FEDERAL CONSTITUTIONAL COURT

– 2 BVR 1390/12 –
– 2 BVR 1421/12 –
– 2 BVR 1438/12 –
– 2 BVR 1439/12 –
– 2 BVR 1440/12 –
– 2 BVE 6/12 –

Pronounced
on 12 September 2012
Rieger
Government Official
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint

of Dr. G…,

- authorised representatives: 1. Rechtsanwalt Prof. Dr. Wolf-Rüdiger Bub, Promenadeplatz 9, 80333 Munich,
2. Prof. Dr. Dietrich Murswiek, In der Röte 18, 79104 Freiburg –

– 2 BVR 1390/12 –,

II. on the constitutional complaint

1. of Dr. B…,
2. of Prof. Dr. H…,
3. of Prof. Dr. N…,
4. of Prof. Dr. S…,
5. of Prof. Dr. Dr. h.c. S…,

- authorised representative: Prof. Dr. Karl Albrecht Schachtschneider, for 1 to 3 and 5 Treiberpfad 28, 13469 Berlin –

– 2 BVR 1421/12 –,

III. on the constitutional complaint

of Mr. H…,
and of 11717 other complainants,

- authorised representatives:

1. Prof. Dr. Christoph Degenhart,
   Burgstraße 27, 04109 Leipzig,
2. Rechtsanwältin Prof. Dr. Herta Däubler-Gmelin,
   of the law firm Schwegler Rechtsanwälte,
   Unter den Linden 12, 10117 Berlin –

– 2 BVR 1438/12 –,

IV. on the constitutional complaint

of Mr. van A … ,
and of 74 other complainants

- authorised representatives:
1. Prof. Dr. Dr. h.c. Hans-Peter Schneider,
   Drosselweg 4, 30559 Hannover,
2. Prof. Dr. Andreas Fisahn,
   Grüner Weg 83, 32130 Enger –

– 2 BVR 1439/12 –,

V. on the constitutional complaint

of Mr. S…,

- authorised representatives: Rechtsanwälte Dr. Arvid Siebert
und Katrin Piepho,
of the law firm Rechtsanwälte kessler&partner,
Martinistraße 57, 28195 Bremen –

– 2 BVR 1440/12 –,

in the proceedings I to V

against the Act on the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro (Gesetz zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrages über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist, Bundestag printed papers (Bundestagsdrucksachen – BTDrucks) 17/9047, 17/10159),

2. the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism (Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus – Bundestag printed papers 17/9045, 17/10126),

3. the Act for Financial Participation in the European Stability Mechanism (Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus – Bundestag printed papers 17/9048, 17/10126),

in the proceedings I to IV also

against the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion – Bundestag printed papers 17/9046, 17/10125)

and in the proceedings I to V

applications for the issue of a temporary injunction

and

VI. on the application for a ruling in *Organstreit* proceedings that

1. Article 1 of the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union of 29 June 2012 (Bundestag printed paper 17/9046),
2. Article 1 of the Act on the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro of 29 June 2012 (Bundestag printed paper 17/9047),
3. Article 1 of the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism (Bundestag printed paper 17/9045),
4. the Act for Financial Participation in the European Stability Mechanism (ESM Financing Act, ESMFinG) of 29 June 2012 (Bundestag printed paper 17/9048),

violate Article 20 paragraph 1 and paragraph 2, Article 23 paragraph 1 and paragraph 2 and Article 79 paragraph 3 of the Basic Law (*Grundgesetz* – GG) and violate the rights of the applicant under Article 38 paragraph 1 sentence 2 of the Basic Law

and application for the issue of a temporary injunction

Applicant: DIE LINKE parliamentary group in the German Bundestag,
represented by its Chairperson Dr. Gregor Gysi, MdB,
Platz der Republik 1, 11011 Berlin,

- authorised representatives: 1. Prof. Dr. Dr. h.c. Hans-Peter Schneider,
Drosselweg 4, 30559 Hannover,
2. Prof. Dr. Andreas Fisahn,
Grüner Weg 83, 32130 Enger –

Respondent: German Bundestag,
represented by its President Prof. Dr. Norbert Lammert, MdB,
Platz der Republik 1, 11011 Berlin,

- authorised representatives: 1. Prof. Dr. Martin Nettesheim,
Horemer 13, 72076 Tübingen,
2. Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin –

– 2 BVE 6/12 –

intervener in the proceedings I to V: German Bundestag,
represented by its President Prof. Dr. Norbert Lammert, MdB,
Platz der Republik 1, 11011 Berlin,

- authorised representatives: 1. Prof. Dr. Martin Nettesheim,
Horemer 13, 72076 Tübingen,
2. Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin –

intervener in all proceedings,
in proceedings VI on the side of the German *Bundestag*: Federal Government,
represented by the Federal Chancellor Dr. Angela Merkel,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin,

- authorised representative: Prof. Dr. Ulrich Häde,
Lennéstraße 15, 15234 Frankfurt (Oder) –

here: Applications for the issue of a temporary injunction

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

Justices Voßkuhle (President),
Lübbe-Wolff,
Gerhardt,
Landau,
Huber,
Hermanns,
Müller, and
Kessal-Wulf

on the basis of the oral hearing of 10 July 2012 by

Judgment

holds as follows:

The applications for the issue of a temporary injunction are refused with the proviso that the Treaty establishing the European Stability Mechanism (Bundestag printed paper 17/9045, pages 6 ff.) may only be ratified if at the same time it is ensured under international law that

1. the provision under Article 8 paragraph 5 sentence 1 of the Treaty establishing the European Stability Mechanism limits the amount of all payment obligations arising to the Federal Republic of Germany from this Treaty to the amount stipulated in Annex II to the Treaty in the sense that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative;

2. the provisions under Article 32 paragraph 5, Article 34 and Article 35 paragraph 1 of the Treaty establishing the European Stability Mechanism do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat.

G r o u n d s :

A.

In their applications, the applicants seek the issue of a temporary injunction, the essential effect of which would be to prohibit the Federal President until the decision in the principal proceedings in each case from signing the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 as measures to deal with the sovereign debt crisis in the euro currency area and from ratifying the agreements under international law approved therein. 1

I.

1. In the Treaty on European Union of 7 February 1992 (OJ C 191; Federal Law Gazette (*Bundesgesetzblatt* – BGBl II p. 1253), known as the Maastricht Treaty, the parties agreed to a common monetary policy of the Member States, which was intended in stages to create a European monetary union and finally to communitarise the monetary policy in the hands of the European System of Central Banks (ESCB). In the third stage of this process, the euro was introduced 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, was agreed; 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 and was amended in the years 2005 and 2011. 2

2. On 23 April 2010, Greece, as a Member State of the euro currency area, applied for financial aid from the European Union and the International Monetary Fund (IMF). Thereupon, the Member States of the euro currency area granted Greece coordinat- 3

ed bilateral financial aid. In order to take the necessary measures on a national level, the German *Bundestag* passed the Act on the Assumption of Guarantees to Preserve the Solvency of the Hellenic Republic Necessary for Financial Stability in 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 European Union) of 7 May 2010 (Federal Law Gazette I p. 537). For the further details, reference is made to the Order of the Second Senate of the Federal Constitutional Court of 7 May 2010 (Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 125, 385 ff.) and the judgment of the Second Senate of the Federal Constitutional Court of 7 September 2011 (BVerfGE 129, 124 <128 ff.>).

3. Following this, the European Council and the Economic and Financial Affairs Council (ECOFIN Council) agreed to create a European stabilisation mechanism ("euro rescue package"), which was to comprise two components: the European Financial Stabilisation Mechanism (EFSM), based on an EU regulation, and the European Financial Stability Facility (EFSF), a special purpose vehicle based on an interstate agreement between the Member States of the euro currency area. In order to implement these decisions, on 11 May 2010, on the proposal of the European Commission on the basis of Article 122 (2) of the Treaty on the Functioning of the European Union (TFEU), the Council issued Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism (OJ L 118 of 12 May 2010, p. 1). In addition, on 7 June 2010, the European Financial Stability Facility, a joint-stock company incorporated in Luxembourg, was founded. 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 euro currency area which are in financial difficulties. The guarantees for the special purpose vehicle are allocated among the Member States of the euro currency area proportionately according to their share of the capital of the European Central Bank. The life of the special purpose vehicle is limited to three years. In the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – Stabilisierungsmechanismusgesetz* – Euro Stabilisation Mechanism Act – StabMechG) of 22 May 2010 (Federal Law Gazette I p. 627), the Federal legislature created on a national level the requirements for financial aid to be given by the European Financial Stability Facility. For the further details, reference is made to the Order of the Second Senate of the Federal Constitutional Court of 7 May 2010 (BVerfGE 125, 385 ff.), the Order of the Second Senate of the Federal Constitutional Court of 9 June 2010 (BVerfGE 126, 158 ff.) and the judgment of the Second Senate of the Federal Constitutional Court of 7 September 2011 (BVerfGE 129, 124 <133 ff.>). 4

4. The continuingly tense situation on the financial markets induced the Member States of the euro currency area to provide the European Financial Stability Facility 5

with additional, more flexible instruments, in order to enable more effective assistance to the over-indebted Member States. The heads of state and government, at the European Council on 21 July 2011, decided to commit the originally agreed maximum lending capacity of the European Financial Stability Facility of 440 billion euros in full. The EFSF was to be able *inter alia* to undertake purchases of government bonds both on the primary and on the secondary market. In Article 1 of the Act to Amend the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*) of 9 October 2011 (BGBl I p. 1992), the German *Bundestag* amended the Euro Stabilisation Mechanism Act and adapted it to the changed legal position. For the further details, reference is made to the judgment of the Second Senate of the Federal Constitutional Court of 28 February 2012 – 2 BvE 8/11 – (*Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2012, pp. 495 ff.).

5. In a letter of 8 February 2012, Greece requested the President of the Group of Finance Ministers of the Member States of the euro currency area (Eurogroup) to provide further emergency loans – for the first time – from the European Financial Stability Facility. On 27 February 2012, the German *Bundestag* agreed to the second Greece aid package under § 3 (1) of the Euro Stabilisation Mechanism Act (*Bundestag* printed paper 17/8730). 6

6. Since as early as the end of 2010, the Member States of the European Union have also been endeavouring to create a permanent crisis management mechanism, over and above the present “euro rescue package”. At the meeting of the European Council of 28/29 October 2010, the heads of state and government agreed to establish a “permanent crisis mechanism to safeguard the financial stability of the euro area as a whole” (EUCO 25/1/10 REV 1, Conclusions, p. 2). On 28 November 2010, the finance ministers of the Member States of the euro currency area agreed on the general characteristics of the future crisis mechanism. 7

a) On 16/17 December 2010, the European Council fundamentally agreed on an amendment of the Treaty on the Functioning of the European Union, which is to add a new paragraph 3 to Article 136. On 17 March 2011, the German *Bundestag* adopted the motion of the CDU/CSU and FDP parliamentary groups for the German *Bundestag* and the Federal Government to agree to the addition to Article 136 TFEU (BT-Drucks 17/4880; *Bundestag* Minutes of Plenary Proceedings – *Bundestagsplenarprotokoll* – BTPlenprot no. 17/96, p. 11015 C). On 25 March 2011, the European Council adopted the (final) draft of a future Article 136 (3) TFEU with the following wording (EUCO 10/11, Conclusions, Annex II, pp. 21 ff.): 8

(3) The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality. 9

b) Following this a draft – a first draft – of a Treaty establishing the European Stability Mechanism (TESM) was prepared and then signed by the ministers of economics and finance of the Member States of the euro currency area on 11 July 2011. When the financial markets failed to calm down as hoped even in the course of the year 2011, the heads of state and government of the euro currency area agreed on 21 July 2011 that in addition to the European Financial Stability Facility they would also furnish the European Stability Mechanism (ESM) with further instruments. The corresponding renegotiations of the Treaty were completed on 2 February 2012 with the second signing of the draft – the second draft – of the Treaty establishing the European Stability Mechanism. 10

By the Treaty establishing the European Stability Mechanism, the Contracting Parties (ESM Members) create an international financial institution, the “European Stability Mechanism” (Article 1 TESM). If this appears indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen (Article 12 TESM); this may include “precautionary financial assistance” in the form of a precautionary conditioned credit line or an enhanced conditions credit line (Article 14 TESM), financial assistance through loans for the purpose of re-capitalising financial institutions (Article 15 TESM) or generally in favour of an ESM Member (Article 16 TESM) and the purchase of government bonds of an ESM Member on the primary or secondary market (Articles 17, 18 TESM). With regard to the procedure, Article 13 TESM provides that on receipt of the request for stability support, the European Commission in liaison with the European Central Bank is to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, to assess whether public debt is sustainable and to assess the actual or potential financing needs of the ESM Member concerned. On the basis of the request and the assessment, the Board of Governors (see Article 5 TESM) then decides whether the ESM Member concerned is to be granted stability support. If the decision is positive, the European Commission – in liaison with the European Central Bank and, wherever possible, together with the International Monetary Fund – negotiates with the ESM Member concerned a memorandum of understanding (an MoU) detailing the conditionality attached to the financial assistance facility. The European Commission signs the MoU on behalf of the European Stability Mechanism, subject to approval by the Board of Governors. The European Commission – in liaison with the European Central Bank and, wherever possible, together with the International Monetary Fund – is entrusted with monitoring compliance with the economic conditionality attached to the financial assistance facility. The provisions which are material to the present proceedings are as follows [...]: 11

Article 3 12

Purpose

The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.

Article 4 13

Structure and voting rules

(1) The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director [...].

(2) The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. [...]

(3) The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. […]

(5) The adoption of a decision by qualified majority requires 80 % of the votes cast.

(6) The adoption of a decision by simple majority requires a majority of the votes cast.

(7) The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.*(Under Annex II, the Federal Republic of Germany was allocated 1,900,248 shares of the authorised capital stock of the ESM out of a total of 7,000,000 shares (= 27.1464 %).)*

(8) If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

Article 5 14

Board of Governors

(1) Each ESM Member shall appoint a Governor and an alternate Governor. [...] The Governor shall be a member of the government of that ESM Member who has responsibility for finance. [...]

(6) The Board of Governors shall take the following decisions by mutual agreement:

[...]

b) to issue new shares on terms other than at par, in accordance with Article 8 (2); [...]

f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13 (3), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18; [...]

i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19; [...]

m) to delegate to the Board of Directors the tasks listed in this Article.

Article 6 15

Board of Directors

(1) Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. [...]

(5) The Board of Directors shall take decisions by qualified majority, unless otherwise stated in this Treaty. Decisions to be taken on the basis of powers delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5 (6) and (7). [...]

Article 7 16

Managing Director

(1) The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, relevant international experience and a high level of competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either. [...]

Article 8 17

Authorised capital stock

(1) The authorised capital stock shall be EUR 700 000 million. [...]

(2) The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms. [...]

(4) ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the

terms set out in this Treaty.

(5) The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

Article 9 18

Capital calls

(1) The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

(2) The Board of Directors may call in authorised unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8 (2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

(3) The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt. [...]

Article 10 19

Changes in authorised capital stock

(1) The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I. […]

Article 25 20

Coverage of losses

(1) Losses arising in the ESM operations shall be charged:

a) firstly, against the reserve fund;

b) secondly, against the paid-in capital; and

c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9 (3).

(2) If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9 (2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.

(3) When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members in accordance with rules to be adopted by the Board of Governors. [...]

Article 32 21

Legal status, privileges and immunities

[...] (5) The archives of the ESM and all documents belonging to the ESM or held by it, shall be inviolable.

(6) The premises of the ESM shall be inviolable. [...]

(9) The ESM shall be exempted from any requirement to be authorised or licensed as a credit institution, investment services provider or other authorised licensed or regulated entity under the laws of each ESM Member. [...]

Article 34 22

Professional secrecy

The Members or former Members of the Board of Governors and of the Board of Directors and any other persons who work or have worked for or in connection with the ESM shall not disclose information that is subject to professional secrecy. They shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

Article 35 23

Immunities of persons

(1) In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.

(2) The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.

(3) The Managing Director may waive any such immunity in respect of any member of the staff of the ESM other than himself or herself.

(4) Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly. [...]

The Treaty establishing the European Stability Mechanism contains no express right of resignation or termination. 24

7. On 2 March 2012, as a further measure to end the sovereign debt crisis, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was signed; the wording of the Treaty (in part) is as follows [...]: 25

Article 1 26

(1) By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion. [...]

Article 2 27

(1) This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4 (3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

(2) This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union.

Article 3 28

(1) The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law:

a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus;

b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective,

as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0.5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;

c) the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;

d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1.0 % of the gross domestic product at market prices;

e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

(2) The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1 (e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.

(3) For the purposes of this Article, the definitions set out in Article 2 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, shall apply.

The following definitions shall also apply for the purposes of this Article:

a) “annual structural balance of the general government” refers to the annual cyclically-adjusted balance net of one-off and temporary measures;

b) “exceptional circumstances” refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.

Article 4 29

When the ratio of a Contracting Party’s general government debt to gross domestic product exceeds the 60 % reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU) No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union.

Article 5 30

(1) A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact.

(2) The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission. […]

Article 7 31

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting

Party concerned, is opposed to the decision proposed or recommended.

