2 May 2010). The shares of the individual states in the loans are based on the respective shares of the euro area Member States in the capital of the ECB. Germany's share as one of the 15 states which formed the Eurogroup at the time (without Greece) was to be 27.92% (see draft bill of the CDU/CSU and FDP parliamentary groups, *Bundestag* printed paper (*Bundestagsdrucksache*, BTDrucks) 17/1544, p. 4). The German share of the credits was therefore, if all Eurogroup states (apart from Greece) participated, approximately 22.4 billion euros, up to 8.4 billion euros of which was payable in the first year. The IMF was to take a share of 30 billion euros (see draft bill of the CDU/CSU and FDP parliamentary groups, BTDrucks 17/1544, p. 1). The financial aid from the Eurogroup is provided subject to strict conditionality which was agreed between the IMF and the EU Commission (in consultation with the ECB) and Greece. The arrangements between the states of the Eurogroup with Greece and between themselves consist of 5

two agreements. On the one hand there is the Loan Facility Agreement between the states of the euro area and Greece, which essentially establishes the loan conditions and requirements for granting the loan, and on the other hand the Intercreditor Agreement, an agreement between the Member States of the euro area which lays down the rights and duties of the Member States between themselves. Both agreements, with regard to Greece's measures of financial and economic policy, relate to the Memorandum of Understanding entered into with Greece (see Greece: Memorandum of Understanding on Specific Economic Policy Conditionality, 2 May 2010), which lays down the conditions for granting loans and in particular makes the disbursement of the financial aid conditional on strict requirements with regard to budget consolidation. The disbursement of the individual tranches is therefore coupled to compliance with quantitative performance criteria. Thus, detailed savings goals are laid down for each quarter; these must be achieved by means of measures such as tax increases or the cancellation of bonuses in the civil service (see Greece: Memorandum of Understanding on Specific Economic Policy Conditionality, 2 May 2010, p. 1). The Intercreditor Agreement also provides for internal balancing of interest and disbursements for financially ailing lender countries. As a result, a lender which has higher refinancing costs than the borrower's interest under the loan agreement may require that it is granted an adjustment of interest which is financed pro rata from the interest revenue of the other lenders. In addition, if it has higher refinancing costs than the borrower's interest under the loan agreement, a lender may apply not to take part in the disbursement of the next tranche. The other lenders decide on this application by a two-thirds majority of their capital shares. As soon as this lender again has lower refinancing costs than the borrower's interest, it is provided that its share of the loan should again be adjusted to the share provided in the loan agreement. No lender is responsible for the commitments of another lender.

5. In order to take the necessary measures on a national level, on 7 May 2010 the German *Bundestag* passed the challenged Act on the assumption of guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability within the Monetary Union (Act on Financial Stability within the Monetary Union – WFStG, Federal Law Gazette I p. 537). The provisions of the Act on Financial Stability within the Monetary Union are as follows: 6

§ 1 – Guarantee authorisation 7

(1) The Federal Ministry of Finance is authorised to give guarantees up to the total amount of 22.4 billion euros to the Hellenic Republic; these are necessary as emergency measures to preserve the solvency of the Hellenic Republic in order to ensure financial stability in the monetary union. The guarantee serves to safeguard loans of the Kreditanstalt für Wiederaufbau to the Hellenic Republic, which are to be disbursed together with the loans of the other Member States of the European Union whose currency is the euro and of the International Monetary Fund. It is based on the measures agreed between the International Monetary Fund, the European Commission on behalf of the Member States of the European Union and the 8

Hellenic Republic, with the cooperation of the European Central Bank. The loans from the Kreditanstalt für Wiederaufbau are to be disbursed in the first year up to the amount of 8.4 billion euros.

(2) A guarantee is to be applied against the maximum amount thus authorised in the amount in which the Federal Government can be called upon under the guarantee. Interest and costs are not to be charged on the amount authorised. 9

(3) Before guarantees are given under subsection 1, the German *Bundestag*'s budget committee must be informed, unless for compelling reasons an exception is advisable. In addition, the German *Bundestag*'s budget committee is to be informed quarterly on the guarantees given and their correct use. 10

§ 2 – Entry into force 11

This Act shall enter into force on the day after it is promulgated. 12

6. The share of the aid measures assumed by Germany will be lent by the Kreditanstalt für Wiederaufbau (KfW), which requires a Federal Government guarantee for this. § 1.1 of the Act on Financial Stability within the Monetary Union authorises the Federal Ministry of Finance to give guarantees of this nature, which secure the granting of the guarantee by the KfW. 13

7. On the same day, 7 May 2010, the heads of state and government of the Eurogroup met again in Brussels and *inter alia* stated that they were in favour of strengthening economic governance in the euro area and regulating the financial markets more intensively and combating speculation (for an earlier decision on the following facts, see BVerfGE 126, 158 <160 ff.>). They reaffirmed their determination to exploit all means to preserve the stability of the euro area. For this purpose they agreed *inter alia* that the EU Commission should propose a European stabilisation mechanism to preserve the stability of the financial markets in Europe (euro rescue package). Thereupon, on 9 May 2010, the ECOFIN Council passed a resolution to create a European stabilisation mechanism, which consists of two parts: the European Financial Stabilisation Mechanism (EFSM), based on an EU regulation, on the one hand and the European Financial Stability Facility (EFSF), a special purpose vehicle based on an inter-state agreement between the Member States of the Eurogroup to grant loans and credit lines, on the other hand. These instruments are intended to give financial assistance to Member States which are in difficulties caused by exceptional occurrences beyond their control (see the “Agreement on Conditions” on the “central structural elements of the EFSF”). The ECB also agreed to be involved in the new approach by resolving on a “securities markets programme”. *Inter alia*, the ECB Governing Council in this connection authorised the national central banks of the Eurosystem to purchase on the secondary market debt instruments issued by central governments or public entities of the Member States (OJ L 124/8). 14

8. Council Regulation No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118/1) is based on Article 122.2 of the Treaty on 15

the Functioning of the European Union (TFEU). This provides that where a Member State is in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control, it may be granted European Union financial assistance. The Council is of the opinion that the exceptional situation consists in the fact that the intensification of the global financial crisis has led to a grave deterioration for more than one Member State of the Eurogroup, which exceeds what can be explained by fundamental economic data. The European Financial Stabilisation Mechanism is to remain in effect for as long as is necessary to preserve the stability of the financial markets and is to have a total financial volume of up to 60 billion euros, which makes it necessary for the EU to borrow. The Regulation lays down the details of the conditions and procedures under which a Member State may be granted financial assistance by the EU. The decision on the grant of financial assistance is made by the Council on a proposal of the EU Commission, by a qualified majority.

9. In addition to the introduction of the EFSM, the heads of state and government of the Eurogroup agreed to support each other financially through a special purpose vehicle, the EFSF. A special purpose vehicle is a legal person or an entity equivalent to a legal person which is usually founded for a quite specific purpose and is dissolved after this purpose has been achieved. It was resolved that the participating Member States, paying due regard to their constitutional provisions, guarantee the special purpose vehicle in proportion to their share of the paid-in capital of the ECB (see Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, of 9 May 2010, Council Document 9614/10). The EU Commission may, through the EFSF, be tasked by the Member States of the Eurogroup (see Decision of the Representatives of the Governments of the 27 EU Member States of 9 May 2010, Council Document 9614/10). 16

10. With regard to this special purpose vehicle, which at this date had not yet been founded, first of all framework conditions were agreed (“Agreement on Conditions”): The shareholders are all Member States of the Eurogroup; every Member State of the Eurogroup delegates one director to the board of the company, and in addition the EU Commission delegates an observer. The special purpose vehicle is to be founded under Luxembourg law. Its purpose is to issue bonds and to grant loans and credit lines to cover the financing requirements, subject to conditions, of Member States of the Eurogroup who are in difficulties. The guarantees for the special purpose vehicle in the amount of 440 billion euros will be shared among the Member States of the Eurogroup in proportion to their share of the capital of the ECB; the liabilities of the Member States under the guarantee are limited to their share plus 20% for each bond issue. The increase of up to 20% results from the fact that not all Eurogroup Member States will be involved in all bond issues. The decisions will be made unanimously; the life of the special purpose vehicle is limited to three years from its foundation, irrespective of the date of maturity of loans granted or bonds issued by the special purpose vehicle and of guarantees given by Eurogroup Member States. 17

11. In addition, a framework agreement is to be entered into between the Eurogroup participating states and the proposed special purpose vehicle; this will govern the details of the issue of bonds on the capital market by the special purpose vehicle, of the declaration of guarantee of the Eurogroup states and of the terms of the loan extension (see EFSF Framework Agreement, draft of 20 May 2010). On the basis of Germany's share in the ECB capital, the German share of the guarantee volume was to be 123 billion euros; in cases of unforeseen and absolute need, it was anticipated that the amount might be exceeded by 20% (see draft bill of the CDU/CSU and FDP parliamentary groups, BTDrucks 17/1685, p. 1). The total volume of the stabilisation instruments in the amount of 750 billion euros is calculated on the basis of the volume of the EFSM in the amount of 60 billion euros, the volume of the EFSF in the amount of 440 billion euros and the (expected) participation of the IMF in the amount of half of the sums named, that is a further 250 billion euros (see Conclusions of the ECOFIN Council of 9 May 2010, Rat-Dok. SN 2564/1/10 REV 1). 18

12. In order to create the conditions on a national level to give financial support through the special purpose vehicle (EFSF), on 21 May 2010 the German *Bundestag* passed the challenged Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (hereinafter: Euro Stabilisation Mechanism Act, Federal Law Gazette I p. 627). After the *Bundesrat* had resolved on the same day not to refer the bill to the Mediation Committee, the Act was promulgated on 22 May 2010. The provisions of the Euro Stabilisation Mechanism Act are as follows: 19

§ 1 20

Guarantee authorisation 21

(1) The Federal Ministry of Finance is authorised to give guarantees up to a total amount of 123 billion euros for loans which are raised by a special purpose vehicle founded or commissioned by the euro area Member States to finance emergency measures to preserve the solvency of a euro area Member State, provided these emergency measures for the preservation of the solvency of the affected Member State are necessary to ensure financial stability in the monetary union. The condition is that the affected Member State has agreed an economic and financial policy programme with the International Monetary Fund and the European Commission with the cooperation of the European Central Bank and that this is approved by mutual agreement of the euro area Member States. Prior to this, the risk to the solvency of a euro area Member State must be established by mutual agreement of the euro area Member States, without the participation of the Member State involved, together with the International Monetary Fund and the European Central Bank. Guarantees under sentence 1 may only be given by 30 June 2013 at the latest. 22

(2) The giving of guarantees under subsection 1 is subject to the condition that the euro area Member, without the participation of the Member State involved and with the cooperation of the European Central Bank and in consultation with the International Monetary Fund, mutually agree that emergency measures under the Council 23

Regulation to create a European financial stabilisation mechanism are not or not in full sufficient to avert the risk to the solvency of the euro area Member State in question.

