Headnotes

to the order of the Second Senate of 17 September 2013

– 2 BvR 2436/10 –

– 2 BvE 6/08 –

1. **Art. 38 sec. 1 sentence 2 of the Basic Law (*Grundgesetz* – GG) safeguards communication between a member of Parliament and the voters that is free from governmental influence, as well as the member of Parliament's freedom from observation, supervision and oversight by the executive branch.**

2. **Observation of a member of Parliament by Offices for the Protection of the Constitution constitutes an interference with the independent mandate under Art. 38 sec. 1 sentence 2 GG, which may be justified in individual cases in order to protect the free democratic basic order. This interference is subject to strict proportionality requirements, and must have a statutory basis that meets the principles inherent to the (*translator's note: constitutional*) requirement of a statutory provision (*Gesetzesvorbehalt*).**

3. **§ 8 sec. 1 sentence 1 and § 3 sec. 1 no. 1 in conjunction with § 4 sec. 1 sentence 1 letter c of the Act on Cooperation between the Federation and the *Laender* (federal states) in Matters of Protection of the Constitution and on the Federal Office for the Protection of the Constitution (*Bundesverfassungsschutzgesetz* – BVerfSchG, Federal Law Gazette, *Bundesgesetzblatt* – BGBl I 1990 p. 2954 <2970>), introduced when that Act was adopted in 1990, constitute a statutory basis for the observation of members of the German *Bundestag* that comply with the requirement of a statutory provision, even though these provisions make no express reference to members of Parliament's rights under Art. 38 sec. 1 sentence 2 GG.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 2436/10 –

– 2 BvE 6/08 –

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint

of Mr Bodo Ramelow,

– authorised representatives: 1. Rechtsanwalt Dr. Peter Hauck-Scholz
Krummbogen 15, 35039 Marburg,

2. Prof. Dr. Dr. h.c. Hans-Peter Schneider
Drosselweg 4, 30559 Hannover –

against the judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 21 July 2010 – BVerwG 6 C 22.09 –

– 2 BvR 2436/10 – ,

II. on the application in *Organstreit* proceedings to find as follows:

1. Respondent 2 and its members are obliged to ensure that members of the German *Bundestag* can exercise their parliamentary mandate independently and unimpeded by measures of observation by the Federal Office for the Protection of the Constitution.

2. Respondents 1 and 2, by failing to instruct the Federal Office for the Protection of the Constitution to cease observing applicant 1, violated Article 46 section 1 and Article 38 section 1 sentence 2 of the Basic Law (*Grundgesetz*– GG) in conjunction with the principle of good-faith cooperation between constitutional organs (*Verfassungsorgantreue*), and thereby violated the constitutional rights of applicant 1 under Article 46 section 1 and Article 38 section 1 sentence 2 of the Basic Law.

3. Respondents 1 and 2, by failing to instruct the Federal Office for the Protection of the Constitution to cease observing applicant 1 and other *Bundestag* members who are members of applicant 2, violated the principle of proper functioning of the German *Bundestag* in conjunction with Article 46 section 1 and Article 38 section 1 sentence 2 of the Basic Law, and the principle of good-faith cooperation between constitutional organs as well as the financial principles of the Constitution under Articles 104a et seq. of the Basic Law, and thereby violated the constitutional rights of the German *Bundestag* under those provisions.

Applicants: 1. Bodo Ramelow,
Platz der Republik 1, 11011 Berlin,

2. The DIE LINKE (“The Left”) parliamentary group,
represented by its Chairman, Dr. Gregor Gysi,
Platz der Republik 1, 11011 Berlin

– authorised representatives: Rechtsanwälte Hauck-Scholz & Christ,
Krummbogen 15, 35039 Marburg –

Respondents: 1. The Federal Minister of the Interior,
Alt-Moabit 101 D, 10559 Berlin,

2. The Federal Government,
represented by Federal Chancellor Dr. Angela Merkel,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin

– authorised representatives: Rechtsanwalt Dr. Dieter Sellner,
Leipziger Platz 3, 10117 Berlin –

– 2 BvE 6/08 –

The Federal Constitutional Court – Second Senate –

with the participation of Justices

President Vosskuhle,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns,

Müller,

held on 17 September 2013:

1. **The proceedings are combined for joint decision.**

2. **The applications in the *Organstreit* proceedings are dismissed as inadmissible.**

3. **The judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 21 July 2010 – BVerwG 6 C 22.09 – violates the complainant's rights under Article 38 section 1 sentence 2 and Article 38 section 1 sentence 2 in conjunction with Article 28 section 1 of the Basic Law. It is reversed. The case is remanded to the Federal Administrative Court.**

4. **The Federal Republic of Germany shall reimburse the complainant for the necessary expenses of the constitutional complaint proceedings.**

Reasons:

A.

The proceedings in the *Organstreit* and the constitutional complaint concern the question of whether observation of members of Parliament by the Federal Office for the Protection of the Constitution is compatible with the Basic Law. 1

I.

The Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) – which is subordinate to respondent 1 – observes individual members of the German *Bundestag* who are members of the DIE LINKE parliamentary group. Of the 53 members of this parliamentary group, 27 were observed by the Federal Office for the Protection of the Constitution during the 16th Legislative Period (cf. *Bundestag* Document – *Bundestagsdrucksache*, BTDrucks – 16/14159, p. 5, and BT-Drucks 17/392, p. 3), including the complainant in the constitutional complaint proceedings, who at the same time is applicant 1 in the *Organstreit* proceedings. The complainant was a member of the Thuringia *Landtag* (state Parliament) from October 1999; from October 2005 until September 2009, he was a member of the German *Bundestag* and the DIE LINKE parliamentary group as well as the vice-chairman of that parliamentary group. He has been the chairman of the DIE LINKE parliamentary group in the Thuringia *Landtag* since autumn 2009. 2

In the *Organstreit* proceedings, he and the DIE LINKE parliamentary group challenged the refusal of the Federal Minister of the Interior and of the Federal Government to instruct the Federal Office for the Protection of the Constitution to cease its observation. In the constitutional complaint, the complainant challenges a judgment of the Federal Administrative Court of 21 July 2010 that approved the collection by 3

the Federal Office for the Protection of the Constitution of personal information about him from the time since becoming a member of the *Landtag* in October 1999.

Since 1986, the Federal Office for the Protection of the Constitution has kept a personal file on the complainant, in which information is collected that dates back to the 1980s. According to the regular courts, the information is derived from generally accessible sources, although the complainant doubts that this was done entirely without methods of secret information gathering. The collected information concerns the complainant's work within and for the party as well as his work as a member of Parliament since 1999, except for his voting conduct and his speeches and debates in Parliament and in the committees (“*Äußerungen im Parlament sowie in den Ausschüssen”; translator’s note: cf. Article 46 sec. 1 GG*). At the same time, the regular courts found that public parliamentary documents (*parlamentarische Drucksachen*) were being analysed. The Federal Office for the Protection of the Constitution also gathers information about other political activities pursued by the complainant. 4

According to the regular courts, the complainant himself is not suspected of pursuing activities against the free democratic basic order. The only reasons given for justifying the observation were his membership and functions in the DIE LINKE party, and before that in the parties PDS and Linkspartei.PDS. 5

II.