Article 8 32

(1) The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3 (2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3 (2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

(2) Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

(3) This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union. [...]

Article 16 33

Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union contains no express right of termination or resignation. 34

8. On 29 June 2012, the German *Bundestag* and the *Bundesrat* adopted the draft bill of an Act on the European Council Decision of 25 March 2011 to Amend Article 35

136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro (*Gesetz zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist* – BT-Drucks 17/9047), the draft bill of an Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism (*Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus*) as amended by the Recommendation for a Resolution of the budget committee (BTDrucks 17/9045; 17/10126; 17/10172) and the draft bill of an Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (*Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*) as amended to include the proposed amendments approved by the budget committee on 27 June 2012 (BTDrucks 17/9046; 17/10125; 17/10171), in each case these were adopted by a two-thirds majority. Article 1 of each of these statutes contains the approval of the relevant Treaty or decision. In addition, the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism in essence provides as follows:

Article 2 36

(1) Increases of the authorised capital stock under Article 10 (1) of the Treaty may enter into effect only subject to Federal-law authorisation of the provision of further capital.

(2) The German Governor in the Board of Governors of the European Stability Mechanism, and in the case of a delegation of the decision under Article 5 (6) (m) of the Treaty the German Director on the Board of Directors of the European Stability Mechanism, may approve a resolution proposal for the amendment of the financial assistance instruments under Article 19 of the Treaty or abstain from voting on such a resolution proposal if this has been authorised in advanced by a Federal statute.

(3) Changes in the authorised capital stock under Article 10 (3) of the Treaty and adjustments to the contribution key under Article 11 (3) and (4) in conjunction with Article 11 (6) and Annex I of the Treaty shall be published in the Federal Law Gazette (*Bundesgesetzblatt*).

9. Also on 29 June 2012, the German *Bundestag* adopted the draft bill of an Act for Financial Participation in the European Stability Mechanism (*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz* – ESM Financing Act, ESMFinG) as amended by the Recommendation for a Resolution of the budget committee (BTDrucks 17/9048; 17/10126). The *Bundesrat* approved this Act. Under § 1 ESMFinG, the Federal Republic of Germany participates in the total amount of the capital of the European Stability Mechanism to be paid in with a sum in the amount of 21.71712 billion euros and in the total amount of callable capital with a sum in the amount of 168.30768 billion euros. The Federal Ministry of 37

Finance is authorised to give guarantees for the callable capital in the amount of 168.30768 billion euros. The other provisions of the Act for Financial Participation in the European Stability Mechanism are, in part, as follows:

§ 4 38

Requirement of parliamentary approval for decisions in the European Financial Stability Mechanism

(1) In matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German *Bundestag*, this responsibility shall be exercised by the plenary session of the German *Bundestag*. The overall budgetary responsibility is affected in particular

1. in the decision under Article 13 (2) of the Treaty establishing the European Stability Mechanism to give a Contracting Party to the European Stability Mechanism, on that Contracting Party's request, stability support in the form of a financial assistance facility provided for in the Treaty,

2. in the acceptance of a financial assistance facility agreement under Article 13 (3) sentence 3 of the Treaty establishing the European Stability Mechanism and of consent to a corresponding Memorandum of Understanding under Article 13 (4) of the Treaty establishing the European Stability Mechanism,

3. in decisions in connection with the European Stability Mechanism to change the authorised capital stock and the maximum lending volume under Article 10 (1) of the Treaty establishing the European Stability Mechanism; Article 2 (1) of the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism is not affected.

(2) In the cases which relate to the overall budgetary responsibility, the Federal Government may through its representative only vote in favour of a proposed resolution in matters of the European Stability Mechanism or abstain from voting on a resolution when the plenary session has passed a resolution in favour of this. Without such a resolution of the plenary session, the German representative must vote against the proposed resolution. The representative of the Federal Government must participate in the passing of the resolution.

(3) If under Article 5 (6) point (m) of the Treaty establishing the European Stability Mechanism tasks of the Board of Governors are delegated to the Board of Directors, §§ 3 to 6 shall apply with the necessary modifications.

§ 5 39

Participation of the budget committee of the German *Bundestag*

(1) In all other matters of the European Stability Mechanism which affect the budgetary responsibility of the German *Bundestag* and in which a decision of the plenary session under § 4 is not provided for, the budget committee of the German

Bundestag shall be involved. The budget committee shall supervise the preparation and enforcement of the agreements on stability support.

(2) The following require the prior approval of the budgetary committee:

1. Decisions on the provision of additional instruments without changing the total financing volume of an existing financial assistance facility or material changes of the conditionality of the financial assistance facility,

2. decisions on calling in capital under Article 9 (1) of the Treaty establishing the European Stability Mechanism and accepting or materially changing the terms and conditions which apply to calls on capital under Article 9 (4) of the Treaty establishing the European Stability Mechanism,

3. the acceptance or material change of the guidelines on the modalities for implementing the individual financial assistance facilities under Articles 14 to 18, of the pricing guidelines under Article 20 (2), of the guidelines for borrowing operations under Article 21 (2), of the guidelines for investment policy under Article 22 (1), of the guidelines for dividend policy under Article 23 (3) and of the rules for the establishment, administration and use of other funds under Article 24 (4) of the Treaty establishing the European Stability Mechanism,

4. the detailed terms and conditions for capital changes under Article 10 (2) of the Treaty establishing the European Stability Mechanism,

5. the acceptance of provisions or interpretations legislating on professional secrecy under Article 34 of the Treaty establishing the European Stability Mechanism.

In these cases, the Federal Government may through its representative only vote in favour or abstain from voting on a resolution proposal on matters of the European Stability Mechanism when the budget committee has passed a resolution in favour of this. The Federal Government may also make an application to this effect in the budget committee. Without such a resolution of the budget committee, the German representative must vote against the proposed resolution. The representative of the Federal Government must participate in the passing of the resolution.

(3) In the cases not covered by paragraph 2 which affect the budgetary responsibility of the German *Bundestag*, the Federal Government shall involve the budget committee and take account of its opinions. This applies in particular to resolutions on the disbursement of individual tranches of the stability support granted.

(4) The Governor appointed by Germany under Article 5 (1) of the Treaty establishing the European Stability Mechanism and the alternate Governor shall, on the request of a minimum of one quarter of the members of the budget committee of the German *Bundestag*, which must be supported by a minimum of two parliamentary groups in the committee, inform the budget committee and provide details except where circumstances under § 6 of this Act are affected.

(5) The plenary session of the German *Bundestag* may, by a resolution passed by a

simple majority, at any time assume to itself and exercise by ordinary resolution the powers of the budget committee.

(6) An application or a submission of the Federal Government shall be deemed to have been transferred to the budget committee within the meaning of the Rules of Procedure of the *Bundestag*. § 70 of the Rules of Procedure applies with the necessary modifications; the request of one quarter of the members of the budget committee must be supported by a minimum of two parliamentary groups in the committee.

§ 6 40

Involvement by way of a special committee

(1) If the purchase of government bonds on the secondary market under Article 18 of the Treaty establishing the European Stability Mechanism is intended, the Federal Government may assert that the matter is particularly confidential. Particular confidentiality exists where the mere fact of consultation or passing of a resolution must be kept secret in order not to thwart the success of the measures. The Federal Government must give reasons for the assumption of particular confidentiality.

(2) In this case, the participation rights set out in §§ 4 and 5 may be exercised by members of the budget committee who are elected by the German *Bundestag* for the duration of one parliamentary term by secret ballot by the majority of the members of the German *Bundestag* (special committee). [...]

§ 7 41

Information by the Federal Government

(1) The Federal Government shall inform the German *Bundestag* and the *Bundesrat* in matters of this statute comprehensively, at the earliest possible date, continuously and as a general rule in writing. It shall give the German *Bundestag* an opportunity to express an opinion in matters which affect its competencies and shall take account of its opinions.

(2) The Federal Government shall communicate to the German *Bundestag* all documents available to it for the exercise of the participation rights of the German *Bundestag*. It shall also communicate these documents to the *Bundesrat*. [...]

(9) The representatives in the ESM appointed by Germany or by the German Governor shall not be entitled to rely on professional secrecy under Article 34 of the Treaty establishing the European Stability Mechanism vis-à-vis a request for information from the German *Bundestag* or its committees and members.

(10) The rights of the German *Bundestag* under the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union and the rights of the Bundesrat under the Act on Cooperation between the Federation and the Länder in Matters concerning the European Union are not affected.

II.

The first to fifth applicants are essentially of the opinion that the challenged statutes – each individually and also in their combined effect – violate the applicants' rights under Article 38 (1) in conjunction with Article 79 (3) and under Article 20 (1) and (2) of the Basic Law. In addition, the first applicant submits that Article 3 (1) of the Basic Law is violated and the second applicants submit that Article 14 (1) and Article 20 (4) of the Basic Law are violated. 42

The sixth applicant submits that the decision of the German *Bundestag* on the challenged statutes violates its rights under Article 38 (1) sentence 2 of the Basic Law in conjunction with Article 20 (1) and (2), Article 23 (1) and (2) and Article 79 (3) of the Basic Law and under Article 23 (2) sentence 1 of the Basic Law and submits that rights of the German *Bundestag* are violated. 43

As grounds for these submissions, the applicants assert the following, weighted in various degrees in the individual case: 44

1. Article 136 (3) TFEU not only gives clarification but also creates rights and duties. It largely devalues the bailout prohibition (Article 125 TFEU) and thus removes a necessary condition for the safeguarding of parliamentary freedom to decide in matters concerning the budget. This signifies not only a fundamental change of monetary policy in the direction of a transfer and liability community, but in addition constitutes a further stage of integration which fundamentally changes the nature of the European Union. The prohibition of direct acquisition of debt instruments of public institutions by the European Central Bank and the prohibition of the assumption of liability as the decisive cornerstones of the economic and monetary union would be removed from the stability community. In addition, the provision is extremely vague. The amendment to the Treaty on the Functioning of the European Union was also effected, in error, using the simplified procedure under Article 48 (6) TEU. 45

The sixth applicant submits that in the case of a Treaty amendment of this significance a convention should have been established, which would have permitted the national parliaments to be involved. 46

2. The approval of the Treaty establishing the European Stability Mechanism has the effect of transferring essential duties and powers to the European Stability Mechanism in a way which is incompatible with the structural principles of the Basic Law, in particular with the principle of democracy. In this way, the German *Bundestag* unconstitutionally divests itself of its budget autonomy. The *Bundestag* also curtails the budget autonomy of a future *Bundestag* by setting in motion an automatic process of liability and performance which such a future *Bundestag* cannot escape. The instruments of the stability support are substantially extended in contrast to the European Financial Stability Facility. As part of the comprehensive provision on allocation of tasks in Article 3 TESM, the European Stability Mechanism is empowered to make far-reaching decisions with extremely serious and scarcely foreseeable consequences for the budgets of the Member States. Thus it ultimately becomes a financ- 47

ing bank, but without being subject to banking supervision. If the European Stability Mechanism receives a banking licence, it will be able to obtain loans in a practically unlimited amount in return for depositing government bonds with the European Central Bank; Germany will share liability for default on these loans in the amount of its share of the capital of the European Central Bank.

a) Against the background of the liability risks already existing under other euro rescue measures, the additional liability volume created by the Treaty establishing the European Stability Mechanism and the Act for Financial Participation in the European Stability Mechanism plainly exceeds the limit of what is responsible. Germany takes on risks in a volume which exceeds the measures of what is constitutionally permissible. In addition, the obligations resulting from the ESM Treaty are incompatible with the Basic Law's debt brake (Article 109 (3), Article 115 (2) of the Basic Law). 48

b) The transfer of competencies to decide which have budgetary relevance to bodies of the European Stability Mechanism is only compatible with the principle of democracy of Article 20 (1) and (2) of the Basic Law if it is guaranteed by the requirement of parliamentary approval that their decisions are subject to the mandatory approval of the *Bundestag*. But such requirements of parliamentary approval are not contained in the Treaty; in so far as the Act of assent and the Act for Financial Participation in the European Stability Mechanism contain requirements, these are incomplete or insufficient in substance. 49

aa) Article 8 (5) TESM does not limit the liability of the Member States. The wording of the provision, which is ostensibly unambiguous, conflicts with the duties to make subsequent contributions which are expressly contained in the provisions on capital calls and loss set-off of Article 9 (2) and (3), Article 25 (2) TESM; these counteract the restriction of the liability risk. If a member became insolvent, the members which were still solvent would have to make higher payments in order to proportionately set off the default. Even now there is already a high degree of likelihood that such duties to make subsequent contributions will arise. In this way, at all events, the European Stability Mechanism indirectly results in a communitarisation of state debts. In addition, the issue of shares above par under Article 8 (2) TESM may make it possible to leverage the funds of the European Stability Mechanism. The actual risks thus extend far beyond the capital expressly to be paid in and the callable sum. The extent of the capital to be paid in by Germany is therefore ultimately not determined in the Treaty, but dependent on the decisions of other states. 50

bb) There are no provisos under international law in favour of the German *Bundestag*. Thus, for example, against the wishes of Germany and without any mandatory authorisation of the *Bundestag*, the Board of Directors and the Managing Director could decide on calls on capital in sums of many billion dollars. But with regard to the manner in which the funds are used too, no sufficient rights of monitoring and participation of the German *Bundestag* are provided for, although the way in which the funds are granted and their amount are extremely indefinite and in addition Article 19 51

TESM provides for the provision of further financial assistance instruments. In this way, the national parliaments would find themselves in the role of mere subsequent enforcement, even if their approval were necessary.

cc) Under Article 4 (8) TESM voting rights may automatically be removed, even where there is only a short-term default in payment or in the case of extremely high and possibly unjustified calls on capital. The loss of all voting rights is a gross violation of the principle of democracy. If the German voting rights were suspended, the Board of Governors and the Board of Directors would be able to pass resolutions which could seriously impair the overall budgetary responsibility of the *Bundestag*. 52

dd) It is true that the European Stability Mechanism is democratically linked to the national parliaments through the members of the Board of Governors and of the Board of Directors. But it is not guaranteed that the German Director has parliamentary responsibility. The members of the bodies are subject to a duty of professional secrecy (Article 34 TESM); as a result, they cannot satisfy their duties to provide information under Article 23 (2) of the Basic Law. 53

c) Finally, the permanent binding effect of the Treaty establishing the European Stability Mechanism encroaches upon Germany's statehood. The Treaty contains no termination provision and is therefore de facto impossible to terminate. The *clausula rebus sic stantibus* (Article 62 of the Vienna Convention on the Law of Treaties – VCLT of 23 May 1969 [...]) can apply only subject to strict requirements. Bearing in mind the long-term binding effect, in addition, the relative strengths of the members may change, as a result of which Germany could lose its veto position. 54

d) The first applicant also submits that the immunity of the members of the Board of Governors and of the Board of Directors and of their alternates under Article 35 TESM violates Article 3 (1) of the Basic Law. 55

3. The Act for Financial Participation in the European Stability Mechanism, in the absence of introduction in parliament corresponding to Article 76 (1) and (2) of the Basic Law, is unconstitutional on formal grounds alone, because the draft bill had a gap in the place where rights of participation would have been provided for. In addition, its §§ 3 to 7 inadequately guarantee the rights of participation and rights to information of the German *Bundestag*. Furthermore, in many cases only the budget committee participates, although these are fundamental changes which affect the overall budgetary responsibility and for which the plenary session is competent. 56

4. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union obliges the Federal Republic of Germany to permanently retain the debt brake inserted into the Basic Law, as a result of which the debt brake is substantively integrated in the unchangeable core of the constitution. Even if the Treaty contains no essential changes of the present state of law, the existing commitments under secondary European Union law and under the debt brake already contained in the Basic Law will acquire a new legal quality as a result of being laid down in international law. 57

a) The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union creates rights and duties. The 0.5% criterion in Article 3 (1) point (b) sentence 1 TSCG creates a stricter requirement for the medium-term budget target than under secondary European Union law. In the case of material deviations from the medium-term budget objective or from the adjustment path towards it, in addition, there is provision for an automatic correction mechanism which must be based on common principles proposed by the European Commission with regard to the nature, scope and supervision of the corrective measures to be undertaken. Further, the Treaty provides for a binding report by the European Commission evaluating whether the contracting states have effectively implemented in national law the mechanism for limiting borrowing and the obligation of orientation towards the Commission's proposals in the formulation of exceptions and in particular with regard to the instruments of the possible correction mechanisms. The Treaty also changes the substantive constitutional position. At present, the Basic Law has never contained either a borrowing limit for the state as a whole, including local authorities and social security organisations, nor an automatic mechanism. In addition, the states whose total borrowing exceeds the Maastricht criterion of 60% of the gross domestic product would have to undertake cutback measures with the aim of reducing the part over 60% by an average of one-twentieth per year. 58

b) Article 4 TSCG obliges Germany to make an annual reduction of debt in the amount of 26 billion euros. This is incompatible with Article 109 (3), Article 115 (2), Article 143d (1) of the Basic Law and requires a change of the Basic Law, because the budget law governs only the reduction of deficit, but not the reduction of public debt. 59

c) The budget autonomy is eroded in particular by the provision of Article 5 TSCG. This provides that the European Commission must approve budgetary and economic partnership programmes which last for longer than one parliamentary term and are capable of restricting parliament's possibilities of decision. This goes beyond the current requirements and possibilities of sanction under secondary law. The automatic correction mechanism will also result in requirements of the European Commission eroding the budgetary sovereignty of the Member States. 60

d) Finally, the irreversibility of the obligation violates the Basic Law. No termination is permitted, nor can one be derived from the nature of the Treaty. It is therefore only possible to terminate the multilateral Treaty by mutual agreement. In this way, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union not only installs permanent mechanisms of supervision and sanction, but also irreversibly determines the economic policy of the Contracting States. 61

5. On the applications for the issue of temporary injunctions, it is submitted that the weighing of consequences makes them necessary, because the ratification of the Treaties cannot be reversed under international law and Germany would be forced to disregard their binding effect under international law if the Federal Constitutional Court granted the applications in the principal proceedings. The issue of temporary 62

injunctions is absolutely necessary in order to prevent the Federal Constitutional Court from finding itself facing a fait accompli when deciding in the principal proceedings.