(3) A guarantee is to be applied against the maximum amount thus authorised in the amount in which the Federal Government can be called upon under the guarantee. Interest and costs are not to be charged on the amount authorised. 24

(4) Before giving the guarantees under subsection 1, the Federal Government will endeavour to reach agreement with the German *Bundestag* budget committee. The budget committee has the right to submit an opinion. If for compelling reasons a guarantee has to be given before agreement has been reached, the budget committee must be subsequently informed without delay; the absolute necessity of giving the guarantee before agreement is reached must be justified in detail. In addition, the German *Bundestag*'s budget committee is to be informed quarterly on the guarantees given and their correct use. 25

(5) Before the guarantees are given by the Federal Ministry of Finance, the agreement on the special purpose vehicle must be submitted to the German *Bundestag*'s budget committee. 26

(6) The scope of the guarantees under subsection 1 may, if the requirements of § 37.1 sentence 2 of the Federal Budget Code are satisfied, with the consent of the German *Bundestag*'s budget committee be exceeded by up to 20 per cent of the sum stated in subsection 1. 27

§ 2 28

Entry into force 29

This Act shall enter into force on the day after it is promulgated. 30

13. On 7 June 2010, the Grand Duchy of Luxembourg founded the special purpose vehicle, initially alone (see European Financial Stability Facility, Société Anonyme, 7 June 2010). On the same day, the finance ministers of the Eurogroup and a representative of the special purpose vehicle accepted the Framework Agreement (see EFSF Framework Agreement, Execution Version of 7 June 2010). Article 13.8 of this Framework Agreement gives the other Member States the right to assume their shares of the special purpose vehicle. 31

II.

In their constitutional complaints, the complainants challenge German and European legal instruments and further measures which are related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union. All complainants assert that there is a violation of their fundamental rights under Article 38.1, Article 14.1 and Article 2.1 of the Basic Law. 32

1. The first complainants are of the opinion that Article 38.1 sentence 2 of the Basic 33

Law gives every citizen a right that the principles of the structure of the state in the Basic Law are at least in essence safeguarded. They submit that fundamental principles of the Basic Law have been disregarded, in particular the principle of the social welfare state, and that the principles of the constitutional rules governing public finances have been disregarded and in particular there has been a violation of borrowing limits (Article 115 of the Basic Law). Germany has largely abandoned its budgetary sovereignty. They state that the measures are contrary to convergence and thus to stability, and that they also violate the fundamental right to property of Article 14.1 of the Basic Law, and they submit as follows:

a) aa) Article 38 of the Basic Law grants an individual right that every instance of European integration policy must be supported by sufficiently specific decisions of the German *Bundestag* and of the *Bundesrat*. Legal instruments which depart from the concept of the European Union monetary union would be ineffective in Germany, for if they took effect, this would lack parliamentary accountability and would therefore violate Article 38.1 of the Basic Law. The German *Bundestag* has assumed responsibility for the monetary union, but only subject to particular basic conditions to ensure the stability of the European Union currency. The stability criteria are binding not only as the limit of the sovereign powers transferred, because the *Bundestag* and the *Bundesrat* were not prepared or entitled to be accountable for a development of the monetary union independent of these stability criteria, but also because a stability community strictly bound by the convergence criteria is a subject agreed on by European Union treaty. Parliament bears responsibility for and legitimises European Union policy only within the limits of the sovereign powers transferred. Just as the policy of a monetary union cannot take effect in Germany without a German Consent Act, such a policy can also not assert itself under the Basic Law contrary to the Consent Act, whose basis is in the treaty. It would also violate the right equivalent to a fundamental right under Article 38.1 of the Basic Law. 34

bb) If there is a departure from the stability principle of the Maastricht Treaty, the German *Bundestag* and the *Bundesrat* are not responsible or accountable for this policy, and this violates the citizen's constitutional rights. Measures which are resolved upon by the European Council and the Council of the Finance Ministers and implemented by the Act on Financial Stability within the Monetary Union disregard the limits of the powers of the European Union and can have no effect in Germany. The measures do not only violate the convergence principle of financial stability law in the narrow sense, but also ignore the requirement of convergence in currency law, that is, the budgetary independence of the members of the monetary union. Decisions of the German *Bundestag* passed by a simple majority cannot democratically assume responsibility for the aid measures of the European Union and Germany. Whether the monetary union following the stability concept of the Treaty may be expected to result in the European currency being stable depends on whether convergence is realised in such a way that the monetary union can be a community which guarantees stability and in particular monetary stability in the long term (BVerfGE 89, 155 <204>). 35

b) In the commitment to grant financial aid to other members of the Eurogroup in order to avert their budgetary hardships, Germany has largely abandoned its budgetary sovereignty, which is an essential part of economic sovereignty. In this way, Parliament's right to decide on the budget, which defines democratic parliamentarianism (Article 110.2 sentence 1 of the Basic Law), is restricted in a way which surrenders existential statehood in an anti-democratic manner. Limits to permissible loan guarantees can be found in the fundamental budgetary principle of Article 110.1 sentence 2 of the Basic Law. It is impossible for Germany to satisfy its commitments under the guarantees without borrowing. 36

c) The measures are contrary to convergence and thus to stability, and they also violate the fundamental right to property of Article 14.1 of the Basic Law. This fundamental right guarantees the “citizen's fundamental right to price stability”. It also receives its substance from the principle of the social welfare state. This guarantee of property is violated by a policy of money instability. Together with the value of money, inflation materially reduces monetary claims. As a result of inflation, monetary wealth loses value to a greater or lesser extent. It is true that the guarantee of property does not generally guarantee the value of assets, but it does afford protection against a state policy which encourages inflation. It also follows from Article 14.1 of the Basic Law that the state has a duty to protect the stability of value of property. The policy of the European Union and of Germany is contrary to convergence and thus to stability and it gives rise to fears of a present and immediate loss of value of the complainants' personal assets. The legal protection of property calls for inflation to be averted in an early stage. For if one waits until inflation has developed, the damage has already occurred. The constitutional complaint proceedings must examine whether the monetary policy of the European Union and of Germany creates a risk of inflation. 37

d) The federal bodies have no powers to undertake acts which are contrary to the Basic Law; at all events, all powers end where they violate the core of constitutional identity, which under Article 79.3 of the Basic Law is not at the disposal of the policies of the federal bodies. The core of constitutional identity also restricts the powers of the European Union bodies. Both the European Union policy and the national policy of the euro rescue package violate not only the principle of conferral, but in the form of inflation policy also violate the core of Germany's constitutional identity, in particular the principle of the social welfare state. They even hold the danger of creating a currency reform which is contrary to the social welfare state. The European Union is attempting to develop Article 122.2 TFEU into a form of federal emergency constitution. This is an arrogation of power which has the quality of a coup d'état. The European Financial Stabilisation Mechanism creates the “financial union”, which is at the same time a “social union”. It creates the “transfer union” and the liability community. Financial aid for ailing state budgets is a form of financial compensation which departs from the concept of the monetary union. 38

2. The second complainant also submits that his fundamental rights and rights equivalent to fundamental rights under Article 38.1, Article 14.1 and Article 2.1 of the 39

Basic Law have been violated. He states that the euro stabilisation mechanism is incompatible with the Treaty on the Functioning of the European Union and has the effect of altering the Treaty (a). Both these elements are significant with regard to more than one violation of a fundamental right ((b) and (c)). He submits as follows:

a) The euro stabilisation mechanism – in the same way as the earlier aid to Greece – violates the bailout prohibition of Article 125.1 TFEU, which rules out European Union liability for commitments of the Member States and liability of the Member States for commitments of other Member States. It is the purpose of this provision to ensure comprehensive legal responsibility of the Member States for their own public-revenue conduct. Only if it is clear to every Member State that neither the European Union nor other Member States are liable for or guarantee that state's own commitments and therefore there is a risk of state insolvency in certain circumstances is there sufficient incentive to satisfy the requirements of stability in the long term and not to engage in an irresponsible debt policy at the cost of the others – who admittedly have no legal obligation, but might see themselves, as a result of the pressure of economic circumstances, de facto forced to be responsible for the commitments of the Member State with unsound economic activity – and to enjoy prosperity on credit in the hope that ultimately the others will pay for this. 40

A justification of this violation by a state of emergency under Article 122.2 TFEU is out of the question. In particular, the overindebtedness of Greece and other states is not an event comparable to a natural disaster, but the result of a financial policy for which, according to the Treaty, the states in question are solely responsible. In the case of overindebtedness, state bankruptcy is an economic consequence of the state's own conduct, for which the state in question must take responsibility under the meaning and purpose of Article 125 TFEU. If the impending insolvency of a Member State were to be understood as an exceptional occurrence within the meaning of Article 122.2 TFEU, scarcely an area of application for the bailout prohibition would remain. 41

The contravention of the bailout prohibition by the euro stabilisation mechanism is not an isolated infringement of the Treaty; on the contrary, the concept of the stability union provided for by the Treaty is permanently destroyed, and replaced by the completely different concept of a liability and transfer union. In addition, the euro stabilisation mechanism as such represents the institutionalisation of ongoing failure to fulfil Treaty obligations. In the Maastricht Treaty, the Federal Republic of Germany only consented to monetary union subject to the proviso that the provisions guaranteeing stability should be in force and be strictly applied. Every time it disregards these provisions, the European Union leaves the Treaty foundation of monetary policy and oversteps the scope of competence defined in the Member States' Acts to ratify the Treaty. Politically, there may be differing opinions as to whether such a turning away from the previous conception is desirable or not. But legally, at all events, such a fundamental change of design is possible only by a formal amendment of the Treaty. The participation of the Federal Government and the *Bundestag* in the de facto alter- 42

ation, sanctioned by custom, of the Treaty on the Functioning of the European Union is incompatible with the principle of democracy.

b) In its Lisbon judgment, the Federal Constitutional Court recognised a comprehensive right of the individual to participate in the democratic legitimation of state authority – a “right to democracy” – which is not restricted to legitimation in connection with the transfer of sovereign powers. In substance, admittedly, this right equivalent to a fundamental right does not entail a comprehensive review of the lawfulness of the whole of the state's activity, but it does entail a “review of democracy”. This right of the individual under Article 38. 1 of the Basic Law has been violated in several ways by the challenged acts and omissions. 43

aa) *Ultra vires* acts of the European Union bodies contravene the principle of democracy and infringe the complainant's right equivalent to a fundamental right under Article 38.1 of the Basic Law because they involve the exercise of sovereignty in Germany which is not democratically legitimised. From Article 38.1 of the Basic Law there follows in general the right of every citizen that state authority and European sovereign power is democratically legitimised, unless the constitution itself – within the limits of Article 79.3 of the Basic Law – permits restrictions or modifications of the democratic principle of legitimation. The challenged acts and omissions of the European Union bodies, as *ultra vires* acts, contravene Article 38.1 of the Basic Law. This applies to the decision of the Council of 9 May 2010 to introduce a euro stabilisation mechanism (violation of the bailout prohibition of Article 125.1 TFEU), to Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (violation of the bailout prohibition of Article 125.1 TFEU), to the purchase of government bonds of Greece and of other euro area Member States by the European Central Bank (violation of Article 123.1 TFEU) and to the coordination of the rescue packages, that is, of the aid to Greece and the euro stabilisation mechanism, by the Council and the EU Commission (violation of the bailout prohibition of Article 125.1 TFEU). These are manifest and serious cases of overstepping of competence within the meaning of the Federal Constitutional Court's Honeywell case-law. 44