Gathering information about the complainant was based on § 8 sec. 1 sentence 1 in conjunction with § 3 sec. 1 no. 1 and § 4 sec. 1 letter c and sec. 2 of the Act on Cooperation Between the Federation and the *Laender* in Matters of Protection of the Constitution and on the Federal Office for the Protection of the Constitution (*Bundesverfassungsschutzgesetz* – BVerfSchG, BGBl I 1990 p. 2954 <2970>). The relevant provisions of that Act read as follows: 6

§ 2 Offices for the Protection of the Constitution 7

(1) For cooperation between the Federation and the *Laender*, the Federation shall maintain a Federal Office for the Protection of the Constitution as a superior federal authority. It shall be subordinate to the Federal Ministry of the Interior. (…)

§ 3 Tasks of the Offices for the Protection of the Constitution 8

(1) The task of the Offices for the Protection of the Constitution of both the Federation and the *Laender* is to gather and analyse information, especially subject-related and personal information, news and documents about

1. Activities directed against the free democratic basic order, the existence or the security of the Federation or of a *Land* [federal state], or having as their objective an unlawful impairment of the execution of the duties of the constitutional bodies of the Federation or a *Land*, or of their members,

(…)

(3) The Offices for the Protection of the Constitution shall be bound by the law (Art. 20 of the Basic Law).

§ 4 Definitions 9

(1) Within the meaning of this law (…),

c) activities against the free democratic basic order are to be understood as political conduct, directed towards a goal and purpose, within or for an association of persons, that is focused on abolishing or invalidating one of the constitutional principles indicated in section 2.

Persons are acting for an association of persons if they strongly support that association in its activities. The existence of factual evidence is a prerequisite for gathering and analysing information within the meaning of § 3 sec. 1. Conduct by individuals who are not acting within or for an association of persons constitutes an activities within the meaning of this Act if it is directed to the use of force or, because of its mode of action, is capable of significantly damaging one of the legal interests protected by this Act.

(2) The free democratic basic order within the meaning of this Act includes:

a) the right of the people to exercise state authority through elections and other votes and through specific legislative, executive and judicial bodies, and to elect the members of Parliament by secret ballot in general, direct, free, and equal elections,

b) that the legislature is bound by the constitutional order, and the executive branch and the judiciary by law and justice,

c) the right to form and exercise a parliamentary opposition,

d) the government's susceptibility to being removed and its accountability to Parliament,

e) the independence of the courts,

f) the exclusion of any violent or despotic rule, and

g) the human rights specified in the Basic Law.

§ 8 Powers of the Federal Office for the Protection of the Constitution 10

(1) The Federal Office for the Protection of the Constitution may gather, process and use the information needed in order to perform its tasks, including personal data, except as prohibited by the applicable provisions of the Federal Data Protection Act or particular provisions of this Act. (…)

(2) The Federal Office for the Protection of the Constitution may apply methods, objects and instruments for secret information gathering, such as the use of trusted agents and other collaborators, observations, video and audio recordings, cover documents and cover identities. (…)

(3) The Federal Office for the Protection of the Constitution shall not have police powers or the authority to give directions or specific instruction; it also cannot ask the police by way of administrative assistance to carry out measures that the Federal Office for the Protection of the Constitution is not authorised to carry out itself. (…)

(5) From among multiple suitable measures, the Federal Office for the Protection of the Constitution must choose those that will presumably have the least adverse effect on the person concerned. A measure must not cause any disadvantage that is recognisably disproportionate to the intended result.

III.

1. The matter of observation of its members by the Federal Office for the Protection of the Constitution was referred to the German *Bundestag* by way of minor interpellations on multiple occasions during the 16th legislative term (cf. BTDrucks 16/1397; BTDrucks 16/1808; BTDrucks 16/2342; BTDrucks 16/3763 and BTDrucks 16/13886 and the answers from the Federal Government, BTDrucks 16/1590; BTDrucks 16/2098; BTDrucks 16/2412; BTDrucks 16/3964 and BTDrucks 16/13990). 11

[…] 12-13

2. On 27 May 2007, applicant 2 presented a motion (BTDrucks 16/5455) for the German *Bundestag* to find that the observation of members of Parliament and the establishment of what is known as a case file on them violate Art. 38 sec. 1 sentence 2 and Art. 46 sec. 1 of the Basic Law, and jeopardise the functioning of Parliament. The motion furthermore proposed finding that monitoring was not covered by the Act on the Federal Office for the Protection of the Constitution, because applicant 2 did not meet the requirements for observation; that this violated parties' right to equal opportunities as guaranteed by Art. 21 GG; and that both the Federal and *Land* Offices for the Protection of the Constitution were using the tax funds provided to them in a manner contrary to Arts. 104a et seq. GG when they monitored members of Parliament from the parties DIE LINKE and Linkspartei.PDS. It furthermore sought that the Federal Government should be asked to halt the monitoring without delay, to delete the gathered data and to destroy the prepared records. The Federal Government was to be asked, moreover, to appeal to the *Land* governments to take equivalent action. The German *Bundestag* rejected the motion at its 225th session on 29 May 2009 (Minutes of Bundestag Plenary Proceedings – *BT-Plenarprotokoll* – 16/225, p. 24908). 14

IV.

[…] 15-17

3. a) In the initial proceedings, the Cologne Administrative Court (*Verwaltungsgericht*) found, in a judgment dated 13 December 2007 – 20 K 3077/06 – that the gathering of personal information about the complainant by the Federal Office for the Protection of the Constitution was unlawful insofar as the information concerned had been or would be gathered during the period in which he exercised his mandate in the 18

Thuringia *Landtag* and as a member of the *Bundestag*.

b) On appeal by the Federal Republic of Germany, the Higher Administrative Court (*Oberverwaltungsgericht*) for the *Land* North Rhine-Westphalia partially revised the judgment of the Cologne Administrative Court, in a judgment dated 13 February 2009 – 16 A 845/08. […]. 19

[…] 20-23

c) In the judgment of 21 July 2010 challenged in the constitutional complaint, the Federal Administrative Court reversed the judgments that had found for the complainant, and instead found against the complainant in full. […] 24

[…] 25-37

V.