III.

The Federal President, the German *Bundestag*, the *Bundesrat*, the Federal Government and all *Land* (state) governments were given the opportunity to express an opinion. 63

1. The Federal Government is of the opinion that both the constitutional complaints and the application in *Organstreit* proceedings (proceedings on a dispute between supreme Federal bodies) are patently unfounded and the applications for the issue of temporary injunctions are therefore inadmissible, or at all events unfounded. 64

a) Article 136 (3) TFEU does not change the orientation of the monetary union, nor does it remove the prohibition contained in Article 125 TFEU of assuming the liabilities of other Member States; it merely contains a clarification. The measures of stability support of the Member States are not measures of monetary policy for which, under Article 3 (1) point (c) TFEU, the European Union would be competent. The granting of financial assistance is a measure of economic policy, for which the Member States are competent. 65

b) The European Stability Mechanism is essentially structured on the model of the European Financial Stability Facility, but its capital structure makes it more efficient. With regard to the participation of the German *Bundestag*, therefore, the same questions arise as in connection with the European Financial Stability Facility pursuant to the judgments of the Federal Constitutional Court of 7 September 2011 and of 28 February 2012. The Act for Financial Participation in the European Stability Mechanism complies with these requirements. By reason of these provisions, there can be no automatic liability. For voting in the Board of Governors, the Treaty establishing the European Stability Mechanism provides for either mutual agreement – and thus unanimity – or a qualified majority of 80% of the votes cast. Since the Federal Finance Minister is delegated to the Board of Governors and a Permanent Secretary to the Board of Directors, it is guaranteed, together with the Act for Financial Participation in the European Stability Mechanism, that the overall budgetary responsibility of the German *Bundestag* is safeguarded. 66

The provisions of the Treaty establishing the European Stability Mechanism limit liability to a Member State's share of the capital stock, which cannot be increased without the approval of the German *Bundestag*. Article 8 (5) TESM expressly provides that the liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price and that no ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The maximum amount for which Germany would be liable is therefore approximately 190 billion euros. This – like the temporary existence of the guarantees for the European Financial 67

Stability Facility – does not result in exceeding an upper limit derived from the Basic Law or to an erosion of parliament's right to decide on the budget. In addition, there is no risk-free alternative to these assistance measures. Thus, according to the assessments of the German Bundesbank, the European Central Bank, the European Commission and the International Monetary Fund, far greater political and economic damage would arise from the insolvency of individual Member States. Nor does the European Stability Mechanism constitute entry into a transfer union; long-term payments similar to financial equalisation remain out of the question.

c) The Act for Financial Participation in the European Stability Mechanism is formally in conformity with the Basic Law. Even if it was introduced without the provision for the participation of the *Bundestag*, it was a complete draft bill, which *inter alia* contained the statutory authorisation required under Article 115 (1) of the Basic Law. It was not necessary for the participation rights of the *Bundestag* to be dealt with in this statute. 68

§ 4 ESMFinG subjects all matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German *Bundestag* to the consent of the *Bundestag* plenary session. § 7 ESMFinG provides for comprehensive rights of information of the German *Bundestag* in matters of the European Stability Mechanism. There is a double safeguard when capital stock is increased. Under the Act of assent, the German representative must be authorised by a Federal statute for an alteration of the financial assistance instruments. In addition, for changes of the conditions for financial assistance which have no effect on the total financing volume, and for the provision of additional instruments within existing financial assistance measures, § 5 (2) no. 2 ESMFinG provides for the consent of the budget committee. The budget committee supervises the implementation of the agreements entered into for the grant of financial assistance. Finally, § 6 ESMFinG provides for a special committee for the purchase of government bonds on the secondary market, although this is only competent to make decisions where there are requirements of particular confidentiality. The waiver of a right of veto for Germany in the cases of capital calls under Article 9 (2) and (3) TESM is appropriate and safeguards the creditworthiness of the European Stability Mechanism. 69

d) The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union is intended to create a strong orientation towards stability, for its central provisions oblige the Contracting Parties to lay down the precept of budgetary discipline in their national law, preferably in constitutional law. Article 3 TSCG does not create a material new restriction of the budget autonomy of the Member States, but puts into concrete terms the already existing provisions of European Union law. In addition, the Treaty guards against excessive public debt and in this way prevents further state financial crises in future; in this way it also supplements the Treaty establishing the European Stability Mechanism substantively and functionally. The monitoring of the budgetary and economic partnership programmes of the Member States contained in Article 5 TSCG is not an impermissible restriction of the legisla- 70

tive discretion of the budget legislature. Nor is the obligation to submit budgetary and economic partnership programmes to the Council of the European Union and to the European Commission contained in Article 5 (1) sentence 3 TSCG a restriction, for lack of associated legal consequences. The limitation of government borrowing is compatible with the Basic Law, since in this case it is only the definition of a framework to be filled in by the Member States and this framework precisely corresponds to the model of the German debt brake. The proposals which Article 3 (2) TSCG requires the European Commission to make on common principles for national correction mechanisms and on the time-frame for convergence towards the medium-term budget objective under Article 3 (1) point (b) sentence 3 TSCG are merely interpretation guides putting the provision in concrete terms.

The indefinite duration of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – and of the Treaty establishing the European Stability Mechanism – is not a violation of the constitution. It is quite customary for important agreements under international law to be entered into without a fixed term or a termination clause. Even a treaty entered into for an indefinite period of time may be terminated at any time by all contracting parties by mutual agreement. In addition, in the case of fundamental changes of the circumstances existing at the date of entry into the treaty a party may withdraw from the treaty on the basis of Article 62 of the VCLT. 71

e) The applications for the issue of temporary injunctions must be refused. In the present fragile situation, an appreciably delayed ratification of the two treaties entails massive consequences for some Member States. Since the Federal Republic of Germany has a share of somewhat more than 27% of the capital in the European Stability Mechanism, the latter cannot enter into effect without the deposit of the German instrument of ratification. The Federal Government proceeds on the assumption that it is urgently necessary to permit at most short-term uncertainty to arise as to the progress of the German ratification procedure. The Federal Constitutional Court has already, in particular cases, taken account of the prospects of success in the main proceedings in the proceedings on the issue of temporary injunctions; it is requested that the Court so proceed in the present case too. 72

2. The German *Bundestag* regards the applications in the principal proceedings as inadmissible in so far as they are directed against the Act of assent to Article 136 (3) TFEU and assert a violation of Article 3 (1), Article 14 and Article 20 of the Basic Law; in this respect, the applicants are not entitled to apply. Apart from this, the applications in the principal proceedings are patently unfounded. 73

a) The Act of assent to the European Council decision to amend Article 136 TFEU does not impair the position of the German *Bundestag* laid down in the Basic Law. In the unanimous agreement of the Member States of the European Union, Article 125 TFEU does not prevent the voluntary grant of assistance. Article 136 (3) TFEU once more makes this clear and is sufficiently specific. The provision serves to safeguard 74

the stability of the monetary union and specifically does not make it possible to introduce a comprehensive liability and transfer union, but instead gives selective authorisation, in a situation which is sufficiently clearly discernible, for assistance measures for a limited period of time; in addition, it contains strict conditionality. The accusation that convention proceedings should have been conducted is mistaken, because Article 136 (3) TFEU does not expand the competence of the European Union.

b) The Act of assent to the Treaty establishing the European Stability Mechanism and the Act for Financial Participation in the European Stability Mechanism do not impair the budgetary responsibility of the budget legislature. The Treaty establishing the European Stability Mechanism makes it sufficiently clear what burdens it creates. The requirement of specificity does not exclude the possibility that the provisions of the Treaty are autonomously further developed, but instead is aimed to enable parliament to follow the process of development sufficiently and to guide it effectively. 75

The overall budgetary responsibility of the *Bundestag* is not endangered. The European Stability Mechanism cannot make any decisions with budget significance which have not already been approved by the legislature in the Treaty or which need a legislative decision in the course of further development. The authority to generate outside capital is therefore no more questionable than the authority to be able to grant financial assistance in the form of a loan and in other forms. Calls on capital merely result in fulfilling an obligation already created. There can be no increase against its will or without its consent of the shares allocated to the Federal Republic of Germany, for under Article 8 (5) TESM the liability of a Member State is limited “in all circumstances” to its portion of the authorised capital stock. In particular, this provision cannot be overridden by the provisions on the revised increased capital call (Article 25 (2) TESM). The consequential effects are also clear; the purpose of the action, the scope of the operation and the ESM equity capital available are clearly limited. The danger of automatic events is excluded both contractually and procedurally. Admittedly, the European Stability Mechanism is of a permanent nature, but the assistance measures are not. These are intended to achieve a return to complete autonomy and by reason of the conditionality they are necessarily limited in duration. The sums to be paid by the Member States do not burden the budget immediately, but at most are to be paid in stages over a period of time. It is in fact possible for the latitude to be extended by reviewing whether the maximum lending volume is appropriate, under Article 10 TESM, but this does require the cooperation of the legislature. The danger of substantial losses in carrying out operations under Article 21 TESM is so small that it may be disregarded. 76

Even in the unlikely event that the Federal Republic of Germany has completely paid in its capital contributions and there is a sudden devaluation of the capital stock, the burdens arising from this would merely increase German state deficit by approximately eight percentage points. The Federal Republic of Germany would then have a level of indebtedness of approximately 90% of the gross domestic product, which would not deprive future budget legislatures of all latitude. However, in these condi- 77

tions it would only be possible to observe the debt brake by relying on the emergency clause. According to the calculations of the Federal Ministry of Finance and the Federal Audit Office (*Bundesrechnungshof*), all rescue measures at the present time would result in a conceivable maximum burden of approximately 310 billion euros, and it is not to be expected that this would be realised suddenly. A waiver of the measures of assistance in question would be highly likely to start a process which would result in burdens for the present and for future budget legislatures which would be equally large or even larger.

The democratic supervision of the work of the European Stability Mechanism is largely effected by way of rights of approval and participation. The fundamental decisions of the European Stability Mechanism are subject to approval in the German *Bundestag*. The office holders involved in the decisions of the European Stability Mechanism are subject to sufficient parliamentary monitoring and are therefore democratically legitimated. On a second level, the acts of the German representatives require the approval of the budget committee; the plenary session, however, may assume the matter to itself at any time. The mechanisms of governance and monitoring are so far upstream that parliament can exercise influence on the process of deciding on the granting of assistance. 78

c) The conditions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union do not constitute a curtailment of budgetary sovereignty, but serve to restrict the German liability risk. The Treaty relates to the law of the European Union, without being intended to change the law. Thus the Treaty creates no direct legal effects on the budgets of the Member States, but only indirect effects by way of the sanctions; a budget Act which violates the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union does not cease to be legally valid. 79

By reason of the federal structure of the Federal Republic of Germany, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union differs in some respects from the debt brake in the Basic Law, but these differences do not result in a substantially different legislative concept. The state as a whole, that is, the Federal and *Länder* governments and local authorities and all other public budgets, are subject to this. Sanctions by the bodies of the European Union may be directed solely to the Federal Government; there is no scope for a reach-through to *Länder* or local authorities. The road of debt reduction provided in the Basic Law is defined by Article 143d (1) of the Basic Law, while the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union leaves it to be put into concrete terms by the European Commission. Admittedly, it is not certain that the European Commission will ultimately decide on an identical road of debt reduction to that provided in the Basic Law; however, the Commission has a duty to take account of country-specific risks and in this respect may orient itself towards the legal position of the Member State in question. 80

The substantive provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union scarcely add to the number of substantive commitments. The Member States assume the obligations of their own volition and are not compelled to participate, not even de facto. The Treaty arranges for the autonomous enforcement of voluntary contractual agreements and complies with already existing provisions of European Union law. It is true that Article 7 TSCG with its "reverse" rule on a qualified majority is an innovation, but this has no constitutional relevance for the budgetary sovereignty of the national parliaments; the agreement on a particular voting procedure does not modify the excessive deficit procedure in substance. Nor is there a transfer of substantive legislative competencies to other bodies with sovereign power. Article 8 TSCG merely grants the Court of Justice the competence with regard to compliance with Article 3 (2) TSCG to decide legal actions of the Contracting Parties and in the case of a violation to impose a penalty payment on a Contracting Party. 81

Admittedly, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union contains no express provision for termination or withdrawal, but this does not exclude the application of the general rules of termination of international law. 82

IV.

Under § 65 (1), § 94 (5) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) the Federal Government has declared its intervention in proceedings named in the recitals; it wishes to intervene in the sixth proceedings on the side of the German *Bundestag*. The *Bundestag* in turn has declared its intention to intervene in the proceedings I to V under § 94 (5) BVerfGG. 83

V.

In the oral hearing of 10 July 2012, the parties reaffirmed and enlarged upon their submissions. The Senate also heard Dr. Jens Weidmann, the President of the German Bundesbank, Prof. Dr. Dieter Engels, the President of the Federal Audit Office, Mr. Rolf Strauch and Mr. Ralf Jansen of the European Financial Stability Facility, Prof. Dr. Dres. h.c. Hans-Werner Sinn (Ifo Institute), Dr. Friedrich Heinemann (Centre for European Economic Research) and Prof. Dr. Clemens Fuest (University of Oxford) as expert witnesses. These persons expressed opinions in particular on the extent of the total burden on the Federal budget entailed by the entry into effect of the European Stability Mechanism, by possible speculative losses and duties to make subsequent contributions, by the German liability risks arising from participation in the European Central Bank; on the existing financing volume of the European Financial Stability Facility; and on the risks of a delayed entry into effect of the European Stability Mechanism. 84

B.

The admissible applications are largely unfounded. 85

I.

1. Under § 32 of the Federal Constitutional Court Act, the Federal Constitutional Court, in a case of dispute, may provisionally provide for a situation by temporary injunction if this is advisable for the common good in order to avert serious detriment, to prevent imminent violence or for another compelling reason. In reviewing whether the requirements of § 32 (1) BVerfGG are satisfied, a strict yardstick must always be applied by reason of the far-reaching effects of a temporary injunction (see BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216-217>; 104, 23 <27>; 106, 51 <58>). This yardstick becomes even stricter if a measure with repercussions in international law or foreign policy is under consideration (see BVerfGE 35, 193 <196-197>; 83, 162 <171-172>; 88, 173 <179>; 89, 38 <43>; 108, 34 <41>; 118, 111 <122>; 125, 385 <393>; 126, 158 <167>; 129, 284 <298>). 86

In the decision on the temporary injunction, the reasons which are submitted to show that the challenged measures are unconstitutional must in principle be disregarded, unless the declaration sought in the principal proceedings or the application made in the principal proceedings is revealed from the outset to be inadmissible or patently unfounded (see BVerfGE 89, 38 <44>; 103, 41 <42>; 118, 111 <122>; established case-law). If the outcome of the principal proceedings is found to be open, the Federal Constitutional Court must in principle only in the course of a weighing of consequences weigh the disadvantages which would occur if a temporary injunction were not granted but the constitutional complaint or the application in *Organstreit* proceedings were successful in the principal proceedings against the disadvantages which would occur if the temporary injunction sought were granted but success were refused in the principal proceedings (see BVerfGE 105, 365 <371>; 106, 351 <355>; 108, 238 <246>; 125, 385 <393>; 126, 158 <168>; 129, 284 <298>; established case-law). 87

2. a) But if the Act of assent to a treaty under international law is presented for review in the principal proceedings, it may be advisable not to restrict the review to a pure weighing of consequences, but to make a summary review at an early stage, in the proceedings under § 32 (1) BVerfGG, to determine whether the reasons submitted to show that the challenged Act of assent indicate with a high degree of probability that the Federal Constitutional Court will find that the Act of assent is unconstitutional (see BVerfGE 35, 193 <196-197>). In this way it can on the one hand be ensured that the Federal Republic of Germany does not enter into any commitments under international law which are incompatible with the Basic Law. On the other hand, it may be avoided in this way that a potential violation of law in the refusal of temporary judicial relief could no longer be reversed, that is, the decision in the principal proceedings were too late (see BVerfGE 46, 160 <164>; 111, 147 <153>), as is typically the case when the instrument of ratification of an agreement under international law is deposit- 88

ed. A summary review of the legal position is advisable in particular in such cases when a violation of the protected interests of Article 79 (3) of the Basic Law is under consideration. In such a situation, it must be the duty of the Federal Constitutional Court to protect the identity of the constitution. If the summary review in the injunctive relief proceedings reveals a high probability of an alleged violation of Article 79 (3) of the Basic Law, the failure to grant legal protection would constitute a serious disadvantages for public welfare within the meaning of § 32 (1) BVerfGG (see BVerfGE 111, 147 <153>).

b) Accompanying legislation may also fall under this review yardstick and be subjected to a summary review if there is a close factual connection with the treaty which is challenged at the same time. This must be assumed in particular if the statute is intended to guarantee that the measure agreed under international law has the connection to parliament which is fundamentally constitutionally required and if reviewing the Act of assent and the accompanying legislation separately would mean both artificially splitting up a unified fact situation and also subordinating them to different yardsticks. 89

3. In accordance with these principles, the agreements under international law challenged in the present constitutional complaints and the *Organstreit* proceedings, including the accompanying legislation, are to be summarily reviewed to determine whether the violations of law admissibly asserted by the applicants are present in so far as they are material to the objective of legal protection pursued in the application for the issue of temporary injunctions. In ratifying the treaties, the Federal Republic of Germany enters into commitments in international law from which it could not easily withdraw if constitutional violations were established. The economic and political disadvantages which may arise from a delayed entry into force of the challenged statutes may be of great weight, but at the same time they cannot be weighed against democracy, which is the interest protected by Article 79 (3) of the Basic Law. The Act for Financial Participation in the European Stability Mechanism contains the domestic safeguards to preserve the budget autonomy of the German *Bundestag* with regard to the European Stability Mechanism and must be included in the summary review. 90

II.