Unlike in the case of the review against fundamental rights, the Federal Constitutional Court has not retracted its authority for *ultra vires* review of European Union acts. The focus is not on a constant, regular overstepping of European Union competences; instead, the Federal Constitutional Court reviews every individual overstepping of the limited individual competences. Since European Union acts which are not covered by the limited individual competences can have no legal effect in the Member States, they are subject in full to review by the Federal Constitutional Court. Consequently, the complainant can also challenge the fact that the European Union acts violate Article 14.1 or Article 2.1 of the Basic Law; in this case, the Solange II case-law is not pertinent. From the perspective of German constitutional law, *ultra vires* acts of the European Union bodies are to be disregarded by German state authority because they are not covered by the German Consent Act ratifying the Treaty and thus are not based on an effective transfer of sovereign powers. Every overstepping of their com- 45

petence by European Union bodies also severs the democratic legitimation connection which is based on the Consent Act.

bb) Article 38.1 of the Basic Law has also been violated by the Federal Government's cooperation in the *ultra vires* acts of the European Union bodies. 46

cc) The same applies to the acts of the Federal Government, which in cooperation with the European Union bodies and with the governments of the other Member States led to a fundamental change of the stability conception of the European monetary union. Not only the Federal Government was involved in this *de facto* alteration of the Treaty outside the legal Treaty amendment procedure, but also the *Bundestag* and the *Bundesrat*, by passing the Act on Financial Stability within the Monetary Union of 7 May 2010 and the Euro Stabilisation Mechanism Act of 22 May 2010. Admittedly, as a rule measures for which Parliament as legislature gives authorisation by statute do not lack democratic legitimation. But it must be noted that the Basic Law makes differing requirements of the democratic legitimation conveyed by the Act of parliament. An amendment of primary European Union law, except where it is a case of a simplified treaty amendment procedure provided for in EU law, requires an international-law treaty and a Consent Act ratifying the treaty within the meaning of Article 23.1 of the Basic Law to be entered into. Treaty amendments without such a ratifying Act do not satisfy the constitutional requirements for democratic legitimation. 47

dd) In addition, the complainant finds his rights under Article 38.1 of the Basic Law violated in that the de facto abolition of the bailout prohibition encroaches upon the people's constituent power. A liability community and a European centralisation of budget policy may not even be introduced by a Treaty amendment unless the Member States are given other competences by the European Union by way of compensation. For with this impetus to centralisation the limit of what the Federal Constitutional Court, in the Lisbon decision, regarded as constitutional by way of transfer of sovereign powers would be clearly exceeded. In this decision, the Court emphasised the importance of the budgetary sovereignty of the national parliaments as the most important element of state sovereignty. 48

ee) There is also a violation of the principle of democracy guaranteed by Article 38.1 of the Basic Law because the guarantee authorisation and the institutional embodiment of the special purpose vehicle in the Euro Stabilisation Mechanism Act is too imprecise and possibilities of parliamentary monitoring and influence were lacking when the Act was implemented. What standards are to be imposed before guarantees are given on the economic and financial policy programme of the Member State which is to benefit and in what way the performance of this programme in practice is monitored and safeguarded cannot be understood from the challenged statute. It is true that the Federal Government has a right of veto, because the programme has to be approved by mutual agreement of the Member States. However, this veto position is relativised in view of the immense political pressure. In addition, the institutional structure of this special purpose vehicle is not defined in the Act. Nor did the dele- 49

gates have access to articles of association of the special purpose vehicle when the Act was passed. The “Agreement on Conditions”, which sketches the “central structural elements of the EFSF” in a few words, was by no means sufficient to enable the *Bundestag* to make an accountable decision.

In addition, under § 1.4 of the Euro Stabilisation Mechanism Act, the Federal Government is merely obliged to attempt to reach agreement with the *Bundestag* budget committee before giving guarantees. This is not enough, since in the case of conflict the obligation to attempt to reach agreement leaves the decision on a financial volume of half of the federal budget to the Federal Government. 50

ff) With regard to the German *Bundestag*'s budget responsibility, the second complainant finds a violation of Article 38.1 of the Basic Law in particular in the fact that responsibility for the guarantee authorisation given in § 1 of the Euro Stabilisation Mechanism Act in the amount of 147.6 billion euros (123 billion euros plus 20%) exceeds what is possible in a parliamentary democracy. If one adds to this the guarantee authorisation in favour of Greece in the amount of 22.4 billion euros agreed in the Act on Financial Stability within the Monetary Union, this is a total amount which is much larger than the largest federal budget item and which greatly exceeds half of the federal budget. Admittedly, it is not likely that the Federal Government will have to assume liability for all guarantees in full, but it is also not unrealistic to prepare for this possibility. The *Bundestag* renounces its budget responsibility and its responsibility for the public interest if it ties itself down in this volume in advance for future budget years. With good reason, the Basic Law provides that decisions on revenue and expenditure are to be made in annual budgets or in budgets relating to years, which are adopted as Budget Acts. Admittedly, Article 115. 1 of the Basic Law permits the *Bundestag* to authorise by statute guarantees of various kinds which may result in expenditure in future financial years. But this presupposes that these are obligations which remain on the scale of customary individual budget items. If, however, half the federal budget is potentially spent in advance in this way, this is a quantum leap. In drafting Article 115 of the Basic Law, the legislature creating the constitution was not thinking of such exorbitant orders of magnitude. It contradicts the principle of parliamentary budget responsibility that the whole or – as in the present case – half of the budget is disposed of in advance and thus room to manoeuvre in order to perform the state's many duties is abandoned. 51

gg) Moreover, Article 38.1 of the Basic Law is also violated by the fact that the Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union of 9 May 2010 is a treaty under international law and under Article 59.2 in conjunction with Article 115.1 of the Basic Law it required the consent of Parliament in the form of a Consent Act. In the absence of a Consent Act, the democratic legitimation necessary under Article 59.2 of the Basic Law is lacking. 52

hh) Finally, the second complainant finds a violation of Article 38.1 of the Basic Law 53

in the fact that Parliament was compelled by the Federal Government to pass the Act on Financial Stability within the Monetary Union and the Euro Stabilisation Mechanism Act, in that the Federal Government claimed that there was a state of emergency with threatening catastrophic consequences or actually caused this state of emergency by a number of omissions. A characteristic of parliamentary democracy is that Parliament debates on various possible decisions and the majority decides in favour of one of the alternatives. If parliament is forced to decide in favour of one alternative because otherwise an absolutely intolerable evil threatens, a democratic choice between alternatives on the basis of competing political conceptions is impossible. However, it is debatable whether there really is only one way out of the Greek crisis and the “euro crisis”. Respected economists think that a far better solution could be achieved if the creditors take a “haircut”. But if there are realistic alternatives, it is undemocratic to put Parliament under such pressure.

c) In addition to Article 38.1 of the Basic Law, Article 14.1 of the Basic Law is also violated by the challenged acts and omissions. They lead to the collapse of the legal stability structure of the currency system. Admittedly, in its decision on the introduction of the euro, the Federal Constitutional Court stated clearly that by law the currency policy must orient itself towards the objective of price stability, which follows from Article 14.1 in conjunction with Article 88 of the Basic Law, but that there is no individual right to demand that this obligation is fulfilled. This is also correct, because and to the extent that the law of economic, financial, currency and social policy allows tolerance for structuring and prognosis. But where there are strict legal commitments with regard to the structuring of the economic regulatory framework for the development of monetary value, no reason is apparent to restrict the individual right under Article 14.1 of the Basic Law. This is precisely the nature of the legal position in the present case. For the policy violates Article 125.1 and Article 123.1 TFEU and thus fails to observe the limits established by treaty of provisions determining the content and limits of property. It would be a one-sided and impermissibly restrictive point of view if one were always to understand provisions determining the content and limits of property only as restrictions of the rights of owners. They are at the same time constitutive elements of the owner's rights. Since the legal scope of owners' rights follows from the totality of the statutory provisions determining the content and limits of property, the individual also has a claim for state authority to observe the provisions determining the content and limits of property. 54

III.

The German *Bundestag* (1) and the Federal Government (2) submitted written opinions on the constitutional complaints. 55

1. The German *Bundestag* is of the opinion that the constitutional complaints are inadmissible (a) and unfounded (b) and submitted as follows: 56

a) The complainants disregard the limits of constitutional complaint proceedings and also of the judicial decisions of the Federal Constitutional Court. The constitutional 57

complaint, which is designed to give an individual recourse to justice, is completely pushed into the background and the complainants conduct themselves as if they were champions of the public. The decisions made by the Council of the European Union and the acts and omissions of the ECB and the EU Commission are outside the scope of a constitutional complaint under Article 93.1 no. 4a of the Basic Law and § 90 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). Nor do the Solange II case-law of the Federal Constitutional Court and the statements on European *ultra vires* acts made in the Lisbon judgment lead to a different result. Independently of this, there is no entitlement to file a specific constitutional complaint, for the complainants are exposed to mere reflex effects, and this is not sufficient to assume a direct effect on them.

aa) The possibility of a violation of Article 14 of the Basic Law has not been shown. It is true that specific property rights are protected, and consequently so is property in the form of money and the basic possibility of being able to exchange money for material assets. However, Article 14 of the Basic Law contains no guarantee of value; the exchange value of property rights is not covered by the guarantee of property, provided that the possibility of exchange is not completely ruled out. The area of protection of Article 14.1 of the Basic Law does not include monetary stability, and therefore there is no fundamental right to a stable currency. Furthermore, the challenged measures serve to ensure the monetary stability of the euro and for this reason too they do not contravene Article 14 of the Basic Law. 58

bb) An infringement of Article 2.1 of the Basic Law is out of the question. Only if an infringement of Article 14.1 of the Basic Law were to be assumed would there at the same time be an infringement of Article 2.1 of the Basic Law, but by reason of its subsidiarity this would then be overridden as a fall-back fundamental right. 59

cc) Where the argument is based on objective constitutional law (the principle of the social welfare state), this is outside the area of application of a constitutional complaint. The principle of the social welfare state alone does not give rise to any individual rights. The principle of the social welfare state includes the requirement for the state to create the minimum requirements for an existence inline with human dignity. This does not include the guarantee of a stable currency, because the principle of the social welfare state does not relate to the general economic conditions of environment and existence. 60

dd) Nor has the possibility of a violation of Article 38 of the Basic Law been shown. State power and the influence on the exercise thereof are legitimised by election, and in the area of application of Article 23 of the Basic Law, Article 38.1 of the Basic Law precludes emptying this of meaning by relocating duties and powers of the *Bundestag* in such a way that the principle of democracy, insofar as Article 79.3 in conjunction with Article 20.1 and 20.2 of the Basic Law declares it to be inviolable, is violated (BVerfGE 89, 155 <171>). This guarantee is not relevant, because duties and powers of the German *Bundestag* are not relocated. The Federal Republic of Ger- 61

many does not abandon its statehood. The challenged statutes are statements of the German legislature and as such an expression of continuing statehood. In the present context, Article 38.1 of the Basic Law gives no protection against the democratically legitimised legislature.