In his constitutional complaint challenging the judgment of the Federal Administrative Court of 21 July 2010, the complainant claims that his right to free development of one's personality under Art. 2 sec. 1 GG in conjunction with the prohibition of arbitrary treatment (Art. 3 sec. 1 GG) and the principle of the rule of law (Art. 20 sec. 3, Art. 28 sec. 1 GG) and the general right of personality under Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG had been violated, as had his rights under Art. 38 sec. 1 GG to participate with equal opportunity in elections, and the guarantee of his right to stand for elections and his independent mandate under Art. 38 sec. 1 sentence 2 GG. 38

[…] 39

He argued as follows: There was no sufficiently specific legal basis pertinent to the relevant field, authorising his observation. § 8 and § 4 of the BVerfSchG were not applicable in the case at hand, because they would have required him to be active specifically in his capacity as a member of Parliament within or for an anti-constitutional "association of persons" and to have "strongly supported" that group "in its activities". It was obvious, he stated, that parliaments are no such associations of persons. He added that neither did the challenged judgment accuse the parliamentary groups of pursuing anti-constitutional activities that he might have supported strongly. 40

The defining criteria under § 8 sec. 1 in conjunction with § 3 sec. 1 no. 1 and § 4 sec. 1 sentence 1 letter c BVerfSchG, he argued, lacked the clarity and specificity required of the law, and therefore violated the principle of the rule of law. Furthermore, he considered the application of the law by the Federal Administrative Court to be arbitrary. He claimed that the court did not at all address the relevant question of how – purely on the basis of his membership in a party which for its part could not as a whole be categorised as anti-constitutional, but rather in which those associations of persons represented only subdivisions or secondary organisations – someone could, as a subject of observation by the Offices for the Protection of the Constitution, provide evidence of anti-constitutional activities. 41

[…] 42-43

VI.

1. In the *Organstreit* proceedings, the applicants initially filed the applications shown in the caption above in their application brief of 20 June 2007, which was received by the Federal Constitutional Court on that same date. 44

They supplemented their applications in the brief of 14 December 2012, which was received on 17 December 2012: 45

[…]. 46-64

VII.

The respondents ask that the applications in the *Organstreit* proceedings be dismissed. 65

They argue that all these applications are inadmissible. […] 66

[…] 67-70

In addition, they argue that if the applications were admissible, they would in any case be unfounded. In their opinion, collecting information about applicant 1 by the Federal Office for the Protection of the Constitution was lawful throughout the relevant period of time. 71

VIII.

The German *Bundestag*, the *Bundesrat*, the Federal President, the *Land* governments, and all *Land* parties were given the opportunity to submit statements in the *Organstreit* proceedings. No statements were submitted. 72

The Federal Government submitted a statement concerning the constitutional complaint, most recently in a letter dated 8 July 2013. The other parties entitled to submit a statement did not avail themselves of the opportunity. 73

The Federal Government argues as follows: The Act on the Federal Office for the Protection of the Constitution is applicable to members of Parliament. Any other position would be incomprehensible, given the background of experience in the Weimar Republic, when both Communists and National Socialists abused their parliamentary activity in the *Reichstag* to pursue their anti-constitutional activities. There is no such thing, the Federal Government argues, as a parliamentary sphere that is exempt from the activities of the Office for the Protection of the Constitution. It is true that the Basic Law confers various privileges on members of Parliament, particularly in its Arts. 46 et seq. However, the scope of application of these privileges is narrowly limited. None of them precludes observation of members of Parliament by the Offices for the Protection of the Constitution. 74

In their opinion, the independent mandate under Art. 38 sec. 1 sentence 2 GG also 75

does not preclude observation as such. Given historical experience, the Government argued, the authors of the Constitution held that even members of Parliament could pose a threat to the free democratic basic order, so that the constitutionally enshrined principle of a militant democracy (*wehrhafte Demokratie*) could also justify interference with Art. 38 sec. 1 sentence 2 GG. If members of the Parliament belong to a political party at all, as a rule, these members of Parliament would certainly include the party's most important officers. It would therefore be illogical not to be allowed to observe them.

The Government conceded that the relevant provisions were in need of interpretation, but argued that they did not in that regard fall short of the degree of clarity and specificity constitutionally required of laws. […] 76

[…] 77-78

IX.

1. In a letter dated 18 April 2013, the Federal Government (in the constitutional complaint proceedings) and the respondents (in the *Organstreit* proceedings) informed this Court that no observation of the DIE LINKE party as a whole had been conducted by the Federal Office for the Protection of the Constitution since the end of 2012. Observation activities since then had focused on so-called "openly extremist structures and associations" of that political party. Just as before, no means of secret information gathering had been used. […] 79

2. […] 80-82

B.

The constitutional complaint is admissible. In particular, the complainant is also entitled to submit a complaint in as far as he invokes – originally only implicitly but now also explicitly – his rights as a member of Parliament under Art. 38 sec. 1 sentence 2 GG. 83

According to the established jurisprudence of the Federal Constitutional Court, it is true that a member of Parliament cannot use a constitutional complaint to settle a dispute with another state organ about his rights as a member of Parliament (cf. Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts,* BVerfGE 32, 157 <162>; 43, 142 <148, 150>; 64, 301 <312>; 99, 19 <29>). A constitutional complaint is not a forum for settling conflicts between state organs (BVerfGE 15, 298 <302>; 43, 142 <148>; 64, 301 <312>). 84

However, Art. 38 GG is included within § 90 sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) in as far as this provision guarantees individual rights similarly to the other provisions of the Basic Law of this nature. Such guarantees are not only contained in Art. 38 sec. 1 sentence 1 GG, but for some cases also in Art. 38 sec. 1 sentence 2 GG (cf. BVerfGE 108, 251 <266>). Already the wording of Art. 93 sec. 1 no. 4a GG constitutes an argument against any 85

intention of the Basic Law to diminish the importance of rights of members of Parliament under Art. 38 sec. 1 sentence 2 GG by excluding that provision and therefore not extending constitutional control to the preservation of those rights (cf. BVerfGE 108, 251 <268>).

On this basis, after exhausting the remedies in the field of administrative law, the complainant may assert in his constitutional complaint a violation of his rights under Art. 38 sec. 1 sentence 2 GG. In the constitutional complaint, he argues that the Federal Administrative Court judgment challenged by him violates his rights. That judgment does not concern his relationship to another constitutional organ or parts thereof, but rather his relationship to the Federal Office for the Protection of the Constitution, as a Higher Federal Authority. 86

The complainant's recognised legal interest in a finding that the challenged Federal Administrative Court judgment violates his rights under Art. 38 sec. 1 sentence 2 GG remains valid, irrespective of the fact that he left the German *Bundestag* in September 2009, and irrespective of whether he remains under observation at present. His initially recognised legal interest has not become moot by those changes (cf. BVerfGE 103, 44 <58-59>; 104, 220 <230-231>; 105, 239 <246>; 106, 210 <214>), because the administrative dispute has always also concerned the past observation period from October 1999 to 13 February 2009 (cf. A.IV.3.b and c). 87

The constitutional complaint is also admissible insofar as the challenged Federal Administrative Court judgment concerns the period of the complainant's *Landtag* mandate, because it is not a priori impossible that the complainant's right under Art. 38 sec. 1 sentence 2 GG in conjunction with Art. 28 sec. 1 GG may have been violated. 88

C.