1. The constitutional complaints are not inadmissible at the outset to the extent that the applicants assert a violation of their rights under Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law; with regard to the other challenges, however, the constitutional complaints are inadmissible. 91

a) The constitutional complaints essentially submit that in the challenged statutes the German *Bundestag* takes incalculable risks, democratic decision processes are shifted to the supranational or intergovernmental level and it is no longer possible for the German *Bundestag* to exercise overall budgetary responsibility. In these submissions, the applicants set out with sufficient substantiation that the permanent budgetary autonomy of the German *Bundestag* is impaired and their rights under Arti- 92

cle 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law are violated (on admissibility and on the requirements for substantiation of this challenge, see BVerfGE 129, 124 <167 ff.>).

b) Apart from this, the challenges are inadmissible. 93

aa) To the extent that the first applicant submits that the ESM Financing Act is formally unconstitutional because it was not correctly introduced into the German *Bundestag*, he has not set out in a substantiated manner that his right under Article 38 (1) of the Basic Law might be eroded in this way (see BVerfGE 129, 124 <170>). 94

bb) To the extent that, in addition to this, he submits that the provision of Article 35 (1) TESM, which grants the office holders of the European Stability Mechanism personal immunity from jurisdiction with regard to their official acts, is arbitrary and violates the general principle of equality before the law of Article 3 (1) of the Basic Law, the first applicant suffers no adverse effects from this provision and consequently a violation of Article 3 (1) of the Basic Law is out of the question (see BVerfGE 63, 255 <265-266>). Substantively, the first applicant asserts a general claim to the enforcement of a statute. Such a claim can be derived neither from the general principle of equality before the law nor from Article 19 (4) of the Basic Law or Article 2 (1) of the Basic Law (see Schmidt-Aßmann, in: Maunz/Dürig, *GG*, *Art. 19 Abs. 4*, marginal no. 122 <February 2003>; Schulze-Fielitz, in: Dreier, *GG*, vol. 1, 2nd ed. 2004, *Art. 19 Abs. 4*, marginal no. 70). If the subject of a fundamental right is not affected in his or her own legal position by a measure or by an omission – that is, for example, if the measure has no effect on the person's legally protected interests – that person can derive neither defensive claims nor claims for performance from Article 3 (1) of the Basic Law (see Rüfner, in: *Bonner Kommentar*, vol. 1, *Art. 3 Abs 1*, marginal nos. 148 ff., 158 <October 1992>; Heun, in: Dreier, *GG*, vol. 1, 2nd ed. 2004, *Art. 3,* marginal no. 45). This is the case with regard to the provision of Article 35 (1) TESM. 95

cc) The constitutional complaint of the second applicants is inadmissible to the extent that they assert a violation of their fundamental right under Article 14 (1) of the Basic Law with regard to inflationary developments as a result of the Treaty establishing the European Stability Mechanism and the accompanying legislation and on the basis of acts of the European Central Bank. A review by the Federal Constitutional Court of economic and financial policy measures to determine whether there are negative consequences for monetary stability may be considered at most in cases of a clear reduction of monetary value (see BVerfGE 129, 124 <174>). The second applicants have not submitted sufficient facts to justify a review by the Federal Constitutional Court. 96

dd) The assertion by the second applicants of a violation of the right equivalent to a fundamental right under Article 20 (4) of the Basic Law is inadmissible. The right to resist any person seeking to abolish the constitutional order is a subsidiary exceptional right which – as the Senate has stated (BVerfGE 123, 267 <333>) – cannot be asserted in cases such as the present one. 97

c) To the extent that the second applicants challenge measures of the European Central Bank to rescue the euro, in particular the purchase of government bonds on the secondary market, with the argument that these are *ultra vires* legal acts, their relevant application for a determination, when judiciously interpreted, is not covered by the application for the issue of a temporary injunction and is therefore reserved to a review in the principal proceedings. 98

2. The application in *Organstreit* proceedings is inadmissible to the extent that the applicant, with regard to the Act on the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro challenges a violation of its rights under Article 38 (1) sentence 2 of the Basic Law. Apart from this, the application is admissible. 99

a) In connection with the Act on the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro, the applicant submits that the choice of the simplified treaty amendment procedure violated its right under Article 38 (1) sentence 2 of the Basic Law to participate in a Convention under the regular treaty amendment procedure under Article 48 (2) to (5) TEU. 100

The applicant has not even shown in what way it would be possible to derive from the Basic Law a right of the German *Bundestag* or of the applicant itself to participate in a Convention under Article 48 TEU, and thus has not shown what right granted by the Basic Law within the meaning of § 64 of the Federal Constitutional Court Act is said to be affected. In addition, the violation of rights alleged has not been set out in a substantiated manner. European Union law does not provide for any rights of consultation for the parliaments of the Member States in the choice of the treaty amendment procedure. On the contrary, under Article 48 (3) subparagraph 2 TEU the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention in the case of a treaty amendment in the ordinary revision procedure should this not be justified by the extent of the proposed amendments. A review together with Article 48 (3) subparagraph 1 sentence 2 TEU shows that this also applies to institutional changes in the monetary area. According to this, a violation of rights of the German *Bundestag* might apply, if at all, if a Convention procedure had actually been held in the case of the ordinary revision procedure under Article 48 (2) to (5) TEU and the German *Bundestag* had not been permitted to participate in it. The applicant made no submissions on any of these requirements in connection with the amendment of Article 136 TFEU. 101

b) Apart from this, the application in *Organstreit* proceedings is admissible. In particular, the applicant, as a parliamentary group of the German *Bundestag*, is authorised to assert on behalf of the latter that in the challenged statutes the German *Bundestag* divests itself of its overall budgetary responsibility (see BVerfGE 123, 267 <338-339>). 102

III.

To the extent that they are to be considered here in the context of the applications for a temporary injunction, the applications in the principal proceedings will, on summary review, be unsuccessful for the most part. 103

1. a) The right to elect the German *Bundestag* (Article 38 (1) of the Basic Law, 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 Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 37, 271 <279>; 73, 339 <375>; 123, 267 <340>). Its guaranteed content includes the principles of the precept of democracy within the meaning of Article 20 (1) and (2) of the Basic Law; these principles are protected by Article 79 (3) of the Basic Law as the identity of the constitution even against interference by the constitution-amending legislature (see BVerfGE 123, 267 <340>; 129, 124 <177>). 104

aa) The Basic Law not only prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) to the European Union or to institutions created in connection with the European Union (see BVerfGE 89, 155 <187-188, 192, 199>; see also BVerfGE 58, 1 <37>; 104, 151 <210>; 123, 267 <349>). Blanket empowerments for the exercise of public authority may also not be granted by the German constitutional bodies (see BVerfGE 58, 1 <37>; 89, 155 <183-184, 187>; 123, 267 <351>). It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character, or if they can still be interpreted in a manner that respects the responsibility for integration, to establish, at any rate, suitable safeguards for the effective exercise of such responsibility. Accordingly, the Act of assent and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union, or for institutions created in connection with the European Union, of taking possession of *Kompetenz-Kompetenz* or of otherwise violating the Basic Law's constitutional identity, which is not open to integration. For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, make effective arrangements in its legislation accompanying the Act of assent to ensure that the responsibility for integration of the legislative bodies can sufficiently develop (BVerfGE 123, 267 <353>). 105

bb) There is a violation of Article 38 (1) of the Basic Law in particular 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 (BVerfGE 129, 124 <177>). 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 therefore 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, 106

311 <329>; 129, 124 <177>).

(1) 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 governing. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany binds itself not only legally, but also with regard to fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget is not necessarily infringed in a way that could be challenged with reference to Article 38 (1) of the Basic Law. Rather, 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 , including those with regard to international and European liabilities (see BVerfGE 129, 124 <177>; Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, NVwZ 2012, p. 495 <497>; BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal no. 114). If essential budget questions relating to revenue and expenditure were decided without the mandatory approval of the German *Bundestag*, 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 mere subsequent enforcement and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget (BVerfGE 129, 124 <178-179>). 107

(2) In its judgment of 7 September 2011 (BVerfGE 129, 124) the Senate stated in detail that the German *Bundestag* may not transfer its budgetary responsibility to other entities by means of imprecise budgetary authorisations. The larger the financial amount of the commitments to accept liability or of commitment appropriations is, the more effectively must the German *Bundestag*'s rights to approve and to refuse and its right of monitoring be elaborated. In particular, the German *Bundestag* may not 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 significance without prior mandatory consent, whether these are expenses or losses of revenue. This prohibition of the relinquishment of budgetary responsibility does not impermissibly restrict the budgetary competence of the legislature, but is specifically aimed at preserving it (see BVerfGE 129, 124 <179>). 108

(3) A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 (1) and (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" (see BVerfGE 129, 124 <179-180>). 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, 109

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 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 (BVerfGE 129, 124 <180>).

(4) Moreover, 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 individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Insofar as supranational agreements are entered into which by reason of their scale 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 shall continue to be made on the manner of dealing with the funds provided (see BVerfGE 129, 124 <180-181>). 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 (BVerfGE 129, 124 <181>). 110

(5) The German *Bundestag* cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions with budgetary implications for which is accountable. The principle of democracy under Article 20 (1) and (2) of the Basic Law therefore requires that the German *Bundestag* is able to have access to the information which it needs to assess the fundamental bases and consequences of its decision (see only Article 43 (1), Article 44 of the Basic Law as well as BVerfGE 67, 100 <130>; 77, 1 <48>; 110, 199 <225>; 124, 78 <114>). The core of the right of parliament to be informed is therefore also entrenched in Article 79 (3) of the Basic Law. Sufficient information of parliament by the government is therefore a necessary precondition of an effective preparation of parliament's decisions and of the exercise of its monitoring function (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, loc. cit., marginal no. 107). This principle not only applies in national budget law (see for instance Article 114 of the Basic Law) but also in matters concerning the European Union (see Article 23 (2) sentence 2 of the Basic Law). 111

cc) Whether and how far a justiciable limit of the assumption of payment obligations or of commitments to accept liability can be derived directly from the principle of democracy has been left open by the Senate in its judgment of 7 September 2011 (see BVerfGE 129, 124 <182>). 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 (BVerfGE 129, 124 <182>). An upper limit following directly from the principle of democracy could only be overstepped if in the case where they 112

are called upon the payment obligations and commitments to accept liability took effect in such a way that budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed (see BVerfGE 129, 124 <183>).

When examining whether the amount of payment obligations and commitments to accept liability will result in the *Bundestag* relinquishing its budget autonomy, the legislature has broad latitude of assessment, in particular with regard to the risk of the payment obligations and commitments to accept liability being called upon and with regard to the consequences then to be expected for the budget legislature's freedom to act; the Federal Constitutional Court must in principle respect this latitude. 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 (see BVerfGE 129, 124 <182-183>), including the consideration of the consequences of alternative options of action. 113

dd) Since the entrance into the third stage of the Economic and Monetary Union, the German *Bundestag*'s overall budgetary responsibility is safeguarded not least by the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union. These provisions do not conflict with 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. 114

(1) The current programme of European integration designs the monetary union as a stability community. As has been repeatedly emphasised by the Federal Constitutional Court (see BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181-182>), this is the essential basis of the Federal Republic of Germany's participation in the monetary union. Not only with regard to currency stability, the treaties are parallel 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 the constitutional requirements in European Union law. This applies in particular to the prohibition of monetary financing 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; see BVerfGE 129, 124 <181>). 115

In view of the transfer of monetary sovereignty to the European System of Central Banks, the German *Bundestag*'s overall budgetary responsibility is safeguarded particularly by the fact that the European Central Bank subjects itself to the strict criteria of the Treaty on the Functioning of the European Union and of the Statute of the European System of Central Banks with regard to the independence of the Central Bank and to the priority of monetary stability (see BVerfGE 89, 155 <204-205, 207 ff.>; 129, 116

124 <181-182>). In this context, an essential element of safeguarding the constitutional requirements resulting from Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law in European Union Law is the prohibition of monetary financing by the European Central Bank (see BVerfGE 89, 155 <204-205>; 129, 124 <181-182>).

(2) However, the design as a stability union that the monetary union has to date been given under the Treaties does not mean that a democratically legitimised change in the concrete structure of the stability requirements under European Union law would be incompatible with Article 79 (3) of the Basic Law from the outset. Not every single manifestation of the stability community is guaranteed by paragraphs 1 and 2 of Article 20 of the Basic Law in conjunction with Article 79 (3) of the Basic Law, which are the only relevant provisions here. 117

Article 79 (3) of the Basic Law does not guarantee the unchanged further existence of the law in force but those structures and procedures which keep the democratic process open and, in this context, safeguard parliament's overall budgetary responsibility. Already in its Maastricht judgment, the Federal Constitutional Court held that, in order to comply with the stability mandate, a continuous further development of the monetary union may be necessary if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from (see BVerfGE 89, 155 <205>). If the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further (see BVerfGE 89, 155 <207>; 97, 350 <369>). It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law. 118

ee) The principle of democracy under Article 20 (1) and (2) of the Basic Law, which is oriented towards fundamental legal reversibility, may also be violated by a long-term restriction of budget autonomy by the transfer of essential budgetary decisions to bodies of a supranational or international organisation or to other states, or by the assumption of corresponding obligations under international law. 119

(1) However, it is not anti-democratic from the outset for the budget legislature to be bound by a particular budget and fiscal policy (see BVerfGE 79, 311 <331 ff.>; 119, 96 <137 ff.>). By putting into specific terms and objectively tightening the rules for borrowing by Federal and *Länder* governments (in particular Article 109 (3) and (5), Article 109a, Article 115 of the Basic Law new, Article 143d (1) of the Basic Law), the constitution-amending legislature made it clear that a constitutional commitment on the part of the parliaments and thus a palpable restriction of their budgetary power to act may be necessary precisely in order to preserve the democratic power to shape affairs for the body politic in the long term (BVerfGE 129, 124 <170>). Even if such a commitment restricts democratic legislative discretion in the present, it serves at the same time to guarantee it for the future. Admittedly, even a long-term worrying development of the level of indebtedness is not a constitutionally relevant impairment of 120

the legislature's competence for a situation-dependent discretionary fiscal policy. Nevertheless, it results in a de facto constriction of discretion (see BVerfGE 119, 96 <147>). Keeping discretion as broad as possible is a legitimate goal of the (constitutional) legislature.