b) The constitutional complaints are also unfounded. Fundamental rights have not been violated. Nor does an argument which places an alleged contravention of provisions of European primary law in centre stage carry weight. Insofar as the constitutional complaints assert that there have been violations of law and place these violations in the context of *ultra vires* review, they overlook the fact that the concept of *ultra vires* acts does not imply a general review, encroaching upon areas of discretion, by Member State courts of the lawfulness of all European physical acts or legal instruments. 62

aa) Apart from the fact that violations of the European treaties by the federal legislature cannot be challenged by way of a constitutional complaint, the accusations are also substantively incorrect with regard to European Union acts. 63

(1) In Article 122 TFEU, there was a legal basis for European Union acts. Under Article 122.2 TFEU, the Council may under certain conditions grant a Member State financial assistance from the European Union if this Member State, by reason of natural disasters or exceptional occurrences beyond its control, is in difficulties or is seriously threatened with severe difficulties. It is true that there is no natural disaster in the present case. However, the financial crisis and the developments on the financial markets are exceptional occurrences within the meaning of Article 122.2 TFEU. They are also beyond the control of the Member States considered, that is Greece, Portugal, Spain, Italy and Ireland. The difficulties within the meaning of Article 122. 2 TFEU need not in their entirety arise without fault. Even if Greece and other euro area Member States had themselves actuated their strained budget situations, it would only have been the financial crisis, contagious tendencies entailed by it and the developments on the financial markets which would have led to difficulties or to the threat of severe difficulties. These difficulties within the meaning of Article 122.2 TFEU consist in a substantial deterioration of loan conditions of some euro area Member States, which could have resulted in these Member States being insolvent, and in the danger that these tensions would spread from the government bonds market to other markets and would adversely affect the functioning of the international financial markets. 64

(2) The purchase of government bonds of Greece and of other euro area Member States by the European Central Bank is not a violation of Article 123 TFEU. This provision only prohibits the ECB from directly purchasing debt instruments of public-sector bodies and institutions. Consequently, only the purchase of government bonds direct from state issuers, that is, the euro area Member States, is prohibited. The direct purchase of government bonds by the ECB from the secondary market is not prohibited. 65

(3) There is no violation of Article 125 TFEU and the bailout prohibition contained therein. There is no aspiration to achieve a completely different conception of the monetary union, away from the stability community and towards the liability and transfer community. Article 125 TFEU is open to interpretation to the extent that it may simply contain a “prohibition of a commitment to give financial aid”, with the result that voluntary financial aid is not affected. Under Article 125 TFEU, neither the European Union nor individual Member States are liable for the obligations of sovereign agencies of other Member States and they do not take responsibility for such obligations. In this way the bailout prohibition prevents creditors of Member States or these Member States themselves from being able automatically to call upon the European Union or other Member States as if they were guarantors of the debts of these Member States. However, this does not mean that Article 125 TFEU contains a general prohibition of financial assistance for Member States. There is no obligation to give assistance, but this is not forbidden. The aid from the Member States does not contravene the bailout prohibition for another reason too. Under the wording of Article 125.1 TFEU – “... A Member State shall not be liable for or assume the commitments ...” – a Member State is only forbidden to enter into the debt relationship between another Member State and its creditor, with the result that the bailout prohibition specifically does not contain a general prohibition of voluntary assistance between the Member States. For this voluntary assistance creates a new, independent commitment and is therefore not conceptually an entry into an old commitment. 66

In addition, a further reason why the financial assistance of the European Union does not violate Article 125 TFEU is that Article 122.2 TFEU authorises the European Union to grant financial assistance and at the same time can be regarded as the ground of justification for deviating from the prohibition of Article 125 TFEU. Even if one were to infer from the provision a prohibition of assistance, it would still be the case that when choosing between the loss of currency stability and giving assistance, in the last resort European Union law could not stand in the way of giving assistance. On the contrary, it would have to be objectively interpreted following the purposive approach. In the political process, reference has repeatedly been made to the last-resort nature of the present measure. It appears absurd to hold fast to a narrowly interpreted bailout clause if assistance is the last means to preserve the stability of the currency, which is precisely what a narrowly interpreted bailout clause is intended to achieve. 67

bb) Finally, in all considerations of lawfulness it must be taken into account that this is an area in which considerable latitude must be given to economic and political assessment and prognosis. The *Bundestag* and the Federal Government are responsible for the stability of the currency. The Federal Constitutional Court cannot release the politically responsible actors of this responsibility by interpretation of constitutional law. If parts of the euro rescue package were invalidated, this would lead to considerable uncertainty on the financial markets and might completely call into question the stabilisation of the financial markets now achieved. Doubt could be cast on Ger- 68

many's willingness and ability to defend the European integration achieved and the joint currency. Trade-offs on the stabilisation package would directly entail substantial risks to the functioning of the financial system in the euro area. As a consequence, a substantial devaluation of the euro could be expected. The probable effects would be a new acute financial and economic crisis in the euro area and beyond it, high welfare loss in Germany and Europe and further political dangers and distortions, which would extend far beyond the economic area.

2. The Federal Government also regards the constitutional complaints as inadmissible (a), but at all events as unfounded (b). It submitted as follows: 69

a) With regard to the secondary-law measures and other practices to be regarded as equivalent to these of the bodies of the European Union, the constitutional complaints are at minimum inadmissible because the conditions under which such acts may be the subject of a constitutional complaint are not satisfied. Nor is it sufficiently shown that the protection of fundamental rights regarded as essential in each case is not generally guaranteed on the European Union level. In addition, the complainants are not affected by the challenged measures in an individual manner. The constitutional complaint proceedings give them no right to challenge provisions which could have only indirect effects on them as part of the general public. In other respects too, there is no possibility that a fundamental right or a right equivalent to a fundamental right has been violated. 70

aa) Article 38.1 of the Basic Law only protects against an erosion of the *Bundestag*'s competences by the transfer of sovereign powers or by *ultra vires* acts of the European Union. On the basis of Article 38.1 of the Basic Law, losses of substance of democratic freedom of action may be challenged; this also includes encroachments upon the principles laid down in Article 79.3 of the Basic Law as the identity of the constitution. But such a case is not applicable in the present matter. Nor can the alleged violations of Articles 123 and 125 TFEU be seen as *ultra vires* acts in the sense of manifestly wrongful recourse to competences not transferred and therefore reserved to the Member States. Consequently, the challenged European Union measures are also incapable of being violations of Article 38.1 of the Basic Law. Insofar as the second complainant asserts that there has been a violation of Article 38.1 of the Basic Law because there is no statute under Article 59.2 of the Basic Law, it is plain that no violation of this right equivalent to a fundamental right is possible. This follows from the mere fact that an alleged violation of Article 59.2 of the Basic Law cannot be challenged by way of a constitutional complaint. 71

bb) Nor is there a violation of the fundamental right to property under Article 14.1 of the Basic Law. The “civil right to price stability” alleged by the first complainants does not exist. Even if a state duty under objective law to protect monetary value resulted from the principle of the social welfare state or other provisions of the Basic Law, this does not entail a fundamental right of the individual. The second complainant may not rely on the argument that violations of strict legal commitments in shaping economic 72

framework conditions for the development of monetary value could be challenged by constitutional complaint with reference to Article 14.1 of the Basic Law. It is true that the fundamental right to property protects concrete legal interests with the value of assets and thus also property in the form of money, but it does not protect monetary value. The area of protection of Article 14.1 of the Basic Law does not include the purchasing power of money. The subject of protection of the fundamental right is essentially only the substance of specific legal positions which have the value of assets and their use. With regard to money too, only its existence and the possibility of using it as a means of payment are guaranteed, but not its exchange value. In addition, the challenged measures – even if a fundamental right to monetary stability existed – could not violate such a fundamental right, because they would serve to guarantee the euro as currency and thus also the monetary stability of the euro.

b) At all events, the constitutional complaints are unfounded. The practices of German constitutional bodies and bodies of the European Union that are challenged do not adversely affect the fundamental rights or rights equivalent to fundamental rights of the complainants (aa). Even if other German constitutional law (bb) and the law of the European Union (cc) could be matters open to review by a constitutional complaint, there would be no violation of prior-ranking law. 73

aa) (1) Article 38.1 of the Basic Law has not been violated, for there has been no transfer of sovereign powers on the basis of Article 23.1 of the Basic Law which could have resulted in an erosion of the *Bundestag*'s competences. The German *Bundestag*'s scope of action has in no way been restricted by law. In the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, the *Bundestag* exercised its competences. The challenged acts of cooperation of the Federal Government in the circle of the representatives of the governments of the Member States meeting within the Council of the European Union and in the passing of decisions in the Council and these decisions themselves also do not violate the right equivalent to a fundamental right under Article 38 of the Basic Law. Political agreement on bilateral measures was made expressly subject to the states' domestic constitutional provisions. The same applies to the decision of the Council of the European Union (Economic and Financial Affairs) of 9 May 2010. The decision of the Council to introduce a European financial stabilisation mechanism, by which it passed Regulation (EU) no. 407/2010, was made on the basis of Article 122.2 TFEU and is not a measure extending competence which could erode the rights of the *Bundestag*. The acts of cooperation of the current German representative from time to time therefore cannot have been violations of Article 38 of the Basic Law. 74

(2) Article 14.1 of the Basic Law has also not been violated; its area of protection has not even been touched on. The measures decided on serve to protect financial stability in the euro area, the euro currency as such and thus also monetary stability. For this reason they cannot violate the fundamental right to property. Even if one presumes that the challenged measures carry dangers for the stability of the euro, con- 75

sideration should be given to the legislature's economic and political latitude for assessment and prognosis, which should at all events be recognised.

bb) (1) The measures of assistance in the form of loan guarantees to threatened Member States do not violate Article 115 of the Basic Law, nor do they contravene other constitutional law relating to the budget. The principle of budgetary equilibrium (Article 110.1 sentence 2 of the Basic Law) requires only a formal balancing of revenue and expenditure, but it forbids neither guarantees nor borrowing. Under Article 115.1 sentence 1 of the Basic Law, guarantees, like borrowing, require authorisation by federal statute in an amount which is either determined or determinable. The legislature exercised the responsibility to safeguard Parliament’s right to decide on the budget which was assigned it by the Basic Law. In addition, the budget committee was given extensive rights of participation and monitoring under § 1.4 and §1.5 of the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism which exceeded the mere right of information which is otherwise customary when guarantees are given (see § 3.8 and § 3.9 of the Budget Act 2010). Article 115 of the Basic Law provides for no upper limit in figures for guarantees. There is no basis in the Basic Law for limiting the amount of a guarantee to the magnitude of “customary” individual budget items. 76