The constitutional complaint is well-founded. The judgment of the Federal Administrative Court of 21 July 2010 – which is subject to unrestricted review by the Federal Constitutional Court with respect to the interpretation and application of constitutional law (cf. BVerfGE 108, 282 <294-295>) – violates the complainant's independent mandate under Art. 38 sec. 1 sentence 2 GG. The same holds true with regard to the period of his *Landtag* mandate in conjunction with Art. 28 sec. 1 GG 89

The observation of a member of Parliament by Offices for the Protection of the Constitution represents an interference with the independent mandate under Art. 38 sec. 1 sentence 2 GG, the justification of which is subject to high requirements (I.). The judgment by the Federal Administrative Court of 21 July 2010 does not adequately meet these requirements. It fails to recognise the content and scope of the complainant's rights under Art. 38 sec. 1 sentence 2 GG (II.). The question may be left aside as to whether further rights of the complainant were violated in addition (III.). 90

I.

The independent mandate under Art. 38 sec. 1 sentence 2 GG safeguards the free process of policy formulation by members of Parliament, and therefore also the communicative relationship between a member of Parliament and the voters that is free from governmental interference (1.), as well as the members of Parliament's freedom from observation, supervision and oversight by the executive branch (2.). Via Art. 28 sec. 1 GG, this also applies to members of Parliament in the *Laender* (3.). The observation of a member of Parliament by Offices for the Protection of the Constitution, together with the associated gathering and storage of personal data, constitutes an interference with the content of this guarantee (4.). Such an interference may, in an individual case, be justified in order to protect the free democratic basic order, but it is subject to strict proportionality requirements, and must have a statutory basis that meets the principles inherent to the requirement of a statutory provision (5.). 91

1. The independent mandate according to Art. 38 sec. 1 sentence 2 GG safeguards unimpaired process of policy formulation by members of Parliament, which includes a communicative relationship between members of Parliament and the voters that is free from governmental interference. 92

a) Art. 38 sec. 1 GG constitutes the basis of the independent mandate. This provision protects not only the existence but also the actual exercise of the mandate (cf. BVerfGE 80, 188 <218>; 99, 19 <32>; 118, 277 <324>). A member of Parliament – elected based on the trust of the voters – is the holder of a public office, the bearer of an independent mandate and, together with all members of Parliament (cf. BVerfGE 56, 396 <405>; 118, 277 <324>), a representative of the entire people (cf. BVerfGE 112, 118 <134>; 118, 277 <324>). Members of Parliament have a representative status, exercise their mandate independently and are not bound by any orders and instructions, and are guided only by their conscience (cf. BVerfGE 40, 296 <314, 316>; 76, 256 <341>; 118, 277 <324>). 93

b) The requirement under Art. 38 sec. 1 sentence 2 GG that a member of Parliament is to benefit of a free process of policy formulation is closely connected to the principle of parliamentary democracy according to Art. 20 sec. 2 sentence 2 GG (cf. BVerfGE 44, 125 <138 et seq.>). The protection intended by Art. 38 sec. 1 sentence 2 GG of the processes of policy formulation and decision-making by members of the German *Bundestag,* as representatives of the people, presupposes protection of the communicative relationship between members of Parliament and voters against deliberate governmental interference and governmental intimidation. 94

In the representative democracy under the Basic Law, policy formulation by the people and policy formulation in state organs take place in a continuous and varied interplay. The political programme and conduct of the state bodies incessantly influence the process of policy formulation by the people, and are themselves the subject-matter for the formation of public opinion; public opinion, often formed and structured especially through political parties, associations and the mass media, influences the 95

process of policy formulation in state organs. In their conduct, the government and the opposition, as well as the political forces supporting them in Parliament, will constantly also have an eye on the voters. All this is part of the political process in a free democratic system as understood by the Basic Law (cf. BVerfGE 44, 125 <139-140>).

96 Through the interaction of policy formulation by society and policy formulation by the state, a member of Parliament – similarly to the political parties (cf. BVerfGE 41, 399 <416-417>) – exercises a transformative function (Morlok, in: Dreier, GG, vol. 2, 2nd ed. 2006, Art. 38 para. 135): a member of Parliament gathers and structures the political views and interests with which voters approach him or her, and decides whether, how, and with what priorities, to make efforts to implement them in state decisions. It is the task of a member of Parliament to note and balance differing political views and interests, and to introduce them into the formation of policies of the political party, parliamentary group and Parliament, and conversely to communicate to the citizenry the good sense of the political decisions made in Parliament, or to point out better alternatives to the people and to argue for those alternatives. A member of Parliament is a link between the Parliament and the citizen (cf. also Härth, Die Rede- und Abstimmungsfreiheit der Parlamentsabgeordneten in der Bundesrepublik Deutschland, 1983, p. 142). Representation calls for the flows of information in both directions (Benda, Zeitschrift für Parlamentsfragen – ZParl 1978, p. 510 <513>). To keep those flows moving, one of the principal tasks within a mandate is to maintain close contact with the party, associations and unorganised citizens, especially with the own constituency of the member of Parliament (H. Meyer, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – VVDStRL 33 <1975>, p. 7 et seq. <95>). Article 38 sec. 1 sentence 2 GG is based on the concept of a member of Parliament who is occupied with plenary and committee meetings in Parliament, with meetings and content-related work within the parliamentary group and political party, and with events of the most varied kinds in the constituency and among the general public, not least of all the preparations for elections and election rallies (cf. BVerfGE 40, 296 <312>).

97 c) The communicative process in which a member of Parliament not only passes along information, but also receives it, is protected by Art. 38 sec. 1 sentence 2 GG. The independent mandate includes feedback between members of Parliament and the electorate, and takes due account of the idea that a parliamentary democracy is founded on the trust of the people (cf. BVerfGE 118, 277 <353>). Therefore – in addition to the specific protection of confidential communication of the member of Parliament by the right to refuse to testify provided under Art. 47 GG – it also protects the communication of the member of Parliament as a condition for his or her free process of policy formulation, and in particular guarantees that the opinions and interests to be represented by the member of Parliament and to be introduced into the formulation of policies by the German *Bundestag* can reach the member of Parliament undistorted, and without governmental interference. The large number of members of Par-

liament shall make it possible that all the various ideas and interests among the population to be considered in the process of policy formulation in Parliament (cf. Morlok, in: Dreier, GG, vol. 2, 2nd ed. 2006, Art. 38 para. 134).