(2) The commitment of the budget legislature to a particular budget and fiscal policy may also be made under European Union law or international law. 121

(a) The requirements for sound budget management contained in the Treaty on the Functioning of the European Union (Article 123 to Article 126, Article 136 TFEU) restrict the national legislature's discretion in exercising its overall budgetary responsibility. A similar situation – assuming that it complies with primary law, which it is not the task of the present decision to examine – applies to secondary European Union legislation (see in particular what is known as the "Six Pack": Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306 of 23 November 2011, p. 1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306 of 23 November 2011, p. 8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306 of 23 November 2011, p. 12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306 of 23 November 2011, p. 25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306 of 23 November 2011, p. 33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States; OJ L 306 of 23 November 2011, p. 41). 122

(b) Apart from this, the Member States are free to enter into further commitments beyond the existing fiscal and budgetary commitments of European Union law, to the extent that these do not conflict with the requirements of European Union law (see Article 4 (3) TEU). The Federal Republic of Germany may therefore introduce stricter domestic rules for its budget policy and enter into contracts to this effect (see BVerfGE 129, 124 <181-182>). 123

(3) In this context, it is primarily the duty of the legislature to weigh whether and to what extent, in order to preserve the discretion for the democratic shaping of affairs and making of decisions, commitments with regard to spending behaviour should be entered into for the future too, and therefore – demonstrating the mirror image principle – a restriction of their discretion for the democratic shaping of affairs and making of decisions in the present must be accepted. In this connection, the Federal Constitutional Court may not with its own expertise usurp the place of legislative bodies, 124

which are first and foremost entrusted with this (BVerfGE 129, 124 <183>). However, it must ensure that the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions (see BVerfGE 5, 85 <198-199>; 44, 125 <142>; 123, 267 <367>; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1995, marginal no. 143; Hofmann/Dreier, *Repräsentation, Mehrheitsprinzip und Minderheitenschutz*, in: Schneider/Zeh, *Parlamentsrecht und Parlamentspraxis*, § 5, marginal no. 58; Sommermann, in: v. Mangoldt/Klein/Starck, *GG*, vol. 2, 6th ed. 2010, *Art. 20*, marginal no. 86), and that an irreversible legal prejudice to future generations is avoided (Kotzur, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL 69 <2010>, p. 173 <192-193>).

b) The submission that there is a violation of the German *Bundestag*'s right to exercise overall budgetary responsibility may also be asserted by a parliamentary group of the German *Bundestag* in *Organstreit* proceedings. In this connection, the review standard corresponds to that of a constitutional complaint (Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law). 125

2. Under these standards, the applications are shown to be predominantly unfounded. 126

a) On summary review, the Act on the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro does not violate Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. 127

aa) (1) Admittedly, the introduction of Article 136 (3) TFEU constitutes a fundamental reshaping of the existing economic and monetary union (see Calliess, *Zeitschrift für europarechtliche Studien* – ZEuS 2011, p. 213 <279>; Kube, *Wertpapier-Mitteilungen* – WM 2012, p. 245 <247>). Since the third stage of the monetary union was effected by the Treaty of Maastricht (Treaty on European Union of 7 February 1992, OJ EC C 191) under European Union law it is provided that assistance payments by individual Member States of the European Union are to be given only to Member States whose currency is not the euro (now Article 143 (2) sentence 2 point (c) TFEU). The institution of a permanent mechanism for mutual rendering of assistance of the Member States of the euro currency area outside the framework of the European Union is detached, if not completely, from the principle of independence of the national budgets which has to now characterised the monetary union (on this, see BVerfGE 129, 124 <181-182>). For it relativises the market dependence associated with this principle with regard to the possibilities of state refinancing in that the rendering of assistance is also permitted between the Member States of the euro currency area if this is essential for the stabilisation of the euro currency area as a whole. 128

(2) But incorporating Article 136 (3) TFEU into European Union law does not mean abandoning stability-directed orientation of the monetary union. Even with regard to 129

this release provision, essential parts of the stability architecture remain in place. Thus in particular the independence of the European Central Bank, its commitment to the paramount goal of price stability (see Article 127, 130 TFEU) and the prohibition of monetary financing (Article 123 TFEU) are unaffected; on the contrary, the authorisation by Article 136 (3) TFEU of the installation of a permanent mechanism to grant financial assistance confirms the will of the European Union and its Member States to strictly limit the tasks of the European Central Bank to the limits prescribed for it in European Union law. Equally, Article 136 (3) TFEU does not provide release from the obligation of budgetary discipline (see Article 126, Article 136 (1) TFEU). Only in connection with the exclusions of liability laid down in Article 125 (1) TFEU does Article 136 (3) TFEU now permit voluntary financial assistance, although this may not be granted without satisfying further requirements or granted for any purposes regardless of what they are. Instead, Article 136 (3) TFEU lays down both the purpose of authorisation and the nature of the provision as an exceptional provision, in that the financial assistance must serve the stability of the euro and in addition may only be permitted to be granted if this is indispensable to the stability of the euro currency area as a whole.

The decision of the legislature to supplement the structure of the monetary union, which remains oriented towards stability, by adding to the existing elements of an independent central bank committed to price stability (Article 127 (1), Article 130 TFEU), commitment to budgetary discipline (see Article 126, Article 136 (1) TFEU) and the personal responsibility of the national budgets aimed at stimulating the market (Article 123 to Article 125 TFEU) the possibility of active stabilisation measures, and the associated prognosis that by means of such measures the stability of the monetary union can be guaranteed and further developed, must in principle be respected by the Federal Constitutional Court in view of the latitude of assessment – which includes assessment of the risks of alternative options of action – of the competent constitutional bodies (see B.II.1.b)cc)); it must also be respected in that on the basis of this decision risks to price stability cannot be ruled out. 130

bb) Following the introduction of Article 136 (3) TFEU, European Union law expressly provides the possibility of establishing a stability mechanism on the basis of international law; this does not lead to a loss of national budgetary autonomy. 131

In the Act of assent to Article 136 (3) TFEU, the German *Bundestag* does not transfer any budgetary authorisations to other actors. There is no danger that the Federal Republic of Germany will, without the prior mandatory consent of the German *Bundestag*, be placed at the mercy of a mechanism with financial effect which is capable of resulting in complex burdens with budgetary significance or in unavoidably accepting liability for decisions of other states. Article 136 (3) TFEU does not itself put a stability mechanism into effect, but merely gives the Member States the possibility of establishing such mechanisms on the basis of an international agreement. In this way, at all events, no competencies are transferred to the bodies of the European Union; on the contrary, the competencies of Member States are to be taken up and their rela- 132

tionship to the rules and regulations on European Union currency law is to be laid down. At the same time, by way of a stability mechanism in treaty law, it will be guaranteed that the only Member States liable are those which participate in it. Regarded in this light, Article 136 (3) TFEU confirms the sovereignty of the Member States in that it entrusts to them the decision as to whether and in what way a stability mechanism is established.

As a result of this, there is no question of the precept of democracy being adversely affected by the consent to the introduction of Article 136 (3) TFEU, for one reason because the requirement of ratification for the establishment of the stability mechanism presupposes that the legislative bodies are involved before it enters into effect. In this case, the stability mechanism established under Article 136 (3) TFEU itself receives democratic legitimation, through which the parliamentary legislature also assumes responsibility for its specific structure. How far the structure of the mechanism approved by the legislature satisfies constitutional requirements does not affect the question which is important in the present case as to whether the German *Bundestag* was entitled to consent to the introduction of Article 136 (3) TFEU, preserving the core area protected by Article 79 (3) of the Basic Law. 133

cc) On summary review, Article 136 (3) TFEU is also sufficiently definite. Since Article 136 (3) TFEU does not transfer any sovereign rights (on this, see BVerfGE 89, 155 <204>), under the aspect of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law no conditions are to be imposed on the specificity of the authorisation to guarantee the responsibility of the legislative bodies for integration. Article 136 (3) TFEU determines the use of the stability mechanism and imposes restrictive conditions on it. There are no grounds for criticising this on summary review. 134

b) On summary review, the Act Concerning the Treaty of 2 February 2012 establishing the European Stability Mechanism essentially takes account of the requirements of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. 135

However, certain interpretations of the provisions on the revised increased capital call (Article 9 (2) and (3) sentence 1 in conjunction with Article 25 (2) of the Treaty establishing the European Stability Mechanism – TESM) and of the provisions on the inviolability of the documents (Article 32 (5), Article 35 (1) TESM) and on the professional secrecy of the legal representatives of the ESM (Article 34 TESM) might violate the *Bundestag*'s overall budgetary responsibility. This must be effectively precluded by declarations under international law made upon ratification of the Treaty (aa). By contrast, the provisions on the suspension of voting rights under Article 4 (8) TESM in the cases provided for under Article 5 (6) points (b), (f) and (i) TESM are ultimately constitutionally unobjectionable (bb). The same applies to the amount of the payment obligations and commitments to accept liability which are intended to be assumed or have already been assumed (cc). On summary review, other provisions of the Treaty 136

establishing the European Stability Mechanism also do not affect the *Bundestag*'s overall budgetary responsibility (dd).

aa) In its judgment of 7 September 2011, the Senate held that the German *Bundestag*'s overall budgetary responsibility was safeguarded with regard to the giving of guarantees in the context of the aid to Greece and of the European Financial Stability Facility because the amount of the Federal Republic of Germany's overall financial commitment was limited, the German *Bundestag* had to individually approve every large-scale aid measure, the *Bundestag* was entitled to monitor the conditionality of the measures, and the aid measures were subject to a time-limit (see BVerfGE 129, 124 <185-186>). With a view to the Federal Republic of Germany's overall financial commitment involved with the Treaty establishing the European Stability Mechanism (1), and with a view to the *Bundestag*'s rights to be informed, which are necessary to safeguard the *Bundestag*'s overall budgetary responsibility (2), the Treaty establishing the European Stability Mechanism only fulfils these requirements if it is interpreted in conformity with the constitution. 137

(1) The authorised capital stock of the European Stability Mechanism is EUR 700 000 million (Article 8 (1) TESM), with shares of a total nominal value of EUR 190 024 800 000 having been subscribed by the Federal Republic of Germany (Annex II to the Treaty establishing the European Stability Mechanism). As results from Article 8 (5) TESM, the portion of the authorised capital stock is the ceiling of all payment obligations arising from the Treaty establishing the European Stability Mechanism, and thus also of the maximum burden on the Federal budget ((a)). It can be assumed that this ceiling also applies with regard to capital calls under Article 9 and Article 25 (2) TESM ((b)). As the Treaty establishing the European Stability Mechanism might be amenable to a different interpretation in this respect, the Federal Republic of Germany must ensure the required clarification in the ratification procedure ((c)). 138

(a) It can be assumed that the express limitation of the liability of the ESM Members to their respective portions of the authorised capital stock, which is provided for in Article 8 (5) sentence 1 TESM, bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the activities of the European Stability Mechanism to EUR 190 024 800 000. 139

(aa) According to the wording of Article 8 (5) sentence 1 TESM, the liability of each ESM Member shall be "limited, in all circumstances, to its portion of the authorised capital stock at its issue price". Thus, Article 8 (5) sentence 1 TESM confirms the limitation of the payment obligations to the ESM Members' respective portions of the authorised capital stock, which already results from Article 8 (4) TESM. That Article 8 (5) sentence 1 TESM is to preclude a burdening of the Federal Republic of Germany beyond the amount of EUR 190 024 800 000 was confirmed by the Federal Minister of Finance and the President of the Federal Audit Office (*Bundesrechnungshof*), during the oral hearing. Subject to a capital increase under Article 10 TESM 140

and to the decisions to be taken in accordance with Article 8 (2) sentence 4 TESM (see B.III.2.b)aa)(1)(a)(bb)), the complete payment of this amount is to cover all payment obligations of the Federal Republic of Germany arising from the Treaty establishing the European Stability Mechanism. On the basis of this interpretation of the Treaty, the German *Bundestag* adopted the Act approving the Treaty (see *Bundestag* printed paper 17/9045, p. 5).

(bb) It can be assumed that the possibility provided for in Article 8 (2) sentence 4 TESM of issuing shares of the European Stability Mechanism's authorised capital stock higher than at par also does not stand in the way of this limitation of the amount. Admittedly, Article 8 (5) sentence 1 in conjunction with Article 8 (2) sentence 4 TESM in principle permits expanding the obligation to accept liability and the payment obligation via an increase of the issue price. However, this can be assumed not to affect the issue of the shares of capital stock initially subscribed, that is, of the shares of the authorised capital stock within the meaning of Article 8 (1) sentence 1 TESM in the amount of EUR 700 000 million (Article 8 (2) sentence 3 TESM) but only the issue of other shares of capital stock after capital increases; capital increases, in turn, require a unanimous decision by the Board of Governors (Article 5 (6) point (b) TESM; see B.III.2.a)bb)(1)(d)(aa)). Subject to such an increase of the authorised capital stock under Article 10 TESM, an extension of liability beyond the amount of EUR 190 024 800 000 Euro can hence be assumed to be precluded at present. 141

(b) The limitation of the amount of the burdens on the budget to EUR 190 024 800 000 can be assumed to also apply to the Federal Republic of Germany's obligations to make payment arising from Article 8 (4) sentence 2 TESM as a consequence of capital calls made in accordance with Article 9 TESM ((aa)); it can also be assumed to apply if they are made as "revised increased" capital calls under Article 25 (2) TESM ((bb)). 142

(aa) Apart from the authorisation of the Board of Governors to take the decisions to make general capital calls (Article 9 (1) in conjunction with Article 5 (6) point (c) TESM), the Treaty establishing the European Stability Mechanism also contains provisions in its Article 9 (2) and (3) which authorise the Board of Directors and the Managing Director to call in authorised capital. 143

Under Article 9 (2) TESM, the Board of Directors may call in authorised unpaid capital from the ESM Members by simple majority decision to restore the level of paid-in capital set out in Article 8 (2) TESM if it is reduced below the established level by the coverage of losses arising from the operations of the European Stability Mechanism (see also Article 25 (1) point (b) TESM). The amount of a capital call made in accordance with Article 9 (2) TESM is determined by the amount of the losses covered by the paid-in capital. Pursuant to Article 9 (3) sentence 1 TESM, the Managing Director calls authorised unpaid capital if there is a danger of the European Stability Mechanism defaulting on its creditors. No specific ceiling is provided for a call made in accordance with Article 9 (3). The call serves to meet all scheduled or other payment 144

obligations due to ESM creditors and can thus relate to all payment obligations of the European Stability Mechanism; with a view to its possibilities to act (see Articles 12 ff., Articles 21 and 22 TESM) the obligations can result from a vast range and multitude of legal transactions, and the amounts involved can be considerable.

However, according to the wording of Article 9 (2) and (3) TESM ("authorised unpaid capital") as well as according to the structure of the treaty, the payment obligation can be assumed to be limited by the nominal value of the respective share of the authorised capital stock because the shares are only "callable" to this extent (see Article 8 (2) sentence 1 TESM). Should the situation arise that the amount of the losses to be covered by a capital call made in accordance with Article 9 (2) TESM, or the amount of the payment obligations to be met by a capital call made in accordance with Article 9 (3) TESM, exceeds the total aggregate nominal value of the callable capital that is still available, it follows from this interpretation that a payment obligation only arises for the Members subject to the precondition that the authorised capital stock was increased by an unanimous decision of the Board of Governors under Article 10 (1) and Article 5 (6) point (d) TESM in a timely manner before the capital call. 145

(bb) It can be assumed that a payment obligation exceeding the German share of the authorised capital stock in the amount of EUR 190 024 800 000 does probably also not arise from the possibility of a revised increased capital call provided for in Article 25 (2) TESM. Admittedly, such a capital call can lead to the Federal Republic of Germany having to mobilise funds which according to the provisions of the Treaty would actually have to be mobilised by other Members. Should an ESM Member not (be able to) meet a capital call made in accordance with Article 9 (2) or (3) TESM, a revised increased capital call is made to all ESM Members; the text of the Treaty expressly provides that the function of a revised increased capital call is to ensure that the total amount of capital needed is paid in, and it is in the nature of it that this can only be ensured by a higher burden on the Members which are willing and able to pay. One will, however, not be able to conclude from this that it is intended to make a burdening of these Members possible beyond the ceiling established by Article 8 (5) sentence 1 TESM. Otherwise, the ceiling would serve no purpose. In particular, it can hardly be assumed that Article 8 (5) sentence 1 TESM is to solely limit the Members' liability in relation to the creditors of the European Stability Mechanism and not also their obligations towards the European Stability Mechanism itself because the Treaty from the outset does not provide a liability of the Members vis-à-vis third parties. On the contrary, Article 8 (5) sentence 2 TESM expressly precludes a liability of its Members for obligations of the European Stability Mechanism. The Treaty establishes the European Stability Mechanism as an institution with full legal personality (Article 32 (2) TESM), an institution beside which the Members are not to become parties to agreements with potential creditors. 146

(c) As the oral hearing has shown, systematic and teleological arguments can, however, be used to interpret the categorical limitation of liability in the context of the provisions on the "revised increased" capital calls (Article 9 (2) and (3) in conjunction 147

with Article 25 (2) TESM), which is intended by Article 8 (5) sentence 1 TESM and which was once again explicitly confirmed by the *Bundestag* and the Federal Government, in a way that would no longer be compatible with the constitutional requirement of determining the burdens on the budget in a clear and definitive manner ((aa)). It is hence required for the Federal Republic of Germany to remove such doubts regarding interpretation in the framework of the ratification procedure under international law ((bb)).