(2) Nor do the measures disregard the core of constitutional identity in the form of the principle of the social welfare state. It is true that constitutional identity, which is laid down in Article 79.3 of the Basic Law, includes the core of the principle of the social welfare state. However, monetary stability is not one of the elements which constitute this core based on the concept of the social welfare state. 77

(3) There is no violation of Article 59.2 of the Basic Law. Even violations of Article 59.2 of the Basic Law are not permitted to be challenged by a constitutional complaint, and there is no violation either with regard to the matters agreed by the government representatives meeting within the Council or with regard to the EFSF Framework Agreement. This follows firstly from the mere fact that these are not agreements under international law. Secondly, even if one were to assume that they were agreements under international law, the requirements in Article 59.2 of the Basic Law which make a Consent Act necessary would not be satisfied. 78

cc) Nor can Article 38. 1 of the Basic Law have been violated under the aspect that the challenged measures contravene European Union law or lead to an alteration or even destruction of the concept of the monetary union as a stability community. On the contrary, it is precisely their objective to preserve the monetary union as a stability community. 79

(1) Regulation (EU) No 407/2010 is permissibly based on Article 122.2 TFEU. Under this provision, the Council may under certain conditions grant a Member State financial assistance from the European Union if this Member State, by reason of natural disasters or exceptional occurrences beyond its control, is in difficulties or is seriously threatened with severe difficulties. The global financial crisis and the nega- 80

tive developments on the financial markets, which cannot be explained solely by the basic economic data, constitute such exceptional occurrences. Article 122.2 TFEU authorises only emergency measures. This proves that the Financial Stabilisation Mechanism is only an emergency measure, not a permanent institution which could result in the “liability and transfer community” feared by the complainants. An argument against assuming a permanent institution is the general restriction to measures subject to a time-limit and the obligation of review, which is intended to ensure that the Regulation applies only as long as the exceptional occurrences which threaten the financial stability of the European Union as a whole continue to exist (Article 9 of Regulation <EU> no. 407/2010).

(2) Article 125 TFEU does not conflict with the grant of aid through the Financial Stabilisation Mechanism, for Article 122.2 and Article 125 TFEU are part of a uniform system of provisions introduced at the same time. It is true that Article 125 TFEU is intended to preserve the budgetary discipline of the Member States by obliging them to take out loans on market conditions. For this reason, a narrow interpretation of Article 125 TFEU may suggest forgoing measures of assistance even where there are imminent dangers to financial stability. However, if the Member States had forgone the measures challenged by the constitutional complaint, serious consequences would have had to be feared, not only for the euro area. Every mechanical application of Article 125 TFEU would have considerably endangered the economy and also the currency in the euro area and beyond. The provision is not tailored to the case of an already existing acute danger to the financial stability of the euro system. The Member States were permitted to act to avert this danger because in Article 125 TFEU there is a gap relating to the case of burdens on Member States in the euro area resulting from a financial crisis, at all events insofar as there is an imminent danger to the whole economic and monetary union. This gap, in the sense of the lack of a necessary restriction, can be closed if it is interpreted purposively with the result that Article 125 TFEU does not apply if the monetary union would otherwise be endangered. In the decision on the emergency measures, in the opinion of the Federal Government the federal legislature has latitude of decision and judgment. At all events, the fact that the legislature, on the basis of consultations in the circle of the finance ministers and of opinions of the European Central Bank, decided in favour of this protective mechanism in order to prevent the feared far-reaching market reactions does not overstep the latitude for judgment to which it is entitled. In this connection it is essential that the measures are merely situation-related emergency reactions, which are therefore subject to a time-limit. 81

(3) In other respects too, the Federal Government did not cooperate in an extra-treaty supplementation of the concept, laid down in the Treaty on the Functioning of the European Union, to ensure the price stability of the euro. The challenged measures were not a de facto amendment of the European Union treaties. The European Union does not arrogate to itself any sovereign powers not yet transferred to it which erode the competences of the German *Bundestag* and thus may violate Article 38 of 82

the Basic Law.

The bilateral aid and the German emergency measures provided by the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism are not elements of an overall strategy aimed at creating a liability and transfer community. Nor do they establish an arrangement for permanent financial compensation. The fact that these are emergency measures and not a long-term financial transfer is shown on the one hand by the strict requirements laid down in the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, and on the other hand by the time-limit both for the Act and for the measures of the special purpose vehicle which coordinates the national aid (Article 2.5.b, Article 10, Article 11 of the EFSF Framework Agreement). If the existing extraordinary situation should take a positive course with the result that the emergency measures are no longer needed, there would be nothing to prevent them being terminated prematurely. For this very reason, Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism, which governs the European Union measures preceding the bilateral aid, includes a commitment to a half-yearly review of the need for its continuance. The Federal Government will continue its commitment to the preservation of price stability in the monetary union and also to an improvement of the associated procedures to protect the stability of the euro as a currency. In this connection, the Council, not least as the result of a German initiative, affirmed its complete determination to ensure the sustainability of public finances in all Member States and to accelerate plans for budget consolidation and structural reforms. The Council also affirmed its determination to bring forward reforms with great urgency to reinforce the monetary union framework in order to ensure the sustainability of public finances. The Federal Government supports these measures because they serve the stability of the euro. It would oppose endeavours to develop the stabilisation mechanism into a permanent institution in the form of a transfer union, which would be inconsistent with the concept of the monetary union as a stability community, and would not permit de facto amendments to the treaty. 83

(4) Finally, the purchase of government bonds by the ECB does not contravene European Union law, for Article 123 TFEU prohibits only the direct acquisition of debt instruments of state issuers, but not purchase on the secondary market. 84

IV.

As expert third parties (§ 27a of the Federal Constitutional Court Act), the German Bundesbank (1) and the European Central Bank (2) submitted opinions. 85

1. In the opinion of the German Bundesbank, the decisions of May 2010 are defensible, all in all, from an economic point of view (a). However, they do put quite considerable strain on the foundations of the monetary union (b). Additional reform steps are necessary to safeguard the monetary union as a stability community in future in order to be prepared for financial crises of Member States too (c). The Bundesbank submits as follows: 86

a) The latest developments have revealed fundamental weaknesses in the current financial policy provisions and have shown the economic consequences where competitive positions in the monetary union diverge in the long term. In view of the risks to the stability of the European monetary union, the decisions made by the European Union finance ministers in May 2010 are defensible, all in all, from an economic point of view. It is true that they do not remove the deeper causes of the intensification of the crisis, that is, the dangerous situation of state finances and the past undesirable macroeconomic developments in some states of the monetary union which entail a continuing high need for capital imports. Countering these undesirable developments calls instead for comprehensive financial and economic corrections, the implementation of which takes time and which often only reach their full effect in the medium term. But in view of the situation of the strongly networked financial sector in the euro area, which as a whole is still fragile, a correction at short notice was not possible in May 2010 without the risk of massive economic distortions throughout the euro area. In order to gain the necessary time and against the background of the dangerous situation, the creation of a possibility of support subject to strict conditions and a time-limit is a suitable means. 87

b) However, the decisions put quite considerable strain on the foundations of monetary union. Against the background of the gaps and weaknesses in the existing set of provisions, which became plain to see at the latest in the course of the crisis, it is now important to create a framework for the monetary union which in future will better guarantee policies encouraging stability and in particular solid public finances in the Member States. The current financial provisions of the monetary union have to date not been adequate to prevent the escalation of the situation in May 2010, and they have also been additionally weakened by the rescue measures. It is therefore now necessary to combine these rescue measures, as intended, with a toughening of the fiscal rules and an improvement of the statistical foundations. The Bundesbank has repeatedly pointed out that the criterion of indebtedness has particular importance for a stability-oriented monetary policy. It should be given more weight in future. For indebtedness levels of over 60% it should be laid down how quickly they should be reduced and what sanctions will apply if this is not achieved. The deficit criterion could be strengthened if extraordinary provisions which were relaxed in the reform of the Stability and Growth Pact were once again drafted more narrowly and above all greater pressure were created in the precautionary part of the Pact if the conditions were not complied with. Altogether, there is a need for a quicker reaction to undesirable developments and thus an acceleration of the current procedure. The central concern is to improve the inadequate implementation of the provisions. Thus the imposition of sanctions should be less subject to the political negotiation process and more strongly comply with the rules. A commitment to firmer entrenchment of the European fiscal provisions – and in particular of the medium-term budget objectives – in national budget law, as for example in the German brake on debt, would also be effective. In the case of manifest serious undesirable developments, strengthened macroeconomic monitoring on the European level is also necessary. However, in this 88

connection both the independence of monetary policy within the existing framework and the subsidiarity principle must also be taken into account; a basic tendency to centralisation of economic policy and to fine-tuning of the economic process does not make sense.

c) The future safeguarding of the monetary union as a stability community demands additional reform steps over and above the toughening of the existing set of provisions in order to be prepared for a financial crisis of Member States which nevertheless occurs. In this connection, a variety of instruments have been suggested for discussion. Thus, for example, the introduction of a state insolvency code has been suggested as an essential element of a reformed set of framework provisions. Especially against the background of the latest experience, such a procedure would take account of the no-bailout principle. Thus, the creditors of state debt instruments would also be called upon to solve the debt crisis. They would then have a greater incentive even in advance to demand interest rates appropriate to the risk, and they would have a tendency also to allow for undesirable developments which had not yet become directly observable in fiscal policy figures, for example non-sustainable economic structures or future burdens on government budgets. Using the disciplining function of the financial markets in this way would have the advantage that interest in sound public finances in individual Member States would at least not solely depend on the political decision process on the European level, which in the past has often been shown to be insufficient. Such proposals or further-reaching proposals to supplement the existing framework must be examined if the existing sanction mechanism proves to be inadequate. A critical view must be taken if the present European Financial Stability Facility, which is subject to a time-limit, were to become a long-term support facility. From the view point of the advocates of such a proposal, this would take better account of the fact that the interconnection of the capital markets has greatly increased since the Maastricht Treaty was passed and thus the effects of economic contagion which the payment default of one state in the monetary union has on the other Member States have increased. But at the same time such a course of action would additionally weaken the personal responsibility of the national financial policies, and it would be a further step in the direction of a liability and transfer community. The risk of default on government bonds of individual Member States would be distributed among all states in the monetary union and thus the disciplining effect of the financial markets would be largely removed. The probability that with such an unsound financial policy the creditors of the state in question would call for adequate risk premiums would be reduced and thus the incentive for a cautious budgetary policy would be weakened. In addition, the intended participation of the International Monetary Fund in the present financing facility, which is subject to a time-limit, plays an important role in the credibility of the consolidation packages from the point of view of the markets, and if there were a long-term European stabilisation facility this participation would probably be extremely difficult to ensure. As part of the collective monetary policy, the euro system is committed to the objective of guaranteeing stable prices in the monetary union. In a monetary union based on stability, however, it is a

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central duty of financial policy to ensure that sound state finances and a suitable institutional framework appropriately support monetary policy. For the long-term stability of the monetary union, the crucial factor will be not allowing the window of opportunity for reforms to strengthen the financial framework and the capacity for growth in the Member States to pass unused.