In all the above, the guarantee of Art. 38 sec. 1 sentence 2 GG refers to all the member of Parliament's political actions, not just his or her activity in the parliamentary sphere. The member of Parliament's spheres as a "holder of a mandate", as a "party member", and as a politically acting "private individual" cannot be strictly separated; to that extent, a parliamentary democracy makes demands upon the member of Parliament's entire person (cf. BVerfGE 40, 296 <313>; 118, 277 <355>). 98

d) Protection of the communication of a member of Parliament also serves the representative function of the German *Bundestag* enshrined in Art. 38 sec. 1 sentence 2 GG, which all members of Parliament have been entrusted with as a whole (cf. BVerfGE 104, 310 <329-330>; 130, 318 <342>). Even though the Basic Law refers to the individual member of the Parliament as a "representative of the entire people", a member of Parliament can still represent the people only jointly with the other members of Parliament. If the people are properly represented in parliamentary decisions only by the Parliament as a whole – i.e., by all of its members together – then the cooperation of all members of Parliament in such decisions must be assured as far as possible, according to what is reasonable within the democratic parliamentary system under the Basic Law (cf. BVerfGE 44, 308 <316>; furthermore BVerfGE 80, 188 <217-218>; 84, 304 <321>; 104, 310 <329-330>). To this extent as well, the independent mandate represents a precautionary measure to protect the integrity of the processes of policy formulation and decision-making by state organs (cf. BVerfGE 44, 125 <140>). Impeding the parliamentary work of an individual member of Parliament alters the majority relationships defined by the people (BVerfGE 104, 310 <329>). If the communication between members of Parliament and the citizenry is disrupted, this consequently affects the process of parliamentary policy formulation, and therefore the Parliament's democratic representative function. 99

2. In this context, Art. 38 sec. 1 sentence 2 GG also safeguards the members of Parliament's right to be free from observation, supervision and oversight by the executive branch and is thus closely related to the principle of the separation of powers enshrined in Art. 20 sec. 2 sentence 2 GG. 100

a) Art. 38 sec. 1 sentence 2 GG establishes a specific relationship of oversight between the *Bundestag* and the Federal Government, as a central link between the separation of powers and the principle of democracy (cf. Möllers, Juristenzeitung – JZ 2011, p. 48 <50>; Gusy, Zeitschrift für Rechtspolitik – ZRP 2008, p. 36). This relationship of oversight derives from the elected members of Parliament; it continues along the democratic train of legitimation from the German *Bundestag* to the Federal Government, but not conversely from the Government to the Parliament. While overseeing the government and public administration is one of the core duties of Parliament, and the parliamentary system of government is therefore fundamentally shaped by 101

Parliament's oversight function (cf. BVerfGE 67, 100 <130>), Parliament, for its part, is not subject to comparable oversight by other constitutional bodies (for the general mutual oversight between the branches, however, cf. BVerfGE 95, 1 <15>, with further references). Democratic "oversight" of the Parliament is exercised primarily by the voters, who in the act of voting, according to Art. 38 sec. 1 sentence 1 GG, express their opinion on the activity of the governing majority and opposition.

b) Nevertheless, it is true that the individual members of Parliament are not a priori exempt from any executive oversight. However, this is first and foremost a concern proper to the German *Bundestag*, which in this regard acts within the framework of parliamentary autonomy. Therefore, with regard to measures against members of Parliament regulated by the Constitution, the Basic Law expressly requires prior parliamentary permission for the executive branch to act on a member of Parliament (cf. Art. 46 sec. 2 to4 GG) and thus establishes procedural impediments that serve not only to protect the individual member of Parliament, but, by means of that protection, most of all to preserve parliamentary autonomy (cf. BVerfGE 102, 224 <235-236>; 104, 310 <332>). Generally, in those cases, Parliament decides whether to grant or refuse permission on its own responsibility. The core of this political decision is a balancing of interests between the concerns of Parliament and the common-good interests the protection of which is assigned to other public authorities, and here the *Bundestag* has a broad margin of assessment (cf. BVerfGE 80, 188 <220>; 84, 304 <322>; 104, 310 <332>). Even the screening of a member of Parliament as to activities for the state security service of the former German Democratic Republic, in view of the parliamentary autonomy that it affects, is conducted solely by Parliament itself, through a peer inquiry pursuant to the specific statutory basis of the Act on Legal Status of Members of the German *Bundestag* (*Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages* – AbgG) (§ 44c sec. 2 AbgG; on old § 44b sec. 2 AbgG, which had the same content, cf. BVerfGE 94, 351; 99, 19). 102

3. The freedom of members of Parliament from executive observation, supervision and oversight, which is ensured by Art. 38 sec. 1 sentence 2 GG, via Art. 28 sec. 1 GG also extends to members of the representative assemblies of the people in the *Laender* (a) and in the present case may also, to that extent, be asserted in the constitutional complaint (b). 103

a) In principle, the Basic Law proceeds from the premise of constitutional autonomy of the *Laender* (cf. BVerfGE 36, 342 <361>; 64, 301 <317>; 90, 60 <84>); as such, the constitutional spheres of the Federation and the *Laender* exist autonomously in the federatively organised political system of the Federal Republic of Germany (cf. BVerfGE 103, 332 <350>; 107, 1 <10>) The significance of the constitutional provisions on Parliament and of the jurisprudence of the Federal Constitutional Court concerning those provisions is limited to outlining the principles of constitutional order to be guaranteed under Art. 28 sec. 1 sentence 1 GG in the *Laender* with reference to the *Land* Parliament. In this context, the provisions governing the status of members of the *Bundestag* and the position of the *Bundestag* are significant for the constitution 104

of the *Laender* not in their specific manifestations, but only with regard to the fundamental principles that characterise the German parliamentary system (BVerfGE 102, 224 <234-235>).

The guarantees of a communicative relationship between the member of Parliament and the voters that is free from state influence, and of the independence of the member of Parliament from executive observation, supervision and oversight, constitute fundamental conditions for an independent mandate rooted in the principles of democracy and separation of powers. These essentials, which, because of Art. 28 sec. 1 sentence 1 GG, also have to be observed in the constitutional sphere of the *Laender*, may be enforced with the assistance of the Federal Constitutional Court, if no other equivalent recourse is available (cf. previously, with regard to Art. 48 sec. 3 GG, BVerfGE 40, 296 <319>). 105

b) It is true that rights whose applicability within the constitutional order of the *Laender* is guaranteed by Art. 28 sec. 1 GG cannot automatically also be asserted before the Federal Constitutional Court (cf. BVerfGE 99, 1 <8, 11 et seq.>). But the situation may be otherwise, at least insofar as the *Land* organs and other entities that are vested with state authority (*Landesstaatsgewalt*), including the *Land* constitutional court, are unable to guarantee effective protection of the right concerned, for reasons of principle that are inherent in the federal order of the Basic Law. This is the case here, because a contravention of law by the decision of a federal court is at issue. 106

4. If, in view of all the above, Art. 38 sec. 1 sentence 2 GG guarantees a communicative relationship between members of Parliament and voters that is free from governmental interference, and therefore members' of Parliament freedom from executive supervision and oversight, then the mere systematic gathering and analysis of publicly accessible information about a member of Parliament – obtained without using methods of secret information gathering – already constitutes an interference with the independent mandate (cf. BVerfGE 120, 378 <398-399>, with further references). This also applies when the gathered information is not digitised (in this regard cf. BVerfGE 120, 378 <398-399>, with further references). 107

Furthermore, gathering information about a member of Parliament compromises the member of Parliament's independent exercise of his or her mandate because the associated stigmatisation may deter voters from making contact and from making up their minds about the content of the political activities of the member of Parliament and those of the party and parliamentary group to which the member of Parliament belongs, and therefore may adversely affect the communicative relationship with the citizens that is protected by Art. 38 sec. 1 sentence 2 GG. The mere possibility of governmental registration of contacts may have a deterrent effect, and may lead to distortions of communication and modification of behaviour even before they occur (cf., in equivalent terms, BVerfGE 65, 1 <43>; 93, 181 <188>; 100, 313 <359>; 107, 299 <313>; 125, 260 <331>; see also, concerning an interference with the right under Art. 5 sec. 1 sentence 2 GG through mentioning an organ of the press in the Report of 108

the Office for the Protection of the Constitution, BVerfGE 113, 63 <78>). This possibility of a deterrent effect constitutes an interference with the right under Art. 38 sec. 1 sentence 2 GG (cf. BVerfGE 124, 161 <195>; differently before: BVerfGE 40, 287 <292-293>).