(aa) A strict limitation of the amount of the German payment obligations in the framework of the application of the provisions legislating on revised increased capital calls made in accordance with Article 9 (2) and (3) in conjunction with Article 25 (2) TESM cannot at any rate be inferred from the wording of Article 25 (2) TESM; therefore an interpretation cannot be ruled out which considers Article 8 (5) sentence 1 TESM inapplicable to this case, so that the amount of EUR 190 024 800 000 that is stipulated in the Treaty would not completely determine Germany's overall commitment in the framework of the European Stability Mechanism. In this context, a justification appears conceivable which uses the argument that even higher payments would not breach this ceiling because claims for compensation against the European Stability Mechanism would arise to the Member making advance payments, and that thus, a sufficient equivalent amount would be available (see Article 25 (3) TESM, *Bundestag* printed paper 17/9045, p. 33). As the revised increased capital calls have been designed for unexpected emergency situations to make it possible to remedy, even at very short notice, a capital shortfall which impairs the European Stability Mechanism's capability of working, teleological considerations could also result in a restrictive interpretation of Article 8 (5) sentence 1 TESM. It could be reasoned, for instance, that if a Member were allowed to postpone the payment that had been considered necessary until a capital increase in accordance with Article 10 TESM became effective arguing that it had already completely paid in its shares of the authorised capital stock, this would make it more difficult to reach the objective pursued by Article 25 (2) TESM, namely to guarantee the European Stability Mechanism's ability to act by securing its optimum creditworthiness in all circumstances and at any time. 148

(bb) If the German *Bundestag'*s overall budgetary responsibility, which is protected by Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, requires that the Federal Republic of Germany's liability in the framework of the European Stability Mechanism cannot be increased beyond EUR 190 024 800 000 without the consent of the *Bundestag*, a ratification of the Treaty establishing the European Stability Mechanism is, in the light of the foregoing, only admissible if the Federal Republic of Germany ensures that Article 8 (5) sentence 1 TESM, subject to decisions taken in accordance with Article 10 (1) and Article 8 (2) sentence 4 TESM, limits the amount of all payment obligations arising from this Treaty to the amount indicated in Annex II to the Treaty, and that provisions of this Treaty, in particular Article 9 (2) and (3) sentence 1 in conjunction with Article 25 (2) sentence 1 TESM, may only be interpreted 149

or applied in such a way that no higher payment obligations are established for the Federal Republic of Germany. The Federal Republic of Germany must clearly express that it cannot be bound by the Treaty establishing the European Stability Mechanism in its entirety if the reservation made by it should prove to be ineffective.

(2) On summary review, it can be assumed that the provisions of Article 32 (5), Article 34 and Article 35 (1) TESM do not violate the core of the right to vote under Article 38 (1), Article 20 (1) and (2) of the Basic Law, which is protected by Article 79 (3) of the Basic Law, because they admit of an interpretation which makes sufficient parliamentary monitoring of the European Stability Mechanism by the German *Bundestag* possible ((a)). However, in view of conceivable other interpretations ((b)) it is required here as well to ensure under international law an interpretation that is compatible with the Basic Law ((c)). 150

(a) Under Article 32 (5) TESM, all official papers and documents of the European Stability mechanism are inviolable; they can therefore at any rate not be reclaimed or inspected without or against the will of the European Stability Mechanism. Article 34 TESM subjects the members of the bodies of the European Stability Mechanism and its staff members to a duty of professional secrecy, while Article 35 (1) TESM provides for their immunity from legal proceedings with respect to acts performed by them in their official capacity and inviolability in respect of their official papers and documents. According to their wording, the obligations, privileges and immunities laid down in Article 32 (5), Article 34 and Article 35 (1) TESM apply comprehensively. 151

The Treaty does not provide for exceptions in favour of the national parliaments. A special provision regarding the information of national parliaments and supreme audit institutions on the European Stability Mechanism's use of funds and its submission and auditing of accounts can only be found in Article 30 (5) TESM. In contrast, the national parliaments are not explicitly mentioned in Article 32 (5), Article 34 and Article 35 (1) TESM. This, however, should not preclude their comprehensive information. If in one of its Member States, decisions of the European Stability Mechanism require to be dealt with not only at government level, to which the necessary information is always available, but also to be discussed and approved in parliamentary bodies, it is absolutely necessary for the latter to be informed as well. 152

The meaning and purpose of Article 32 (5), Article 34 and Article 35 (1) TESM can also be assumed to prove that the fact that the national parliaments are mentioned in Article 30 (5) TESM cannot be assumed to justify the conclusion e contrario that their information is precluded in other cases. A good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorised third parties, for instance to actors on the capital market, but not to the entities responsible for the European Stability Mechanism themselves. As holders of the budget authority, which must bear political responsibility for the commitments based on the Treaty establishing the European Stability Mechanism vis-à-vis their citizens also during further treaty implementation (see BVerfGE 104, 151 <209>; 123, 267 153

<434-435>), the parliaments of the Member States, including the German *Bundestag*, are not among the third parties to be excluded from the flow of information. Moreover, it is significant that a restrictive interpretation of the provisions in question about obligations, privileges and immunities which makes the effective and comprehensive information of the national parliaments possible is also suggested by the coherence with European Union law, which is mandatory for the European Stability Mechanism (see *Bundestag* printed papers 17/9045, p. 29; 17/9047, p. 4; Rathke, *Die Öffentliche Verwaltung* – DÖV 2011 p. 753 <759-760>; Kube, *Wertpapier-Mitteilungen* 2012 p. 245 <246 ff.>; Calliess, NVwZ 2012, p. 1 <1-2>). Accordingly, not only the constitutional identity of the Member States is to be respected (see Article 4 (2) sentence 1 TFEU), which is of importance here with a view to the German *Bundestag*'s overall budgetary responsibility. The position of the national parliaments in the institutional structure of the European Union has been strengthened time and again in recent years to use their reservoir of legitimation to benefit European processes (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal no. 98 with further references). In the present context, this is all the more important, and the Contracting Parties must have been aware of this, as, due to the form chosen for the treaty – that of an international treaty complementing the integration programme of the European Union (see also Lorz/Sauer, DÖV 2012, p. 573 <575>: "*völkerrechtliches Ersatzunionsrecht*" (international law substituting European Union law) – no monitoring by the European Parliament is possible (see BVerfGE 123, 267 <353 ff.>).

(b) However, this is only one possible interpretation of Article 32 (5), Article 34 and Article 35 (1) TESM, albeit one that stands to reason, and it by no way needs to correspond to the view taken by the European Stability Mechanism and by other Members; this particularly applies because the situation under constitutional law as regards the parliament's rights of participation and its rights to be informed is different in the Member States, and because due to different legal and factual circumstances, for instance with regard to precautions concerning parliamentary secrecy, the assessment of the consequences of disclosing to the parliaments also information that is to be kept away from the financial markets may be different. 154

(c) If the German *Bundestag*'s overall budgetary responsibility, which is protected by Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, requires that the German *Bundestag* is able to receive the information which it needs to assess the fundamental bases and consequences of its decisions (see B.III.1.a)bb)(5)), a ratification of the Treaty establishing the European Stability Mechanism is only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, *Bundestag* and *Bundesrat* will receive the information which they need to be able to develop an informed opinion. The Federal Republic of Germany must clearly express that it cannot be bound by the Treaty establishing the European Stability Mechanism in its entirety if the reservation made by it should prove to be ineffective. 155

(d) Article 32 (5), Article 34 and Article 35 (1) TESM are thus to be interpreted in such a way that they do not stand in the way of the information of the German *Bundestag*, with the consequence that a violation of the German *Bundestag*'s right under Article 23 (2) sentence 2 of the Basic Law, which can only be challenged in *Organstreit* proceedings, to be informed comprehensively and at the earliest possible date (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal no. 107) is ruled out from the outset. 156

bb) Admittedly, with a view to its potentially far-reaching consequences, the suspension of the Members' voting rights in accordance with Article 4 (8) TESM appears to be not unproblematic under the aspect of overall budgetary responsibility (1). However, with regard to its function and to the conditions of its application, the provision legislating on the suspension of voting rights differs from other provisions with potentially far-reaching budgetary consequences in a manner which admits of regarding it as constitutional (2). 157

(1) Under Article 4 (8) TESM, all voting rights of an ESM Member are suspended if it fails to fully meet its obligations to make payment that it has vis-à-vis the European Stability Mechanism. Until payment of all requested capital shares has been made, the Member concerned *ipso iure* loses all voting rights in all collegial bodies of the European Stability Mechanism; consequently, for so long as the default continues, the Member can no longer influence the decisions of the Board of Governors and of the Board of Directors, even if they bear no relation to the payment obligation at issue. Under Article 4 (8) sentence 2 TESM, the voting thresholds that have been agreed under the Treaty, which relate to the quorum of the bodies (Article 4 (2) sentence 2 TESM) and to the majorities required in the respective case (Article 4 (4) to (6) TESM), are recalculated accordingly for so long as the voting rights of one or several Members are suspended. Hence, irrespective of the number of voting rights suspended, the suspension of voting rights will under no circumstances result in the lack of a quorum or in the impossibility of reaching certain majorities in the bodies. 158

(a) Article 4 (8) TESM covers all payment obligations of the Members in relation to paid-in shares or to capital calls under Articles 8, 9 and 10 TESM, or in relation to the reimbursement of financial assistance granted. What is problematic with a view to the *Bundestag*'s budgetary responsibility is in particular the issue of new shares on terms other than at par in accordance with Article 8 (2) sentence 3 and sentence 4 TESM, as well as capital calls made in accordance with Article 9 TESM (if necessary in conjunction with Article 25 (2) TESM). 159

As the suspension of voting rights leads to the voting thresholds being recalculated (Article 4 (8) sentence 2 TESM), all decisions of the European Stability Mechanism – with the exception of decisions regarding changes in the authorised capital stock (see Article 10 (1) sentences 2 and 3 TESM) – including the decisions on the granting of stability support in individual cases and on its terms and conditions (Articles 13 ff. TESM) and on a review of the list of financial assistance instruments (Article 19 160

TESM) can be taken without the participation of the Members whose voting rights have been suspended in accordance with Article 4 (8) sentence 1 TESM.

(b) The Treaty establishing the European Stability Mechanism does not provide for a legal remedy that suspends the effect of the suspension of voting rights in accordance with Article 4 (8) sentence 1 TESM. To the extent that an unilateral objection made against the suspension of voting rights would be deemed a “dispute arising between an ESM Member and the ESM” it would be decided on – again, however, with the votes of the Member affected being suspended (Article 37 (2) sentence 2 TESM) – by the Board of Governors by qualified majority; it would be possible to contest the decision of the Board of Governors before the Court of Justice of the European Union (Article 37 (3) TESM). The wording and the structure of the Treaty suggest the assumption that the suspension of voting rights continues during the entire duration of the proceedings. 161

(c) If voting rights of ESM Members are suspended in accordance with Article 4 (8) sentence 1 TESM, their respective representatives in the Board of Governors (Article 5 (1) TESM) and in the Board of Directors (Article 6 (1) TESM) are excluded from voting. Consequently, the German *Bundestag*’s participation in the decisions of the German representatives in the bodies of the European Stability Mechanism, which is provided for at national level, would fail. This would mean that the decisions taken by the European Stability Mechanism in this period would not be legitimised and monitored by the German *Bundestag*, regardless of which voting rules are provided for by the Treaty with regard to the decisions to be made in the specific situation. This would also concern decisions which affect the German *Bundestag*’s overall budgetary responsibility and which therefore in principle require the participation of the German *Bundestag* (see BVerfGE 129, 124 <179 ff.>), such as decisions on the issue of shares on terms other than at par (Article 8 (2) sentence 4 TESM), on the granting of stability support including the detailing of the conditionality attached to it in the Memorandum of Understanding under Article 13 (3) TESM and on the choice of the instruments and the detailing of the financial terms and conditions in accordance with Articles 12 to 18 TESM, and on changes to the list of the financial assistance instruments which the European Stability Mechanism can use (Article 19 TESM). 162

(2) Nevertheless, Article 4 (8) TESM does not infringe Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. 163

(a) The German *Bundestag* must include the Federal Republic of Germany’s share in the initial capital, which is set out in Article 8 (2) sentence 2 TESM, in the budget; it must ensure to the extent necessary that in the event of calls made in accordance with Article 9 TESM, if necessary in conjunction with Article 25 (2) TESM, it will be possible at any time to completely pay in Germany’s further shares in the authorised capital stock in accordance with Article 8 (1) TESM in a timely manner (see Article 110 (1) of the Basic Law, § 22 of the Law on Budgetary Principles (*Haushaltsgrundsätzegesetz* – HGrG), § 16 of the Federal Budget Code (*Bundeshaushaltsordnung* – 164

BHO)). Thus, a suspension of the German voting rights can virtually be ruled out.

(b) This also applies to cases in which different opinions regarding the justification of a capital call or its amount exist. There can, for instance, be different opinions on whether Germany made complete payment of its share in the authorised capital stock, whether the constitutive elements of a capital call made in accordance with Article 9 (2) and (3) (if necessary in conjunction with Article 25 (2) TESM) exist, whether in this case, the German share has been correctly determined, or whether capital must be returned if the situation provided for under Article 25 (3) TESM arises. In such cases, the Federal Republic of Germany must meet the capital call to prevent the suspension of its voting rights. To assert its legal view, it must rely on the procedure provided for under Article 37 (2) and (3) TESM; if necessary, it can – without prejudice to Article 8 (4) TESM, which recognisably is not intended to cover such circumstances – make payment subject to the proviso of revocation, make use of possibilities to offset payments, or request securities. 165

(c) Also otherwise it must be ensured under all circumstances that the context of legitimation between parliament and the European Stability Mechanism is not interrupted. If necessary, the Federal Government and the *Bundestag* have to make arrangements in a timely manner to avoid a suspension of the voting rights. 166

cc) According to the standards indicated above (see B.III.1.a)cc)), the legislature's assessment that the payment obligation for shares in the European Stability Mechanism of a total nominal value of EUR 190 024 800 000, which is set out in § 1 (1) of the ESM Financing Act (*ESM-Finanzierungsgesetz* – ESMFinG) and referred to as a "guarantee authorisation" in its paragraph 2, does not lead to a complete failure of budget autonomy is to be accepted by the Federal Constitutional Court. This also applies if the German participation in the European Financial Stability Facility, bilateral assistance in favour of Greece and risks resulting from the participation in the European System of Central Banks and in the International Monetary Fund are included in the calculation of Germany's overall commitment undertaken with regard to the stabilisation of the European monetary union. In the oral hearing, the *Bundestag* and the Federal Government stated in detail that the risks involved with making available the German shares in the European Stability Mechanism were manageable, while without the granting of financial facilities by the European Stability Mechanism the entire economic and social system was under the threat of unforeseeable, serious consequences. Even though these assumptions are the subject of great controversy among economic experts, they are at any rate not evidently erroneous. Therefore the Federal Constitutional Court may not replace the legislature's assessment by its own. 167

dd) Finally, on summary review, no threat of impairing the overall budgetary responsibility results from the possibility of an issue of future shares on terms other than at par pursuant to Article 8 (2) sentence 4 TESM ((1)), from capital calls made in accordance with Article 9 (2) and (3) TESM ((2)), from a possible interplay of the European Stability Mechanism and the European Central Bank ((3)) and from the lack of an ex- 168

press right of resignation or termination ((4)).

(1) The possibility of issuing capital stock on terms other than at par (Article 8 (2) sentence 4 TESM) does not impair the overall budgetary responsibility. Under Article 8 (2) sentence 4, the Board of Governors decides on a change to the terms of issue. Under Article 5 (6) point (b) TESM, the decision is to be taken by mutual agreement. A decision without the participation of the German representative is ruled out also in the event of a delegation of the authorisation to decide to the Board of Directors (Article 5 (6) point (m) in conjunction with Article 6 (5) TESM). In this respect, the *Bundestag*'s overall budgetary responsibility can therefore be safeguarded through its participation in the decision to be taken by the respective German representative in the bodies of the European Stability Mechanism; consequently, the overall budgetary responsibility is not impaired by the Treaty. 169

(2) Furthermore, no impairment of the overall budgetary responsibility results from the authorisations to make capital calls in accordance with Article 9 (2) and (3) TESM. Admittedly, calls made in accordance with Article 9 (2) TESM are decided on by the Board of Directors by simple majority, and calls made in accordance with Article 9 (3) TESM are decided on by the Managing Director, so that the German representatives in the bodies of the European Stability Mechanism have no blocking minority in this respect. However, the appraisal of these instruments against the standard of constitutional law must take into account that they are not only based on the abstract approval by the *Bundestag* of the German overall involvement set out in the Treaty establishing the European Stability Mechanism (Article 8 (1), Annexes I and II) and in § 1 (1) and (2) ESMFinG, but that every single stability support measure taken in accordance with Article 13 (2) TESM, as well as the signing of the respective Memorandum of Understanding in accordance with Article 13 (4) TESM, require a decision by mutual agreement of the Board of Governors and can be, and actually are, made contingent on the approval by the German *Bundestag*. As the *Bundestag* can exercise the constitutionally required influence through its approval of stability support and can participate in the decision on the amount, on the terms and conditions and on the duration of stability support in favour of Members seeking help, the *Bundestag* itself lays the most important foundation of possible capital calls made in accordance with Article 9 (2) TESM. 170

Admittedly, there are no comparable possibilities for the *Bundestag* of exerting influence with regard to possible losses resulting from the activities of the European Stability Mechanism. It can, however, influence the activities of the European Stability Mechanism via the guidelines for borrowing operations (Article 21 (2) TESM) and the investment policy (Article 22 (1) TESM). Moreover, according to the Federal Government's assessment, which has not been opposed by the applicants in a substantiated manner, such losses are not to be expected against the background of the experience made with other international financial institutions. 171

(3) Contrary to the allegations made by the first and second applicants, the objection 172

that the European Stability Mechanism can become the vehicle of unconstitutional state financing by the European Central Bank cannot be raised against the Treaty establishing the European Stability Mechanism. The ban on monetary financing as an important element for safeguarding the constitutional requirements of the precept of democracy under European Union law (see above B.III.1.a)dd)) is not affected by the Treaty establishing the European Stability Mechanism. In the applicable primary legislation, the ban on monetary financing is expressed in Article 123 TFEU. It contains the prohibition of overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States, and the ban on purchasing debt instruments directly from them by the European Central Bank or national central banks. It can be left open whether the European Stability Mechanism's taking up of loans with the European Central Bank is already precluded by Article 21 (1) TESM, which merely provides for borrowing "on the capital markets". As an internal agreement between European Union Member States, the Treaty establishing the European Stability Mechanism must at any rate be interpreted in conformity with European Union law (see Court of Justice of the European Communities, Case C-235/87, *Matteucci*, ECR 1988, p. 5589, marginal no. 19; Kube, WM 2012, p. 245 <246 ff.>; *Bundestag* printed papers 17/9045, p. 29; 17/9047, p. 4; on the reference of the TESM to European Union law see Rathke, DÖV 2011, p. 753 <759-260>; Calliess, NVwZ 2012, p. 1 <1-2>). As borrowing by the European Stability Mechanism from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with European Union law, the Treaty can only be taken to mean that it does not permit such borrowing operations.