1. The European Central Bank points out that the current financial situation and the economic and currency decisions based on it are linked to the global economic and financial crisis. It submits as follows: The crisis began with turbulences on the financial markets in August 2007 and drastically intensified in September 2008 when the collapse of Lehman Brothers led to the financial markets virtually drying up in the industrial countries; this had considerable effects on the real economy in the countries affected. The turbulences on the financial markets and the intensification of the crisis required decisive and energetic measures by the political decision-makers, including the ECB, at that time, in order to guarantee price stability in the euro area. In the weeks and months following this, there was again a drastic and abrupt aggravation of the situation on the financial markets. The epicentre of the tensions was in the European bond markets, in particular in the government bonds markets. These extremely serious tensions on the financial markets affected the whole euro area including the interbank market, the stock market and the foreign exchange market, and it threatened to spread to the global financial markets. The development on the government bonds markets quickly affected the money markets and resulted in a marked increase of uncertainty in connection with the risk of counterparty default. Quotations which reflect this risk of default rose to twelve-month maximums. There was also a liquidity squeeze on the interbank markets. The liquidity position in the area of unsecured loans deteriorated, not only for term money, but also for overnight money. On the European overnight money market, liquidity fell to the lowest level since the beginning of the economic and monetary union in January 1999. The global economic and financial crisis led to unprecedented challenges for political decision-makers, in particular in the industrial countries, which were most severely affected. The latest developments with regard to the increasingly more difficult situation on the government bond markets had the potential to considerably increase the total risk to the financial stability of the euro area, and it should be noted that financial stability is a basic condition of the guarantee of price stability. 90

V.

Applications by the complainants for the issue of temporary injunctions were rejected by the Federal Constitutional Court in orders of 7 May and 9 June 2010 (BVerfGE 125, 385; 126, 158). 91

VI.

On 5 July 2011, the Federal Constitutional Court held an oral hearing in which the parties explained and expanded upon their legal viewpoints. 92

B.

The constitutional complaints against the Act on Financial Stability within the Monetary Union and against the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism are admissible insofar as they challenge an injury to the permanent budgetary autonomy of the German *Bundestag* on the basis of Article 38.1 sentence 1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law (I). Apart from this, the constitutional complaints are inadmissible (II). 93

I.

1. The Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism may be the subject matter of a constitutional complaint in constitutional complaint proceedings as measures by German state authority. 94

2. The complainants submit with sufficient substantiation that they themselves may be presently and directly affected by violation of a fundamental right or right equivalent to a fundamental right which is challengeable under Article 93.1 no. 4a of the Basic Law and § 90.1 of the Federal Constitutional Court Act (§ 23.1 sentence 2, § 92 of the Federal Constitutional Court Act). 95

a) Insofar as the complainants assert a violation of their right equivalent to a fundamental right under Article 38.1 sentence 1 of the Basic Law by the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, the entitlement to file a constitutional complaint depends on the contents of the individual challenges (see BVerfGE 123, 267 <329>). The constitutional complaints are admissible with regard to the alleged erosion of the budgetary autonomy of the German *Bundestag*. 96

aa) In their submission that the sustained (long-term) budgetary autonomy of the German *Bundestag* is violated in the sense of the erosion of its competences, the complainants set out with sufficient substantiation the possibility of a violation of their right equivalent to a fundamental right under Article 38.1 sentence 1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law. 97

(1) Article 38.1 and 38.2 of the Basic Law guarantees the individual right to take part, in compliance with the constitutional election principles, in the election of the Members of the German *Bundestag* (see BVerfGE 47, 253 <269>; 89, 155 <171>; 123, 267 <330>). Here, the act of election does not consist solely in a formal legitimation of state power on the federal level under Article 20.1 and 20.2 of the Basic Law. The right to vote also comprises the fundamental democratic content of the right to vote, that is, the guarantee of effective popular government. Article 38 of the Basic Law protects the citizens with a right to elect the *Bundestag* from a loss of substance of their power to rule, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the *Bundestag*, above all to supranational institutions (BVerfGE 89, 155 <172>; 123, 267 98

<330>). The same applies, at all events, to comparable commitments entered into by treaty, which are connected institutionally to the supranational European Union, if the result of this is that the people's democratic self-government is permanently restricted in such a way that central political decisions can no longer be made independently.

(2) This substantive extent of protection of Article 38 of the Basic Law does not in general give rise to any right of the citizens to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them. Article 38.1 of the Basic Law, as the fundamental right to participate in the democratic self-government of the people, therefore in principle grants no entitlement to file a specific constitutional complaint against decisions of Parliament, in particular enactments. 99

(a) Since the judgment on the Maastricht Treaty on European Union, the Federal Constitutional Court has recognised an exception to this principle if, by reason of relocations of duties and powers of the *Bundestag* under international agreements, an erosion of Parliament's political legislative possibilities guaranteed by the constitutional system of competences is to be feared (see BVerfGE 89, 155 <172>). This view holds that the principle of representative rule of the people protected by the right to vote may be violated if the *Bundestag*'s rights are substantially curtailed and thus a loss of substance occurs of the democratic freedom of action for the constitutional body which has directly come into being according to the principles of free and equal election (see BVerfGE 123, 267 <341>). Such a possibility of challenge is restricted to structural changes in the organisation of government such as may occur when sovereign powers are transferred to the European Union. 100

This review of state power accessed by every citizen's constitutional complaint was already criticised in connection with the Maastricht judgment (Tomuschat, *Europäische Grundrechte-Zeitschrift* – EuGRZ 1993, p. 489 <491>; Bryde, *Das Maastricht-Urteil des Bundesverfassungsgerichts – Konsequenzen für die weitere Entwicklung der europäischen Integration*, 1993, p. 4; König, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* – ZaöRV 54 <1994>, p. 17 <27-28>; Bieber, *Neue Justiz* – NJ 47 <1993>, p. 241 <242>; Gassner, *Der Staat* 34 <1995>, p. 429 <439-440>; Cremer, NJ 49 1<1995>, pp. 5 ff.). Similar opinions were also expressed following the Lisbon judgment (Schönberger, *Der Staat* 48 <2009>, pp. 535 <539 ff.>; Nettesheim, *Neue Juristische Wochenschrift* – NJW 2009, p. 2867 <2869>; Pache, EuGRZ 2009, p. 285 <287-288>; Terhechte, *Europäische Zeitschrift für Wirtschaftsrecht* – EuZW 2009, p. 724 <725-726). However, the Senate adheres to its opinion. The citizen's claim to democracy, ultimately rooted in human dignity (see BVerfGE 123, 267 <341>) would lapse if Parliament abandoned core elements of political self-determination and thus permanently deprived citizens of their democratic possibilities of influence. The Basic Law has provided, in Article 79.3 and Article 20.1 and 20.2 of the Basic Law, that the connection between the right to vote and state power is inviolable (see BVerfGE 89, 155 <182>; 123, 267 <330>). In the revised version of Article 101

23 of the Basic Law, the constitution-amending legislature made it clear that the mandate to develop the European Union is subject to permanent compliance with particular constitutional structural requirements (Article 23.1 sentence 1 of the Basic Law) and that in this connection an absolute limit is created by Article 79.3 of the Basic Law to protect the identity of the constitution (Article 23.1 sentence 3 of the Basic Law), which at all events in this context requires less than cases of imminent totalitarian seizure of power for it to be exceeded. Citizens must be able to defend themselves in a constitutional court against a relinquishment of competences which is incompatible with Article 79.3 of the Basic Law. The Basic Law provides for no more extensive right of challenge.

The defensive dimension of Article 38.1 of the Basic Law therefore takes effect in configurations in which the danger clearly exists that the competences of the present or future *Bundestag* will be eroded in a manner that legally or de facto makes parliamentary representation of the popular will, directed to the realisation of the political will of the citizens, impossible. The entitlement to make an application is therefore only granted if there is a substantiated submission that the right to vote may be eroded. 102

(b) The entitlement to file a specific constitutional complaint under Article 38.1 of the Basic Law may also exist if, and this is the only matter at issue in this case, guarantee authorisations under Article 115.1 of the Basic Law which implement matters decided in international agreements may by their nature and extent result in massive adverse effects on budgetary autonomy. 103

The fundamental decisions on public revenue and public expenditure are part of the core of parliamentary rights in democracy. Article 38.1 sentence 1 of the Basic Law excludes the possibility of depleting the legitimation of state authority and the influence on the exercise of that authority provided by the election by fettering the budget legislature to such an extent that the principle of democracy is violated (see BVerfGE 89, 155 <172>; 123, 267 <330> in each case on the relocation of duties and powers of the *Bundestag* to the European level). By putting the elements into specific terms and objectively tightening the rules for borrowing by Federal and *Länder* governments (in particular Article 109.3 and 109.5, Article 109a, Article 115 of the Basic Law new, Article 143d.1 of the Basic Law, Federal Law Gazette I 2009 p. 2248), the constitution-amending legislature made it clear that a constitutional commitment of the parliaments and thus a palpable restriction of their power to act is necessary in order to preserve the democratic freedom of action for the body politic in the long term. The act of voting would be devalued if the German *Bundestag* no longer disposed of these means of organisation to fulfil state functions resulting in expenditure and to exercise its powers, when its power to act is legitimised by the voters to use these very means of organisation. 104

Whereas conventional guarantee authorisations within the meaning of Article 115.1 of the Basic Law, as the discussion in the oral hearing showed, entail no extraordinary risks to budgetary autonomy and therefore the Basic Law contains no restric- 105

tions in this connection, guarantee authorisations to implement obligations which the Federal Republic of Germany undertakes as part of international agreements to preserve the liquidity of states in the monetary union certainly have the potential to restrict the *Bundestag*'s possibilities of political organisation to a constitutionally impermissible extent. Such a case would have to be feared, for example, if the Federal Government, without the requirement of the *Bundestag*'s consent, were permitted to give guarantees to a substantial extent which contribute to the direct or indirect communitarisation of state debts, that is, guarantees where only the conduct of other states decided when the guarantee would be called upon.