Finally, observation of a member of Parliament by Offices for the Protection of the Constitution also constitutes an interference with the independence of the member of Parliament's mandate because it reverses the typical relationship of oversight between the legislature and the executive branch as provided in the Basic Law. This constitutes an impairment of the member of Parliament's normative status without requiring an actual influence on the process of policy formulation and decision-making in Parliament (cf. also Möllers, JZ 2011, p. 48 <50>). 109

5. The interference with the independent mandate through the observation of a member of Parliament by the Offices for the Protection of the Constitution, and by the associated gathering and storage of data, may be justified in individual cases in the interest of protecting the free democratic basic order (a), but is subject to strict proportionality requirements (b), and must have a statutory basis that meets the criteria of the principles inherent to the requirement of a statutory provision (c). 110

a) aa) Independence of the mandate is not guaranteed without limitations. It may be limited by other constitutionally protected legal interests. Recognised legal interests in this sense particularly include Parliament's representative function and its ability to function adequately (cf. BVerfGE 80, 188 <219>; 84, 304 <321>; 96, 264 <279>; 99, 19 <32>; 112, 118 <140>; 118, 277 <324>; 130, 318 <348>). 111

bb) Protection of the free democratic basic order may be a reason to permissibly restrict constitutionally protected interests. The jurisprudence of the Federal Constitutional Court has acknowledged that a restriction of freedoms may be permissible to protect the free democratic basic order because the Basic Law has decided in favour of a militant democracy (*streitbare Demokratie*) (cf. BVerfGE 5, 85 <137 et seq.>; 13, 46 <49-50>; 28, 36 <48-49>; 30, 1 <19 et seq.>). Enemies of the Constitution are not to be permitted, by claiming constitutional freedoms, to endanger, impair or destroy the constitutional order or the existence of the state (cf. Art. 9 sec. 2, Art. 18, Art. 21 GG). 112

Gathering documents for the purpose of protecting the Constitution is expressly permitted by the Basic Law since the Basic Law provides for the relevant legislative competence and permits the creation of authorities to perform this task (Art. 73 no. 10b in conjunction with Art. 70 sec. 1 GG, Art. 87 sec. 1 sentence 2 GG; cf. BVerfGE 30, 1 <19 et seq.>). 113

However, interference by Offices for the Protection of the Constitution with constitutionally protected interests is justifiable only if and because these authorities are bound by the Constitution and the relevant statutory law, and their compliance with the Constitution and statutes is subject to parliamentary and judicial oversight (cf. 114

Gusy, Grundrechte und Verfassungsschutz, 2011, p. IX and p. 11). In this regard, the principle of a militant democracy must not be misunderstood as a non-specific, all-inclusive authorisation to act. Rather, whether an interference can be justified by the purpose of protecting the free democratic basic order, has to be determined in each individual case on the basis of the interpretation of the specific “militant” (“streitbare”) provisions of the Constitution.

cc) If a member of Parliament abuses his or her office to fight against the free democratic basic order – and provided the requirements in this regard are met –, proceedings to prohibit political parties under Art. 21 sec. 2 GG (cf. also BVerfGE 70, 324 <384>) or proceedings under Art. 18 GG can be initiated. That the latter may be permitted against members of Parliament is shown by Art. 46 sec. 3 GG, which expressly provides for this possibility and ties it to the consent of the German *Bundestag.* 115

If protection of the free democratic basic order is to be assured through the observation of members of Parliament by Offices for the Protection of the Constitution, this, however, constitutes an influence of the executive branch on parts of the legislative branch that affects the process of representative democratic policy formulation. To justify it, the criteria used have to be at least of similar stringency to those for a particularly serious interference with members of Parliament’s rights by Parliament itself. 116

The risk that a “militant democracy” may turn “against itself” (cf. BVerfGE 30, 33 <45-46>) is particularly high with regard to the observation of elected members of Parliament by Offices for the Protection of the Constitution. Such a case does not only concern the influence on the process of formation of public opinion, but also the influence on the process of policy formulation and decision-making by the representative organ elected by the people, to which the decisions essential [translator’s note: under the essential-matters doctrine] are entrusted in the democracy under the Basic Law. 117

b) The interference with Art. 38 sec. 1 sentence 2 GG represented by the observation of a member of Parliament by Offices for the Protection of the Constitution is therefore subject to strict proportionality requirements. 118

The principle of proportionality requires that a statute may allow only what is necessary to protect a constitutionally recognised legal interest – here, the free democratic basic order – and that only this may be ordered in an individual case (cf. BVerfGE 7, 377 <397 et seq.>; 30, 1 <20>). The restriction of the independent mandate may not extend any further than necessary (cf. BVerfGE 130, 318 <353>). Furthermore, on balancing all relevant factors, the severity of the interference may not be disproportionate to the weight of the reasons justifying it (cf. BVerfGE 90, 145 <173>; 92, 277 <327>; 109, 279 <349 et seq.>; 115, 320 <345>; 125, 260 <368>; 126, 112 <152-153>). 119

Accordingly, observation of a member of Parliament by Offices for the Protection of the Constitution is permissible only if it is necessary and a balancing of interests in the 120

specific case shows that the interest in protecting the free democratic basic order has priority over the rights of the member of Parliament concerned. Once it turns out that observation of the member of Parliament is no longer required in order to protect the free order, the principle of necessity ordains that the observation must end immediately (cf. BVerfGE 113, 63 <84>).