As a financial institution belonging to the public sector within the meaning of Article 3 of Council Regulation (EC) No 3603/93 of 13 December 1993 (OJ L 332 of 31 December 1993, p. 1), the European Stability Mechanism is one of the institutions specified in Article 123 (1) TFEU to which no loans may be granted. Due to its objectives, it is not covered by the exemption from the prohibition of monetary financing set out in Article 123 (2) TFEU. Pursuant to this provision, Article 123 (1) TFEU does not apply to publicly owned credit institutions. However, Article 123 (2) TFEU does not apply to institutions whose funds directly benefit European Union Member States because this would circumvent the prohibition set out in Article 123 (1) TFEU. This would be the case with the European Stability Mechanism. Under Article 3 sentence 1 TESM, the purpose of the European Stability Mechanism is to provide stability support under strict conditionality to the benefit of ESM Members. It uses the funds at its disposal for direct financial stabilisation of its members, which the European Central Bank is prevented from doing by Article 123 (1) TFEU. Accordingly, in its opinion of 17 March 2011 (CON/2011/24, OJ C 140 of 11 May 2011, p. 8, observation 9), the European Central Bank assumes that Article 123 TFEU would not allow the European Stability Mechanism to become a counterparty of the Eurosystem under Article 18 of the 173

Statute of the ESCB.

A depositing of government bonds by the European Stability Mechanism with the European Central Bank as a security for loans would also infringe the ban on the direct acquisition of debt instruments of public entities. Here, it can remain open whether this would constitute a direct acquisition of debt instruments of state issuers on the primary market or whether after their intermediate acquisition by the European Stability Mechanism, it would be tantamount to an acquisition on the secondary market. For an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is prohibited as well, as it would circumvent the prohibition of monetary financing (see also Recital 7 of Council Regulation (EC) No 3603/93 of 13 December 1993 (OJ L 332 of 31 December 1993, p. 1)). This is taken account of by the Treaty establishing the European Stability Mechanism, whose Recital 4 calls for strict observance of the European Union framework, the integrated macroeconomic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union. Article 123 TFEU is one of these rules. 174

(4) Finally, an impairment of the German *Bundestag*'s overall budgetary responsibility also does not result from the circumstance that the Treaty establishing the European Stability Mechanism does not provide for express rights of resignation or termination. With a view to the binding limitation of the burdens on the budget to EUR 190 024 800 000, which is to be ensured by a reservation to this effect, the safeguarding of the *Bundestag*'s overall budgetary responsibility does not require providing a special right of resignation or termination in the Treaty. The limitation of liability sufficiently ensures that the entry into force of the Treaty alone does not establish an automatic and irreversible procedure regarding payment obligations or commitments to accept liability. Instead, every new payment obligation or commitment to accept liability requires a new mandatory decision by the German *Bundestag*. In other respects, the general provisions apply in this context. 175

c) On summary review, the provisions on the integration of the German *Bundestag* in the decision processes of the European Stability Mechanism, which follow from the Act on the Treaty Establishing the European Stability Mechanism and the ESM Financing Act, essentially satisfy the requirements of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, for the structuring of the participation rights and possibilities of exerting influence of the German *Bundestag* to ensure democratic governance of the European Stability Mechanism and to ensure its overall budgetary responsibility (aa). However, in the principal proceedings closer consideration must be given to the issue of shares of the capital stock of the European Stability Mechanism on terms other than at par (Article 8 (2) sentence 4 TESM) and the budgetary guarantee that Article 4 (8) TESM will not be applied to the Federal Republic of Germany. In this connection, however, a temporary injunction is not necessary (bb). To the extent that the Act of assent to the Treaty establishing the Euro- 176

pean Stability Mechanism and the ESM Financing Act on a provisional assessment do not fully guarantee a constitutional functional allocation of competencies between the bodies of the *Bundestag*, it is questionable whether this violates the core of the right to vote protected by Article 38 (1) sentence 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law; at all events, here too there is no need for a temporary injunction (cc).

aa) The requirements of domestic safeguarding of the principle of democracy are essentially satisfied, both with regard to the consultation rights of the *Bundestag* ((1)) and with regard to its rights of information ((2)) and the personal legitimation of the German representatives in the bodies of the European Stability Mechanism ((3)). 177

(1) The accompanying legislation has the function of modelling and putting into concrete terms in national law the constitutionally required rights of the legislative bodies to participate in the work of the European Stability Mechanism (see BVerfGE 123, 267 <433>). It must ensure that the *Bundestag* – mediated through the Federal Government – has a determining influence on the actions of the European Stability Mechanism (see BVerfGE 123, 267 <356, 433 ff.>) and in this way is in a position to exercise its overall budgetary responsibility and the responsibility for integration (see BVerfGE 129, 124 <177 ff., 186>). 178

On summary review, it is not apparent that the legislature – except in the case of Article 8 (2) sentence 4 TESM (on this, see B.III.2.b)aa)(1)(a)(bb) and B.III.2.c)bb)(1)) – omitted to tie decisions of the European Stability Mechanism which have consequences in practice and are thus essential to the exercise of the overall budgetary responsibility to a participation of the *Bundestag*. The constitutionally required participation of the German *Bundestag* is in principle sufficiently provided for in the Act on the Treaty establishing the European Stability Mechanism and in the ESM Financing Act. For the decisions of the European Stability Mechanism which play a role for the overall budgetary responsibility, the legislature has provided for a connection to parliament by laying down in Article 2 of the Act of assent to the ESM Treaty, in § 4 (2) of the ESM Financing Act and in § 5 (2) of the ESM Financing Act that the German members of the Board of Governors and Board of Directors must attend the meetings of the bodies of the European Stability Mechanism and must implement the decisions of the German *Bundestag* in their voting in the bodies. The fact that some of the decisions to be expected are subject to the vote of the plenary session (see § 4 (1) ESMFinG) and others merely to that of the budget committee (see § 5 (2) ESMFinG) does not affect the basic question of the participation of the German *Bundestag*. 179

The further development of the instruments provided for in the ESM Treaty (see Article 19 TESM) does not make it possible at this stage to determine in detail and legislate for all cases in which a participation of parliament will be advisable. However, the participation rights must keep pace with the development of the treaty – whether by statutory amendment, whether by interpretation – in order that the effective exercise of the parliamentary budgetary responsibility and responsibility for integration is guar- 180

anteed in every eventuality. Against this background, the legislature has made a change of the financial assistance instruments under Article 19 TESM contingent on the requirement of authorisation by Federal legislation (Article 2 (2) of the Act of Assent to the ESM Treaty). If it appears in the enforcement of the ESM Treaty that further essential participation requirements are not expressly provided for, the provision of § 4 (1) ESMFinG, which names only three areas of decision of the European Stability Mechanism by way of example ("in particular") in which the plenary session is to decide, offers sufficient scope for constitutional treatment. The same applies to the catch-all provision § 5 (3) ESMFinG, which obliges the Federal Government to involve the *Bundestag* budget committee and to take account of the budget committee's opinion in all cases not provided for elsewhere in which not the overall budgetary responsibility, but merely the *Bundestag*'s budget responsibility, is affected.

(2) On summary review, the rights to information of the German *Bundestag* contained in the ESM Financing Act satisfy the requirements of Article 23 (2) sentence 2 of the Basic Law – which is the standard of review in *Organstreit* proceedings – (on the possibility of informing the national parliaments, which in particular is not excluded by Article 34 TESM, see above B.III.1.a)bb)(5)). 181

The work of the European Stability Mechanism is a matter concerning the European Union within the meaning of Article 23 (2) of the Basic Law, and just like the establishment and structuring of the Mechanism it gives rise to rights of participation and information of the *Bundestag* (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal nos. 90 ff.). § 7 (1) to (3) ESMFinG reproduce the determining constitutional requirements imposed by Article 23 (2) sentence 2 of the Basic Law on the duties of information of the Federal Government and thus guarantee the parliamentary right of information. In addition, § 7 (10) ESMFinG refers to the more extensive rights under the Act on Cooperation between the Federal Government and the German *Bundestag* in Matters Concerning the European Union. 182

(3) Under the aspect of personal democratic legitimation too, there are no grounds for criticising the structuring of Germany's representation in the European Stability Mechanism. It is part of the inviolable content of the principle of democracy under Article 79 (3) of the Basic Law that the exercise of state duties and the exercise of state powers can be traced back to the citizens of the state and the decisions are in principle accounted for to them. In this connection it is crucial that the *Bundestag* retains substantial influence on the decisions of the German representatives in the bodies of the European Stability Mechanism which affect the *Bundestag*'s budgetary responsibility (see BVerfGE 89, 155 <182>; 107, 59 <94>). This requires the representatives to be bound by the decisions of the *Bundestag*. The Basic Law does not lay down in what way the legislature here ensures that the substantive decisions of the German *Bundestag* are correctly implemented by the respective representatives in the bodies. Nevertheless, in this connection parliamentary responsibility and dependence on instructions of the German representatives in the bodies of the European Stability Mechanism are a decisive precaution. Constitutionally it must at least be required that 183

the Federal Minister of Finance as a member of the Board of Governors and the German member of the Board of Directors are accountable to the German *Bundestag* and that in this way it is made possible for the German *Bundestag*'s budgetary responsibility and responsibility for integration to be effectively exercised.

The ESM Treaty does not prevent this. It proceeds on the basis that the members of its bodies are responsible to their parliaments – in particular on the basis of the constitutionally required interpretation of the provisions on professional secrecy (Article 34 TESM) and personal immunity (Article 35 TESM), which must be ensured by international law. This follows from the fact that the ministers of finance of the ESM members are represented on the Board of Governors (Article 5 (1) sentence 3 TESM), and from their authority – subject to no conditions – to appoint a Director and an alternate Director on the Board of Directors and to revoke the appointments (Article 6 (1) sentence 2, Article 43 TESM). The provision makes it possible to enforce a commitment to instructions from the national government and in this way to ensure the influence of parliament. 184

The ESM Financing Act clearly assumes that the German representatives are bound by the decisions of the *Bundestag* and are accountable to it. The German member of the Board of Governors is the Federal Minister of Finance (Article 5 (1) sentence 3 TESM), who is not only indirectly dependent on the trust of the *Bundestag* (Article 64 (1), Article 67 (1) of the Basic Law), but also accountable to it (Article 114 of the Basic Law). In the oral hearing, the Federal Government also stated that a Permanent Secretary will be entrusted with the function of the German member of the Board of Directors. Finally, the ESM Financing Act clearly assumes, in providing that the German representatives must reject decisions of the European Stability Mechanism with budgetary relevance if the German *Bundestag* has made no resolution of consent (§ 4 (2) and (3), § 5 (2) sentence 4 ESMFinG), that they are bound by parliamentary requirements. 185

bb) With regard to the issue of shares of the capital stock of the European Stability Mechanism on terms other than at par under Article 8 (2) sentence 4 TESM (1) and the budgetary guarantee that Article 4 (8) TESM will not be applied to the Federal Republic of Germany (2), this must be considered in more depth in the principal proceedings. 186

(1) The issue of shares of the capital stock of the European Stability Mechanism on terms other than at par under Article 8 (2) sentence 4 TESM is capable of being a decisive factor for the burdening of the Federal budget and its effects are not substantially different from those of the increase of capital stock laid down in Article 2 (1) of the Act of assent to the ESM Treaty. The legislature has linked this to the requirements of authorisation under Federal law because it affects the overall budgetary responsibility of the German *Bundestag* (see also BVerfGE 129, 124 <177-178>). But there is no express provision with regard to the elements of Article 8 (2) sentence 4 TESM and the corresponding competence of the Board of Governors (Article 5 (6) 187

point (b) TESM).

But since, in view of its non-definitive nature (“in particular”), as set out above (see B.III.2.c)aa)(1)), § 4 (1) ESMFinG may be interpreted in conformity with the constitution to the effect that it may also be applied to decisions under Article 5 (6) point (b) TESM, then – independent of the question as to how far an express provision would be desirable here – at all events there is no need for a temporary injunction to be issued. 188

(2) In § 1 (1) ESMFinG, the Supplementary Budget Act of 14 June 2012 (BTDrucks 17/9650, 17/9651) and § 1 (2) sentence 1 ESMFinG, the legislature has made funds available in the amount of 21.71712 billion euros and authorised the Federal Ministry of Finance to give guarantees for the callable capital in the amount of 168.30768 billion euros. Whether this guarantees with sufficient certainty that the Federal Republic of Germany can make all capital calls, including short-term ones (Article 9 (3 TESM) and exclude a loss of voting rights must be reserved for the decision in the principal proceedings. 189

cc) The Federal Constitutional Court has not yet decided in what circumstances a complainant may challenge the allocation of competencies between the plenary session, the budget committee and other subsidiary bodies of the German *Bundestag* in exercising its rights of participation in matters concerning the European Union (see BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, NVwZ 2012, p. 495 <498> with further references) as a violation of the core of the right to vote, protected by Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. The clarification of this question is reserved for the principal proceedings, as is the review of the submission that *Bundestag* members’ rights have been violated, which was made in the *Organstreit* proceedings but not included in the application for the issue of a temporary injunction. For a temporary injunction may not be issued, firstly, because the plenary session of the German *Bundestag* is capable of countering claims that the allocation of rights of participation to the budget committee is unconstitutional by exercising its right of revocation under § 5 (5) ESMFinG. The German *Bundestag*’s right to decide on the budget and its overall budgetary responsibility are in principle exercised by negotiation and passing resolutions in the plenary session (see BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, loc. cit., p. 495 <498> with further references). To the extent that supranational agreements are entered into which by reason of their scale may be of structural significance for parliament’s right to decide on the budget, the German *Bundestag*, in the plenary session, must decide on every large-scale measure resulting in expenditure and on fundamental questions of the manner in which the funds provided are dealt with. Consequently, the budget committee may act independently in place of the plenary session only in the case of decisions which either are subordinate or have already been determined sufficiently clearly in advance by the plenary session. 190

In allocating the rights of participation to the plenary session, the budget committee 191

and the special committee, the legislature oriented itself towards these criteria.