(3) In the circumstances of the present case, the complainants' submissions satisfy the strict requirements for showing the violation of a fundamental right. 106

The present case concerns statutory authorisations for the giving of a guarantee with effect outside the state and the creation of an international mechanism intended to be temporary to preserve the liquidity of states in the monetary union. With regard to the German *Bundestag*'s right to decide on the budget affected by this, this is a case of the creation of obligations whose effects may be equivalent to a transfer of sovereign powers if the *Bundestag* is no longer able to dispose of its budget on its own responsibility. Since it has not yet been clarified in the case-law of the Federal Constitutional Court subject to what requirements in such a combination of circumstances the right under Article 38.1, Article 20.1 and 20.2, and Article 79.3 of the Basic Law may be violated, in this respect it is sufficient to submit that the challenged statutes are merely first steps towards a historically unprecedented automatic liability which is becoming established and altogether is constantly increasing and which does indeed correspond to the shaping or transformation of transferred sovereign powers within the meaning of Article 23.1 of the Basic Law and at all events is designed to be such a shaping or transformation. 107

bb) Insofar as the second complainant submits on the basis of Article 38.1 sentence 1 of the Basic Law that there is also an extra-treaty supplementation of the concept provided in the Treaty on the Functioning of the European Union to ensure the price stability of the euro, his constitutional complaint is inadmissible. 108

It is true that the principle of the Basic Law's openness towards European law (see BVerfGE 123, 267 <354>; 126, 286 <303>) and the constitutionally protected viability of the European Union’s legal order (see BVerfGE 37, 271 <284>; 73, 339 <387>; 102, 147 <162 ff.>; 123, 267 <399>) subject German agencies to an obligation when they act functionally for the European Union within its institutional organisation, and at the same time constitutionally bind them to observe European Union law. But this is not relevant in the present case. The second complainant has not submitted with sufficient substantiation to what extent domestic requirements of the particular responsibility of German legislative bodies in the European integration process (responsibility for integration) might not be complied with. It may therefore remain undecided subject to what requirements constitutional complaints against extra-treaty supplementation 109

of primary European Union law may be based on Article 38.1 sentence 1 of the Basic Law (see BVerfGE 123, 267 <351>; with reference to the amendment of treaty law by European Union bodies without ratification procedures). In particular, no decision is necessary as to when measures of German state power which have an extra-treaty effect on primary European Union law or which substantively or institutionally supplement it may be challenged in constitutional complaint proceedings in the same way as a Consent Act to agreements under international law. It may also remain undecided whether contraventions of the principle of democracy – at all events in conjunction with the principle of the rule of law – are in principle also challengeable in this way. For the second complainant has at all events not shown a specific context which suggests an extra-treaty supplementation of primary European Union law in such a way that a violation of the right to vote seems possible. In particular, he has not submitted with sufficient substantiation that an extra-treaty supplementation of primary European Union law might be connected to the Act on Financial Stability within the Monetary Union or the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism.

b) The constitutional complaints against the Act on Financial Stability within the Monetary Union and against the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism are also inadmissible insofar as the complainants submit that there is a violation of their fundamental right under Article 14.1 of the Basic Law. 110

aa) Whether, and if so in what more detailed circumstances, the purchasing power of money is included in the area of protection of the fundamental right to property of Article 14.1 of the Basic Law (see BVerfGE 97, 350 <370-371>) need not be decided here. The same applies with regard to the constitutional protection against inflationary effects which are clearly induced by the state and which may possibly be desired in economic policy (see Herrmann, *Währungshoheit, Währungsverfassung und subjektive Rechte*, 2010, p. 338 ff.). In particular, it is not necessary to answer the question as to how far the provision on the organisation of government of Article 88 sentence 2 of the Basic Law, as a result of the statutory requirement of independence and as a result of the commitment to price stability, also serves the goal of the individual protection of property (see BVerfGE 89, 155 <174>; 97, 350 <376>). 111

bb) At all events, the complainants neither show in a substantiated manner an inflationary effect in the sense of such an intentional state economic policy, nor do they submit sufficient facts to show that the purchasing power of the euro is substantially objectively impaired by the challenged measures. The fact that the challenged authorisations to give guarantees – with regard to their volume – entail considerable challenges for the budgetary policy of the Federal Republic of Germany does not alter the fact that the sums which have been involved to date do not as yet display such massive effects on monetary stability that a justiciable violation of the guarantee of property is possible, and in particular the submissions of the complainants do not support this. It is not in general the task of the Federal Constitutional Court in the course of 112

constitutional complaint proceedings to review economic and financial policy measures to identify negative effects on monetary stability. Such a form of review only comes into consideration in marginal cases – which have not sufficiently been shown in the present case – where there is a manifest decrease of monetary value as a result of state measures. With regard to the support measures challenged in the present case too, the result is the general conclusion that monetary value is in a particular way related to and dependent on the Community (see BVerfGE 97, 350 <371>).

II.

With regard to the other subject matters of the constitutional complaints, the constitutional complaints are inadmissible in their entirety. 113

1. Insofar as the constitutional complaints are directed against the Federal Government's cooperation in the intergovernmental Decisions of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union and of the Representatives of the Governments of the 27 EU Member States of 10 May 2010 (Council Document 9614/10) and against the cooperation of the Federal Government in the decision of the Council of the European Union of 9 May 2010 to create a European stabilisation mechanism (Conclusions of the Council [Economic and Financial Affairs] of 9 May 2010, Rat-Dok. SN 2564/1/10 REV 1 of 10 May 2010, p. 3), and against the cooperation of the Federal Government in the decision of the Council on the Council Regulation establishing a European financial stabilisation mechanism of 10 May 2010 (Council Document 9606/10), the complainants are not directly burdened (see BVerfG, Order of the Second Chamber of the Second Senate of 12 May 1989 – 2 BvQ 3/89 –, NJW 1990, p. 974; BVerfG, Order of the Third Chamber of the Second Senate of 9 July 1992 – 2 BvR 1096/92 , *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 1993, p. 883; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 2, 75 <76>). 114

The various acts of cooperation of the Federal Government are not acts of sovereign power against the complainants which are challengeable by constitutional complaint. In this respect, despite the differences between the law of international agreements and supranational law, the same applies as to acts of cooperation of German bodies in agreements under international law (see BVerfGE 77, 170 <209-210>; BVerfG, Order of the Second Chamber of the Second Senate of 12 May 1989 – 2 BvQ 3/89 –, ibid.). 115

2. The submissions of the complainants that their fundamental rights are directly violated by the intergovernmental decisions of the representatives of the governments of the euro area Member States meeting within the Council of the European Union and of the representatives of the governments of the 27 EU Member States of 10 May 2010 (Council Document 9614/10), the decision of the Council of the European Union of 9 May 2010 to create a European stabilisation mechanism (Conclusions of the Council [Economic and Financial Affairs] of 9 May 2010, Rat-Dok. SN 2564/1/10 116

REV 1 of 10 May 2010, p. 3), the decision of the Council on the Council Regulation establishing a European Financial Stabilisation Mechanism of 10 May 2010 (Council Document 9606/10) and the purchase of government bonds of Greece and other euro area Member States by the European Central Bank are inadmissible because they are not based on qualified subject matters of constitutional complaints. The challenged acts – notwithstanding other possibilities of review with regard to the right to apply them in Germany (see BVerfGE 89, 155 <175>; 126, 286 <302 ff.>) – are not sovereign acts of German state authority within the meaning of Article 93.1 no. 4a of the Basic Law and § 90.1 of the Federal Constitutional Court Act which may be challenged by the complainants.

3. Insofar as the second complainant's constitutional complaint challenges an alleged omission of the EU Commission to use the measures against the indebtedness of euro area Member States provided in the Treaty on the Functioning of the European Union and to counteract their disregard of the budgetary discipline laid down in the Treaty and to prevent in this way a state of emergency coming into existence which is now used as the justification of the rescue packages (Greek rescue package and European stabilisation mechanism) which are incompatible with the Treaty, the constitutional complaint is also inadmissible. The same applies insofar as the second complainant submits that the Federal Government omitted to take measures against the speculators who, by the account of the Federal Government, speculate against the euro or against particular euro area Member States so aggressively that the rescue packages are needed to save the stability of the currency. 117

An omission on the part of the legislature may be the subject of a constitutional complaint if the complainant can rely on an express mandate of the Basic Law which essentially defines the content and scope of the duty to legislate (see BVerfGE 6, 257 <264>; 23, 242 <259>; 56, 54 <70-71>). Fundamental principles which could justify the assumption of such a duty to act on the part of the Federal Government of the EU Commission have neither been submitted with substantiation by the second complainant, nor are they otherwise apparent. 118

C.

The constitutional complaints are unfounded insofar as they are admissible. There are no well-founded constitutional objections to the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism. 119

I.

Article 38.1 sentence 1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law determine the basis for judicial review. The right to vote, as a right equivalent to a fundamental right, guarantees the citizens' self-determination and guarantees free and equal participation in the state authority exercised in Germany (see BVerfGE 37, 271 <279>; 73, 339 <375>; 123, 267 <340>, with reference to the re- 120

spect for the constituent power of the people). The guaranteed content of the right to vote includes the principles of the requirements of democracy within the meaning of Article 20.1 and 20.2 of the Basic Law, which Article 79.3 of the Basic Law guarantees as the identity of the constitution (see BVerfGE 123, 267 <340>).

1. There is a violation of the right to vote if the German *Bundestag* relinquishes its parliamentary budget responsibility with the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget on its own responsibility. 121

a) The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German *Bundestag* must make decisions on revenue and expenditure with responsibility to the people. In this connection, the right to decide on the budget is a central element of the democratic development of informed opinion (see BVerfGE 70, 324 <355-356>; 79, 311 <329>). On the one hand, the right to decide on the budget serves as an instrument of comprehensive parliamentary monitoring of the government. On the other hand, the budget brings the fundamental principle of equality of the citizens up to date in the imposition of public charges as an essential manifestation of constitutional democracy (BVerfGE 55, 274 <302-303>). In relation to the other constitutional bodies involved in establishing the budget, the elected parliament has a paramount constitutional position. Article 110.2 of the Basic Law provides that the competence to prepare the budget lies solely with the legislature. This particular position is also expressed by the fact that the *Bundestag* and *Bundesrat* are entitled and obliged under Article 114 of the Basic Law to monitor the Federal Government's execution of the budget (see BVerfGE 45, 1 <32>; 92, 130 <137>). 122

The budget, which under Article 110.2 sentence 1 of the Basic Law is declared by the Budget Act, is not merely an economic plan, but at the same time a sovereign act of government in the form of a statute (see BVerfGE 45, 1 <32>; 70, 324 <355>; 79, 311 <328>). It is subject to a time-limit and task-related. The state functions are presented in the budget as expenses which must be covered by revenue under the principle of compensation (see BVerfGE 79, 311 <329>; 119, 96 <119>). The extent and structure of the budget thus reflect overall government policy. At the same time, the revenue achievable restricts the latitude to exercise state functions resulting in expenditure (see Article 110.1 sentence 2 of the Basic Law). Budget sovereignty is the place of conceptual political decisions on the correlation of economic burdens and privileges granted by the state. Therefore the parliamentary debate on the budget, including the extent of public debt, is regarded as a general debate on policy (BVerfGE 123, 267 <361>). 123

b) As representatives of the people, the elected Members of the German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany commits itself not only in legally, but also in fiscal policy. Even if such commitments assume a 124

substantial size, parliament's right to decide on the budget has not been infringed in a way that could be challenged with reference to the right to vote. The relevant factor for adherence to the principles of democracy is whether the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments. If decisions were made on essential budgetary questions of revenue and expenditure without the requirement of the *Bundestag*'s consent, or if supranational legal obligations were created without a corresponding decision by free will of the *Bundestag*, Parliament would find itself in the role of merely re-enacting and could no longer exercise overall budgetary responsibility as part of its right to decide on the budget.