The interest in the protection of the free democratic basic order might in particular prevail if there are indications that the member of Parliament misuses his or her mandate to fight against the free democratic basic order or fights against this order in an active and aggressive way. 121

Apart from that, all relevant interests and factors must form part of the balancing process. In this context, an overall assessment must be performed of the severity of the interference, the degree of threat presented by the member of Parliament to the free democratic basic order, and the importance of the information that can be expected from observation for protecting the free democratic basic order. In such a case, the member of Parliament's relationship to his or her party is not constitutionally excluded as a factor to be considered. While it is true that the member of Parliament holds an independent, genuine constitutional status in relation to the party and parliamentary group (cf. BVerfGE 2, 143 <164>; 4, 144 <149>; 95, 335 <349>; 112, 118 <134-135>; 118, 277 <328-329>; established jurisprudence), the member of Parliament experiences a particular relationship of tension between his or her independent and equal mandate, and his or her standing in the parliamentary group. This relationship of tension derives from the member of Parliament's double position as a representative of the people as a whole, yet at the same time as an exponent of a specific party organisation, which is evident in Art. 21 and Art. 38 GG (cf. BVerfGE 2, 1 <72-73>; 95, 335 <349>; 112, 118 <134-135>; 118, 277 <328-329>). 122

Therefore, the member of Parliament's party membership can constitute one aspect of the required overall assessment. According to the perception of political parties that underlies Art. 21 GG – which assigns the parties a significant role in the process of policy formulation by the people within the democratic constitutional order under the Basic Law (cf. BVerfGE 1, 208 <225>; 11, 239 <243>; 12, 276 <280>; 13, 54 <82>; 18, 34 <37>; 20, 56 <101>; 107, 339 <358>; established jurisprudence) – it must be presumed that a party political commitment that is founded itself upon the free democratic basic order will reinforce that order. Thus, mere membership in a party can only justify a temporary observation which helps to clarify the member of Parliament's functions, importance and standing in the party and relationship to anti-constitutional segments, and to assess the relevance of such segments within the party and for the member of Parliament's work. To that extent, in assessing the threat that the member of Parliament presents to the free democratic basic order, it is of crucial importance to determine whether, and if so, to what degree, the member of Parliament's political conduct is influenced by the groups and segments within the party that are opposed to the free democratic basic order. 123

Furthermore, the means used to gather information about the member of Parliament concerned must be proportionate. In particular, under Art. 46 sec. 1 GG any speech and debate by a member of Parliament is exempt from the gathering or collection of information if it is made in the *Bundestag* or any of its committees. According to Art. 46 sec. 1 sentence 1 GG, a member of Parliament cannot at any time be subjected to court proceedings or disciplinary action or otherwise "called to account" outside the *Bundestag* for a vote cast or any speech and debate in the *Bundestag* or any of its committees. In view of its wording and its purpose of protecting Parliament's ability to work and function and of protecting members of Parliament (cf. BVerfGE 104, 310 <332-333>), this provision is to be construed broadly. Therefore, the protection under Art. 46 sec. 1 GG also extends to measures taken by Offices for the Protection of the Constitution (cf. also Magiera, in: *Bonner Kommentar zum Grundgesetz*, vol. 8, Art. 46 para. 69 <February 2011>; H.-P. Schneider, in: Kommentar zum Grundgesetz für die Bundesrepublik Deutschland – Alternativkommentar zum Grundgesetz, AK-GG, 3rd ed. 2001, Art. 46 para. 8 <August 2002>; Trute, in: von Münch/Kunig, *GG*, vol. 1, 6th ed. 2012, Art. 46 para. 17; Brenner, in: Festschrift für Peter Badura, 2004, p. 25 <40>). This Court remains unconvinced by the objection against a broad construction of this provision, i.e. that observation by Offices for the Protection of the Constitution does not have the nature of a sanction because it does not entail immediate consequences (cf. Löwer, in: Bundesministerium des Innern, Verfassungsschutz. Bestandsaufnahme und Perspektiven, 1998, p. 240 <259>). Immediacy of consequences is not a requirement for the existence of an interference with a constitutionally protected legal interest (cf. C.I.4. above). 124

c) In addition to the foregoing, interfering with the independent mandate by observing members of Parliament requires a statutory basis which meets the requirements of specificity and clarity according to the rule of law. 125

We may leave aside the question of whether this requirement already proceeds from the legislative mandate under Art. 38 sec. 3 GG, because that provision refers to the entire section 1 of the provision and the legislature regulates "the details" not just with regard to voting rights, but also with regard to the status of members of Parliament. The constitutional imperative of a provision under a parliamentary statute proceeds in any case from the requirement of a statutory provision as developed in the Federal Constitutional Court's essential-matters doctrine (*Wesentlichkeitsdoktrin*). The principle of the rule of law and the principle of democracy oblige the legislature itself to adopt the essential provisions for realising fundamental rights (cf. BVerfGE 49, 89 <129>; 61, 260 <275>; 73, 280 <294, 296>; 82, 209 <224-225, 227>; 83, 130 <142>; 108, 282 <311>; 120, 378 <407>; 128, 282 <317>). The requirements for permitting an interference with those rights must be regulated with sufficient clarity and specificity (cf. BVerfGE 128, 282 <317>). The legislature must draft its provisions as specifically as possible considering the particular nature of the situations to be governed, with due regard to the purpose of the law (cf. BVerfGE 49, 168 <181>; 59, 104 <114>; 78, 205 <212>; 103, 332 <384>; 128, 282 <317>). The persons concerned 126

must be able to recognise the legal implications of a situation and to adjust their conduct accordingly (cf. BVerfGE 103, 332 <384>; 113, 348 <375>; 128, 282 <317>), and the administrative bodies implementing the law must be given standards of action to guide and limit their conduct (cf. BVerfGE 110, 33 <54>; 113, 348 <375>; 128, 282 <317-318>).

However, the necessary specificity is not lacking merely because a provision is in need of interpretation (cf. BVerfGE 45, 400 <420>; 117, 71 <111>; 128, 282 <317>; established jurisprudence). Rather, the requirement of specificity is met if the problems of interpretation can be resolved by established methods of legal interpretation (cf. BVerfGE 17, 67 <82>; 83, 130 <145>; 127, 335 <356>). It is first of all the task of the bodies applying the law to clarify matters of doubt (cf. BVerfGE 31, 255 <264>; 127, 335 <356>) and to resolve problems of interpretation using the established means of legal interpretation (cf. BVerfGE 83, 130 <145>; 127, 335 <356> with further references). 127

These principles also apply to the essential provisions for the exercise of a mandate by an elected member of the German *Bundestag* and for determining the relationship between the independent mandate of democratically elected members of Parliament, on the one hand, and the protection of the free democratic basic order, on the other hand. The necessary balancing between the interests of Parliament and its elected member, on the one hand, and the executive branch acting under the principle of a “militant democracy”, on the other hand – the “synthesis between ‘militant democracy’ and the idea of the parliamentary-democratic rule of law founded on mutual tolerance” (Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol. I, 2nd ed. 1984, pp. 207-208) –, including the observation of members of Parliament by Offices for the Protection of the Constitution, must be provided by Parliament. Parliament itself must take the essential decision as to whether it will or will not permit observation of its members – within the limits permitted by the Constitution – and if so, under what conditions this should be the case. 128

II.

The judgment by the Federal Administrative Court of 21 July 2010 (Decisions of the Federal Administrative Court – *Entscheidungen des Bundesverwaltungsgerichts,* BVerwGE 137, 275) does not sufficiently meet these standards. It thereby fails to recognise the content and extent of the complainant’s independent mandate under Article 38 sec. 1 sentence 2 GG. Observation of the complainant by the Federal Office for the Protection of the Constitution, including gathering and storing the personal information obtained thereby, violates his rights under Art. 38 sec. 1 sentence 2 GG, because the criteria justifying interference with the independent exercise of his mandate are not met. 129

1. According to the aforementioned criteria (cf. C.I.4 above), the observation of the complainant by the Federal Office for the Protection of the Constitution constitutes an interference with the independent exercise of his mandate. Regarding this, the Sen- 130

ate proceeds on the basis of the factual findings by the courts involved that the information is collected without resorting to methods of secret information gathering. In asserting that the Office for the Protection of the Constitution also employed methods of secret information gathering, the complainant did not identify constitutionally relevant infringements by the courts in their findings to the contrary.