(1) In the case of matters which relate to the overall budgetary responsibility, it has either already provided for them in the statute itself (Article 2 of the Act of assent to the Treaty establishing the European Stability Mechanism) or allocated them to the plenary session (§ 4 ESMFinG). Cases where § 4 (1) sentence 1 ESMFinG applies are illustrated by concrete examples in § 4 (1) sentence 2 no. 1 to no. 3 ESMFinG. In this, the concept of overall budgetary responsibility is at the same time given sufficient contours for the present context. To the extent that it is only the budgetary responsibility which is affected, § 5 ESMFinG provides that the budget committee shall make the decision. It is true that the legislature allocated the decisions on granting and conditions of a stability support to the plenary session, but it left the decision on the modalities of implementation without substantial effects on the volume and risks of liability to the budget committee (§ 5 (2) sentence 1 no. 1 ESMFinG) and at the same time provided that in the case of an increase of the volume over that of the fundamental decision under Article 13 (2) TESM the plenary session is once more competent (Budget Committee printed paper 4410 of the 17th electoral period – *Haushaltsausschuss-Drucks 4410 der 17. Wahlperiode*, legislative rationale of § 5 ESMFinG). The weighting expressed in this corresponds to the provision of § 5 (2) sentence 1 no. 4 ESMFinG, which provides that the detailed terms and conditions for capital changes under Article 10 (2) TESM require only the consent of the budget committee, because the change of the capital stock under Article 10 (1) TESM is subject to the constitutional requirement of the specific enactment of a statute. There are no constitutional objections to this. 192

(2) In contrast, it is possible that in § 5 (2) sentence 1 no. 2 and no. 3 ESMFinG competencies are allocated to the budget committee which by reason of their scope should be exercised by the plenary session. 193

§ 5 (2) sentence 1 no. 2 ESMFinG relates to decisions of the Board of Governors on capital calls (Article 9 (1) TESM) and the acceptance or material change of the terms and conditions which apply under Article 9 (4) TESM. § 5 (2) sentence 1 no. 3 ESMFinG refers to the acceptance or material change of the guidelines on the modalities for implementing the individual financial assistance facilities under Articles 14 to 18 TESM, of the pricing guidelines under Article 20 (2) TESM, of the guidelines for borrowing operations under Article 21 (2) TESM, of the guidelines for investment policy under Article 22 (1) TESM, of the guidelines for dividend policy under Article 23 (3) TESM and of the rules for the establishment, administration and use of other funds under Article 24 (4) TESM. The decisions named must be assessed against the background that the ESM Treaty is a legal framework which contains a large number of possibilities of development and leaves room for putting matters into specific terms, whether by the by-laws, whether by guidelines or whether by terms and conditions. The interpretation of the abstract powers and their exercise, however, for example in the field of investment policy, will typically have effects on the overall budgetary responsibility which is to be exercised by the plenary session of the *Bundestag*. 194

Taking capital calls under Article 9 (1) TESM as an example, it can be shown that more detailed consideration is needed in this connection. Even if the calling of the capital stock already “granted” by the legislature will typically not (any longer) affect the overall budgetary responsibility itself, the situation appears to be different with regard to the terms and conditions set out in Article 9 (4) TESM. As is shown by a draft document submitted to the Court by the representative of the Federal Government, they will, for example, lay down authorisation proceedings which precede the relevant meetings. They are to lay down periods of time within which the members of the ESM bodies receive proposals for capital calls, and to lay down concrete deadlines for payment. In addition, the areas of application of the various types of capital call by the Board of Governors (Article 9 (1) TESM), the Board of Directors (Article 9 (2) TESM) and the Managing Director (Article 9 (3) TESM), which differ with regard to the nature of potential parliamentary involvement, are specified. Thus, for example, the draft document submitted provides that the capital calls under Article 9 (3) TESM, which according to the system of the provision are likely to be rare, are also intended to include accelerated payment of capital under Article 41 (2) “during the initial phase”. The decision on the terms and conditions under Article 9 (4) TESM may therefore restrict the subject or size of the powers of the bodies to make capital calls under Article 9 TESM or also extend them beyond the degree laid down in the foreseeable wording of the provisions. In view of the importance of these restrictions for the *Bundestag*, which as the holder of the right to decide on the budget needs to know in good time of planned capital calls and their amount, and in view of the risks for the voting rights under Article 4 (8) TESM, which are suspended if payment is not made in time, the supplementary abstract general provisions affect the overall budgetary responsibility of the German *Bundestag*. 195

d) On summary review, the Act of assent to the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union also does not violate Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. The content of the Treaty largely coincides with constitutional requirements already in existence and with primary-law duties under the Treaty on the Functioning of the European Union (aa). It grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German *Bundestag* (bb) and does not force the Federal Republic of Germany to lay down its economic policy permanently in a way that can no longer be reversed (cc). 196

aa) The aim of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, pursuant to its Article 1 and to the “fiscal compact” laid down in Title III, is the strengthening of the economic pillar of the economic and monetary union by fostering budgetary discipline. It coincides in part with the requirements of Article 109, 115 and 143d of the Basic Law as amended by the Act Amending the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) of 29 July 2009 (BGBl I p. 2248) ((1)), and in part with the provisions for the budget management of the Member States contained in the Treaty on the Functioning of the European Union, in particular 197

with the provisions laid down in Article 126 TFEU and its supplementary protocols (above all Protocol <no. 12> on the excessive deficit procedure and protocol <no. 13> on the convergence criteria) ((2)). This does not affect the overall budgetary responsibility of the German *Bundestag* ((3)).

(1) The obligations in international law under Article 3 TSCG, which in many places takes up concepts and contents from the secondary-law “Six Pack”, are essentially similar in structure to the provisions contained in Article 109, 109a, 115 and 143d of the Basic Law, whose aim is already taken from the European stability policy. The constitutional rules on indebtedness were reformed in the year 2009 because the provisions of the Basic Law which applied until that date were incapable of preventing the development of an excessive level of indebtedness (see also BVerfGE 119, 96 <141-142>) and the legislature believed that the approaches of the preventive and the corrective arm of the European Stability and Growth Pact (Regulations (EC) No 1466/97 and (EC) No 1467/97) would be more effective (see BTDrucks 16/12410, p. 1, 5-6, 10; see also Kube, in: Maunz/Dürig, *GG*, *Art. 109*, marginal nos. 24-25 <May 2011>; Pünder, in: Friauf/Höfling, *Berliner Kommentar zum Grundgesetz*, *Art. 115*, marginal nos. 17-18, 34; Gregor Kirchhof, in: v. Mangoldt/Klein/Starck, *GG*, vol. 3, 6th ed. 2010, *Art. 109*, marginal nos. 28-29; Siekmann, in: Sachs, *GG*, 6th ed. 2011, *Art. 109*, marginal no. 83; Christ, NVwZ 2009, p. 1333 <1337>; Scholl, DÖV 2010, p. 160 <164>). 198

(a) Article 3 (1) point (a) TSCG requires the submission of a budget which is at least balanced. Under Article 3 (1) point (b) TSCG, such a budget is deemed to have been achieved if the annual structural balance is at the country-specific medium-term objective to be laid down by the Member States themselves, as defined in the revised Stability and Growth Pact (see Article 2a (2) of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011), with a lower limit of a structural deficit of 0.5% of the gross domestic product. These deficit limits need not be achieved immediately. However, under Article 3 (1) point (b) sentence 2 and sentence 3 TSCG the Contracting Parties have a duty to ensure convergence towards their respective medium-term objectives within an individual time frame. The essential characteristics of this “adjustment path” follow from secondary law (Article 3 (2) point (a), Article 5 (1) subparagraphs 2 ff. of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011). In the case of a level of indebtedness of up to 60% of the gross domestic product, the balance is to be corrected by a target value of 0.5% p.a. of the gross domestic product. In the case of a higher level of indebtedness, the target value is over 0.5%. In the case of exceptional circumstances, the Treaty permits deviations from the medium-term objective or from the adjustment path towards it (Article 3 (1) point (c) TSCG). This refers to periods of severe economic downturn and other unusual events which are outside the control of the Contracting Party concerned (Article 3 (3) sentence 2 point (b) TSCG). 199

Significant deviations from the medium-term objective or the adjustment path towards it, under Article 3 (1) point (e) TSCG, automatically trigger a correction mecha- 200

nism. Whether there is a significant deviation is evaluated on the basis of an overall assessment; the medium-term objective or the adjustment path may be fallen short of by up to 0.5% of the gross domestic product (Article 6 (3) of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011). The correction mechanism is to be put in place at national level in an institutionalised form by the Contracting Parties (Article 3 (2) sentence 2 TSCG). The Contracting Parties are to put it in place on the basis of principles to be proposed by the European Commission.

(b) Under Article 109 (3) sentence 1 of the Basic Law too, the budget is in principle to be balanced without revenue from credits. The core demand of the European debt brake under Article 3 (1) point (a) TSCG corresponds to this. 201

(aa) Like Article 3 (1) point (b) TSCG, Article 109 (3) sentence 4 in conjunction with Article 115 (2) sentence 2 of the Basic Law also creates a legal fiction to achieve a balanced budget if this target only barely fails to be achieved. The path of adjustment provided for in Article 3 (1) point (b) sentence 2 and sentence 3 TSCG is reflected in Article 143d (1) sentence 5, sentence 6 and sentence 7 of the Basic Law. Under the requirements of the Basic Law too, the objective of a balanced budget need not be achieved immediately; instead, what is envisaged is the continuous reduction of the deficit within a concrete time frame. As under the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, it is sufficient if the legal fiction is finally achieved. Whether the Basic Law lays down indebtedness limits only for the Federal Government and the *Länder*, as the fourth applicants submit, whereas under European Union law local government and social security funds are also to be taken into consideration (see recital 23 of Directive 2011/85/EU of 8 November 2011, part of the Six Pack) need not be decided. This would not result in a change to the structural comparability of the provisions. A difference in the financial volume would have no different effect than under the existing deficit provisions of Article 126 TFEU. 202

(bb) Under Article 109 (3) sentence 2 in conjunction with Article 115 (2) sentence 3 of the Basic Law, in the case of a market development which deviates from normal conditions and in the case of natural disasters or unusual emergency situations which are beyond government control and which substantially harm the state's financial situation, it is permitted to deviate from the deficit requirements. Article 3 (1) point (c) in conjunction with (3) sentence 2 point (b) TSCG also names as a ground for deviation a serious economic downturn and an "unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government". On the level of international law, the last-named ground for deviation is described in abstract terms; the Basic Law names it specifically as natural disasters. 203

(cc) Article 109a sentence 1 no. 1 of the Basic Law in conjunction with the Stability Council Act (*Stabilitätsratsgesetz* (BGBl I 2009 p. 2702)), which was passed in this connection, provides that in order to avoid budget emergencies a Stability Council should be established to provide constant supervision of the budget management, 204

that is – as provided under Article 3 (2) sentence 2 TSCG – an institutionalised form of supervision of the substantive budget criteria. Under Article 115 (2) sentence 4 of the Basic Law in conjunction with the national implementing statute (*Ausführungsgesetz* (BGBl I 2009 p. 2704)) passed in this connection if the deficit limits are exceeded, reaching a particular threshold value automatically triggers the obligation to decrease the deficit in a manner appropriate to the economic situation, and in this respect is similar to the requirements of Article 3 (1) point (e) TSCG.

(2) Another aspect that is important to the constitutional assessment is the fact that the provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union repeat provisions of European Union law or put them into more concrete terms. 205

(a) Thus, for example, Article 4 sentence 1 TSCG obliges the Contracting States, where the reference value for the level of indebtedness of 60% of the gross domestic product (Article 126 (2) sentence 2 point (b), sentence 3 TFEU in conjunction with Article 1 of Protocol <no. 12> on the excessive deficit procedure) is exceeded, to reduce the ratio between the two by an average of one-twentieth per year as a benchmark. As is shown by the reference to Article 2 of Regulation (EC) No 1467/97 as amended by Regulation (EU) No 1177/2011, this is likely to result in the obligation to reduce the part exceeding a level of indebtedness of 60% of the gross domestic product by one-twentieth per year (this is also stated in BTDrucks 17/9046, p. 21). In effect, this puts into concrete terms Article 126 (2) sentence 2 point (b) TFEU, which is not specific in this connection but for the monitoring of which the Commission and the Council continue to have an obligation under the procedure laid down in Article 126 TFEU (Article 4 sentence 2 TSCG). 206

(b) The obligation to submit budgetary and economic partnership programmes subject to approval under Article 5 (1) TSCG is embedded in the deficit procedure, which is governed by primary law (Article 126 TFEU). Article 5 (1) TSCG alters its course only in a manner benefiting the Contracting Parties. They are no longer restricted to reacting to recommendations of the European Union bodies which are subject to sanctions, but can now themselves structure their budgets when submitting the budget programme. This idea is expressed not least in the recitals of the secondary legislation which is decisive in the present case, which without exception emphasises the necessity of greater national responsibility for compliance with rules jointly agreed on (see Regulation (EU) No 1175/2011, recital 8; Regulation (EU) No 1177/2011, recital 4 and Directive 2011/85/EU, recital 1). A direct “reach-through” of the bodies to national budget legislation is not provided for in Article 5 TSCG (see also Conseil constitutionnel, Décision n°2012-653 DC of 9 August 2012, cons. 32). 207

(c) Article 7 TSCG also fits into the procedure under Article 126 TFEU. Article 7 TSCG, which refers to the “deficit criterion” in the singular, relates only to the criterion named in Article 126 (2) sentence 2 point (a) TFEU of the government deficit (reference value 3%) and obliges Member States whose currency is the euro to support the 208

proposals or recommendations of the European Commission in a procedure under Article 126 TFEU (sentence 1). By Article 7 sentence 2 TSCG, the obligation does not apply if a qualified majority of the Member States whose currency is the euro votes against the proposed or recommended resolution in the Council. Article 7 TSCG does not alter the course of procedure laid down in Article 126 TFEU. However, it binds the political freedom to decide of the Contracting Parties in the Council and in this way strengthens both legally and effectively the influence of the European Commission in the deficit procedure. Whether the provision of Article 7 TSCG is compatible with European Union law need not be decided here; at all events, it does not entail an impairment of the budgetary sovereignty of the German *Bundestag*.

(3) The budget-specific provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union therefore in principle coincide with Article 109, 109a, 115, 143d of the Basic Law and with Article 126 TFEU, which has not only been approved several times by the Federal Constitutional Court (see BVerfGE 89, 155 <204-205>; 129, 124 <181-182>), but has also been expressly referred to by the constitution-amending legislature in Article 109 (2) of the Basic Law. In view of this broad equivalence between the “debt brake” of the Basic Law and the deficit provisions of the Treaty on the Functioning of the European Union, the constitutionality of which was not called into question in the constitutional complaints, the applicants have not shown any evidence that the substantive requirements of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union violate the core of the right to vote and the principle of democracy under Article 20 (1) and (2) of the Basic Law, which are protected by Article 79 (3) of the Basic Law. 209

bb) On summary review, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union grants bodies of the European Union no powers which affect the overall budgetary responsibility of the German *Bundestag*. 210

(1) On summary review, Article 3 (2) sentence 2 TSCG has no adverse effect on the overall budgetary responsibility of the German *Bundestag*. Under this provision, the Contracting Parties, in establishing the corrective mechanism, rely on common principles, to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be taken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the deficit and indebtedness criteria. Article 3 (2) sentence 3 TSCG, however, emphasises that this corrective mechanism must fully preserve the prerogatives of the national parliaments. Article 3 (2) sentence 2 TSCG can therefore only be understood to the effect that it is restricted to the institutional provisions and gives the European Commission no authority to impose specific substantive requirements for the structuring of the budgets (see also Conseil constitutionnel, Décision n°2012-653 DC of 9 August 2012, cons. 25). Thus a partial transfer of the budget responsibility to the European Commission is excluded from the outset (for a similar view, see also Commission communication of 20 June 2012, KOM <2012> 342 final, according to BTDrucks 17/10069 trans- 211

ferred to a number of *Bundestag* committees on 26 June 2012).

(2) Under Article 8 (1) TSCG, the Court of Justice of the European Union may be requested to deal with a violation of the obligations under Article 3 (2) TSCG. In this connection, the jurisdiction of the court is restricted from the outset to reviewing the incorporation of the deficit limits and the adjustment path and the corrective mechanism into the national legal system (Article 8 (1) sentence 2 TSCG). It thus extends only to the codification of these instruments, but not to their concrete application. In this way, Article 8 TSCG only procedurally safeguards, as set out, obligations under Article 3 (2) TSCG. 212

On summary review, there are no constitutional objections to the specific structuring of this procedural safeguard. Judicial review is modelled on the two-stage proceedings for failure to fulfil Treaty obligations of Article 259-260 TFEU. In the first stage of the proceedings, the Court of Justice may at first only establish a violation of Article 3 (2) TSCG. In the second stage of the proceedings, it is possible to impose a financial sanction, but this too does not result in a direct reach-through of the bodies of the European Union to the specific freedom of drafting of the national budget legislature. 213

cc) Finally, in ratifying the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union the Federal Republic of Germany is not entering into an irreversible commitment to a particular budget policy. 214

Under Article 3 (2) sentence 1 TSCG, the provisions under paragraph 1 (deficit limits, adjustment path and correction mechanism) are to take effect in the national law of the Contracting Parties through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes, at the latest one year after the entry into force of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Irrespective of whether Article 3 (2) sentence 1 TSCG actually prevents the constitution-amending legislature from later removing the existing “debt brake” under Article 109 (3), Article 109a, Article 115 (2) and Article 143d of the Basic Law, there is no question of the Federal Republic of Germany being irreversibly bound by these requirements if only because it is possible to leave the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. It is true that the Treaty does not provide for a right of withdrawal or termination for the Contracting Parties. Whether the Treaty is intended, notwithstanding the evaluation provision contained in Article 16 TSCG – this provides that on the basis of the experience obtained in the next five years, there shall be an attempt to incorporate it into European Union law – to permanently exclude this is not necessary to decide; the same applies to the question as to whether treaties which affect the core of the Contracting Parties’ economic and social constitutions do not, for reasons of democracy alone, already have an inherent right of termination under Article 56 (1) point (b) of the Vienna Convention on the Law of Treaties – VCLT (see Fulda, *Demokratie und pacta sunt servanda*, 2002, p. 209). It is recognised in customary international law that the with- 215

drawal by mutual agreement from a treaty is always possible, and a unilateral withdrawal is possible at least if there is a fundamental change of the circumstances which applied when the treaty was entered into (see Article 62 VCLT). In this connection it is of particular importance that the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union also presupposes membership of the European Union (recitals 1 and 5; Article 1 (1), (2) sentence 1, Article 15 sentence 1 TSCG). If a Member State left the European Union (see BVerfGE 123, 267 <350, 396>), the basis for the further participation in the mutual obligations of the Member States of the European Union would cease to exist as a result of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (see Article 1 TSCG). The continuing membership of the common currency is also a fundamental basis for the commitment of the Federal Republic of Germany to the requirements of Article 3 ff. TSCG (see Article 14 (5) TSCG) which would cease to apply if it left the monetary union (on this, see BVerfGE 89, 155 <205>).

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