2. Against this background, the German *Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue. This prohibition of the relinquishment of budgetary responsibility does certainly not impermissibly restrict the budgetary competence of the legislature, but is specifically aimed at preserving it. 125

a) Accordingly, the Federal Constitutional Court has already, in connection with the opening up of the state political regime to the European Union which is intended to realise a unified Europe (see Article 23 of the Basic Law), referred to constitutional limits which the Basic Law creates to prevent Parliament limiting its own right to decide on the budget (see BVerfGE 89, 155 <172>; 97, 350 <368-369>). In this view, a transfer of the right of the *Bundestag* to adopt the budget and control its implementation by the government which would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content would at all events occur if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent and thus the *Bundestag* would be deprived of its right of disposal (see BVerfGE 123, 267 <361>). 126

A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20.1 and 20.2, Article 79.3 of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently “the master of its decisions”. There is a considerably strained relationship between this principle and guarantee authorisations which are intended to ensure the solvency of other Member States. Admittedly, it is primarily the duty of the *Bundestag* itself to decide, while weighing current needs against the risks of medium- and long-term-guarantees, in what maximum amount guarantee sums are responsible (see BVerfGE 79, 311 <343>; 119, 96 <142-143>). But it follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee 127

or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the *Bundestag*'s control and influence. If the *Bundestag* were to give indiscriminate authorisation in a substantial degree to guarantees, fiscal disposals of other Member States might lead to irreversible, possible massive, restrictions on national political legislative discretions.

128 For this reason, 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. The *Bundestag* must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level. Insofar as supranational agreements are entered into which by reason of their magnitude may be of structural significance for Parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy, or by participation in equivalent financial safeguarding systems, not only every individual disposal requires the consent of the *Bundestag*; in addition it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with. The responsibility for integration borne by the German *Bundestag* with regard to the transfer of competences to the European Union (see BVerfGE 123, 267 <356 ff.>) has its counterpart here for budget measures of equal weight.

129 b) The provisions of the European treaties do not conflict with the understanding of national budget autonomy as an essential competence, which cannot be relinquished, of the parliaments of the Member States which enjoy direct democratic legitimation, but instead they presuppose it. Strict compliance with it guarantees that the acts of the bodies of the European Union in and for Germany have sufficient democratic legitimation (BVerfGE 89, 155 <199 ff.>; 97, 350 <373>). The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act (BVerfGE 89, 155 <205>). In this regard, the treaties are parallel, not only with regard to currency stability, to the requirements of Article 88 sentence 2 of the Basic Law, and if appropriate also of Article 14.1 of the Basic Law, which makes compliance with the independence of the European Central Bank and the primary objective of price stability permanent constitutional requirements of a German participation in the monetary union (see Article 127. 1, Article 130 TFEU). Further central provisions on the design of the monetary union also safeguard constitutional requirements of democracy in European Union law. In this connection, particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (Articles 123 to 126, Article 136 TFEU). Although in this connection the interpretation of these provisions in detail is not essential, it is nevertheless possible to derive from them the fact that the independence of the national budgets is constituent for the present design of the monetary

union, and that the acceptance of liability for decisions of other Member States with financial effect 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.

3. In establishing that there is a prohibited relinquishment of budget autonomy with regard to the extent of the guarantee given, the Federal Constitutional Court must restrict itself to manifest violations and in particular with regard to the risk of guarantees being called upon it must respect a latitude of assessment of the legislature. 130

a) The restriction to manifest violations applies to the question as to the maximum amount of a guarantee that can be responsibly given, with regard to the risks of its being called on and the consequences then to be expected for the budget legislature's freedom to act. Whether and how far a justiciable limit of the extent of guarantee authorisations can be derived directly from the principle of democracy is questionable. At all events, unlike in the case of borrowing, Article 115.1 of the Basic Law does not explicitly provide for such a restriction (see Kube, in: Maunz/Dürig, *GG*, *Art. 115*, marginal nos. 78, 124, 241-242; Wendt, in: von Mangoldt/Klein/Starck, *GG*, 6th ed. 2010, *Art. 115*, marginal no. 26; for a more cautious view on the old legal position, see Siekmann, in: Sachs, *GG*, 5th ed. 2009, *Art. 115*, marginal no. 21, according to whom guarantees of various types, at all events in the amount of the payment obligations which experience has shown to be realised, should be included in the figure for borrowing without restriction). How far what is known as the brake on debt, which was incorporated into the Basic Law in the year 2009 by the 57th Act Amending the Basic Law (*57. Gesetz zur Änderung des Grundgesetzes*; Article 109.3, Article 115.2 of the Basic Law), nevertheless imposes an obligation to observe upper limits need not be decided with regard to the challenged statutes. At all events, in the present connection with its general standards based on the principle of democracy, only a manifest overstepping of extreme limits is relevant. 131

b) With regard to the probability of having to pay out on guarantees, the legislature has a latitude of assessment, which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and the economic performance capacity of the Federal Republic of Germany. In this connection, the Federal Constitutional Court may not with its own expertise usurp the decisions of the legislative body which is the institution first and foremost democratically appointed for this task. 132

II.

The right to elect the *Bundestag* under Article 38.1 of the Basic Law is not violated by the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism. The *Bundestag* has not eroded its right to decide on the budget in a constitutionally impermissible manner and thus disregarded the material content of the principle of democracy. 133

1. Insofar as it is possible to derive from the democratic principles of Article 20.1 and 20.2 of the Basic Law, which are declared unamendable by Article 79.3 of the Basic Law, a prohibition for configurations like the present one to burden present or future federal budgets with disproportionately great commitments, even if these are only guarantees, it is at all events impossible in the present case to establish that such a limit to burdens has been overstepped. 134

An upper limit to the giving of guarantees following directly from the principle of democracy could only be overstepped if in the case where the guarantee is called upon the guarantees took effect in such a way that budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed. This cannot be established in the present case. The legislature considers that the guarantee authorisation contained in § 1 of the Euro Stabilisation Mechanism Act in the amount of 147.6 billion euros (123 billion euros plus 20%) is acceptable from the point of view of the budget even in addition to the guarantee authorisation in favour of Greece contained in the Act on Financial Stability within the Monetary Union in the amount of 22.4 billion euros; this is constitutionally unobjectionable. The same applies to the expectation that even in the case that the guarantee risk were realised in full, the losses of approximately 170 billion euros could be refinanced by way of increases of revenue, reductions of expenses and long-term government bonds, albeit possibly with the loss of growth possibilities and creditworthiness with corresponding losses of income and risk premiums. In this respect, it is in particular not relevant whether the guarantee sum is potentially far greater than the largest federal budget item and substantially exceeds half of the federal budget, because this alone cannot be the yardstick of a constitutional limit of the legislature's latitude for action. 135

2. None of the challenged statutes creates or consolidates an automatic effect as a result of which the German *Bundestag* would relinquish its right to decide on the budget. At present there is no occasion to assume that there is an irreversible process with adverse consequences for the German *Bundestag*'s budget autonomy. 136

a) Even the currently applicable legal basis of the monetary union, which cannot be influenced by the two challenged statutes, does not permit an automatic effect by which the German *Bundestag* could relinquish its budget autonomy. All legal and factual effects of the two challenged statutes, in particular those of the further steps of execution contained in them, are decisively influenced by the treaty conception of the monetary union. The development of this is laid down in a foreseeable manner and subject to parliamentary accountability (see BVerfGE 89, 155 <204>; 97, 350 <372-373>; 123, 267 <356>). The German Consent Act to the Treaty of Maastricht (Federal Law Gazette II 1992 p. 1253; now as amended by the Treaty of Lisbon, Federal Law Gazette II 2008 p. 1038) continues to guarantee with sufficient constitutional detail that the Federal Republic of Germany does not submit to the automatic creation of a liability community which is complex and whose course can no longer be controlled (see BVerfGE 89, 155 <203-204>). De facto changes which might cast question on the binding character of this legal framework cannot at present be established 137

by the Court; the same applies with regard to the current discussion on changes in the incentive system of the monetary union.

b) The challenged statutes contain no normative provisions which could – in the necessary overall consideration – undermine the principle of permanent budget autonomy. 138

aa) The Act on Financial Stability within the Monetary Union restricts the guarantee authorisation by amount, indicates the purpose of the guarantee, provides to a certain extent for the payment modalities and makes certain agreements with Greece the basis of the giving of guarantees. Thus the content of the guarantee authorisation is largely defined. Against this background it is acceptable that the German *Bundestag* participates in the further execution of the statutes merely in the form of giving information to the budget committee. 139

bb) The Euro Stabilisation Mechanism Act defines not only the purpose and the basic modalities, but also the volume of possible guarantees, which cannot be altered either by the Federal Government or by the special purpose vehicle without the consent of the *Bundestag*. The giving of guarantees is possible only during a particular period of time and it is made contingent on agreeing an economic and financial programme with the Member State affected. This programme must be consented to by the mutual agreement of the euro area Member States, which gives the Federal Government a determining influence. 140

However, § 1.4 of the Act merely obliges the Federal Government to endeavour, before giving guarantees, to reach agreement with the German *Bundestag*'s budget committee, which has the right to state an opinion (sentences 1 and 2). Insofar as compelling reasons mean that a guarantee must be given before agreement is reached, the budget committee must be subsequently informed without delay; the absolute necessity of giving the guarantee before agreement is reached must be justified in detail (sentence 3). In addition, the budget committee is to be informed quarterly on the guarantees given and their correct use (sentence 4). On the basis of these provisions alone, the continuing influence of the *Bundestag* on the guarantee decisions would not be ensured by procedural precautions – over and above the general political supervision of the Federal Government. For these precautions – even together with the objective, the amount of the guarantee limits and the time-limit of the Euro Stabilisation Mechanism Act – would not prevent parliamentary budget autonomy being affected in a manner which would adversely affect the right to vote. It is therefore necessary, in order to avoid unconstitutionality, for § 1.4 sentence 1 of the Euro Stabilisation Mechanism Act to be interpreted to the effect that the Federal Government, subject to the cases named in sentence 3, is obliged to obtain the prior consent of the budget committee. 141

D.

This decision was passed by seven votes to one insofar as it treats the constitutional 142

complaints as admissible.

Voßkuhle	Di Fabio	Mellinghoff
Lübbe-Wolff	Gerhardt	Landau
Huber		Hermanns

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