Gathering information constitutes an interference with the above-mentioned right, irrespectively of whether it is intended by the executive branch to bring about particular parliamentary conduct by the complainant, and of whether the complainant's conduct is in fact influenced. 131

2. This interference with the complainant's independent mandate is not justified. The relevant provisions of the Act on the Federal Office for the Protection of the Constitution do indeed constitute a sufficiently specific statutory basis that meets the conditions imposed by the requirement of a statutory provision (a). However, observation of the complainant, including gathering and storing information, does not conform to the principle of proportionality (b). 132

a) § 8 sec. 1 sentence 1 and § 3 sec. 1 no. 1 in conjunction with § 4 sec. 1 sentence 1 letter c of the Act on Cooperation between the Federation and the *Laender* in Matters of Protection of the Constitution and on the Federal Office for the Protection of the Constitution, introduced when that Act was adopted in 1990, constitutes a sufficient basis for the observation of the complainant that meets the conditions imposed by the requirement of a statutory provision, even though these provisions make no express reference to members of Parliament's rights under Art. 38 sec. 1 sentence 2 GG. 133

In these provisions, it is the legislature itself that answered in the affirmative the essential question whether members of the German *Bundestag* may be subject to observation by the Federal Office for the Protection of the Constitution. But at the same time, it also decided on the essential requirements for such observation, namely that the same criteria apply for observation of members of Parliament as for the observation of private individuals. It was common knowledge in 1990, at the time of the enactment of the Act on the Federal Office for the Protection of the Constitution, that members of Parliament were also being observed (on this, one only need to consult BTDrucks 10/6584 of 27 November 1986, p. 126 et seq., with an extensive list of *Landtag* and *Bundestag* members who were under observation). Given this background, there is no reason to believe that the observation of members of Parliament was not to be included in these provisions adopted in 1990 in the Act on the Federal Office for the Protection of the Constitution. 134

By including, in § 8 sec. 5 BVerfSchG, the stipulation that the observation must be proportionate, the legislature gave adequate consideration to members of Parliament's specific need of protection. Accordingly, from among multiple suitable measures, the Federal Office for the Protection of the Constitution must choose those that will presumably have the least adverse effect on the person concerned. A measure 135

may not cause any disadvantage that is recognisably disproportionate to the intended result. Consequently, the authorisation under § 8 BVerfSchG permits and demands that all interests concerned should be taken into consideration – including, therefore, the fact that the activity of the persons under observation is subject to the specific protection of Art. 38 sec. 1 sentence 2 GG. As members of Parliament are not *a priori* exempt under Art. 38 sec. 1 sentence 2 GG from observation by the Federal Office for the Protection of the Constitution, proportionality depends on the specific factors of the individual case; in assessing these, the aspects indicated above (C.I.5.b.) must be taken into account.

b) Observation of the complainant over many years, including gathering and storing the gathered information, does not comply with the requirements of the principle of proportionality. In an overall balancing of all factors, the marginal additional insights which the Federal Administrative Court assumed could be gained for establishing a comprehensive picture of the party (cf. BVerwGE 137, 275 <311, para. 88>) are disproportionate to the severity of the interference with the complainant's independent mandate. 136

The proceedings in the regular courts established factual evidence in support of a suspicion of anti-constitutional activities only with regard to single subdivisions – namely the Communist Platform, the Marxist Forum and the recognised youth organisation Linksjugend [`solid] (cf. North Rhine-Westphalia Higher Administrative Court – *Oberverwaltungsgericht Nordrhein-Westfalen,* OVG NRW, judgment of 13 February 2009 – 16 A 845/08 –, juris, paras. 67 et seq., cf. also BVerwGE 137, 275 <290 et seq., paras. 41 et seq. and particularly para. 45, as well as p. 303, para. 63>). 137

At the same time, it was explicitly found that the complainant individually is not suspected of pursuing anti-constitutional activities (cf. OVG NRW, judgment of 13 February 2009 – 16 A 845/08 –, juris, para. 104; cf. also BVerwGE 137, 275 <303, para. 67-68>). The complainant did hold important party offices; among others, from October 2007 he was a member of the Party Council, until 2008 he was the party's federal elections chairman, and from October 2005, he took on the duty of restructuring the party when the Linkspartei.PDS party merged with the WASG party. Furthermore, in the 16th German *Bundestag* he was vice-chairman of the DIE LINKE parliamentary group (cf. OVG NRW, judgment of 13 February 2009 – 16 A 845/08 –, juris, paras. 6-7). In the opinion of the Higher Administrative Court, this indicated that the complainant was a "top-ranking officer of the party" (OVG NRW, op. cit., para. 163); the judgment of the Federal Administrative Court speaks of the complainant's activity as that of an "eminent member" (BVerwGE 137, 275 <302, para. 64>) and mentions that the complainant played a "leading role" in the party (BVerwGE 137, 275 <303-304, para. 68>). 138

However, the complainant is not among either the members or the supporters of the concerned subdivisions within the party. On this point, the Higher Administrative Court states in its decision that the complainant does not belong to any group within 139

the party that is suspected of anti-constitutional activities. It also found that there was no other reason to believe that he was participating or had participated in activities directed against the free democratic basic order (OVG NRW, op. cit., paras. 104, 163).

There is therefore no reason to believe that the complainant's political conduct as a member of Parliament was influenced by the groups concerned whose views oppose the free democratic basic order. Consequently, even considering his relationship to the DIE LINKE party and its segments, the complainant himself does not, in any relevant way, contribute to any threat to the free democratic basic order. Furthermore, the complainant's behaviour – in particular, whether he actively fighted the radical forces – could only justify his being observed if these forces were already a dominant influence within the party. No such findings were made in the regular court proceedings. 140

According to these criteria, the following assumption by the Federal Administrative Court is untenable under constitutional law: that the complainant's behaviour was nevertheless objectively capable of supporting anti-constitutional activities because even people who were rooted in the free democratic basic order could be dangerous to this order if their behaviour indicated, viewed objectively, that they unwittingly furthered anti-constitutional activities or that they did not consider these activities to constitute sufficient reason to leave such a group of people, whom they supported for other reasons (cf. BVerwGE 137, 275 <304, para. 69>). In this regard, the judgment of the Federal Administrative Court fails to recognise that according to the perception of political parties that underlies Art. 21 GG – which assigns the parties a significant role in the process of policy formulation by the people within the democratic constitutional order under the Basic Law (cf. BVerfGE 1, 208 <225>; 11, 239 <243>; 12, 276 <280>; 13, 54 <82>; 18, 34 <37>; 20, 56 <101>; 107, 339 <358>; established jurisprudence) – it must be presumed that a party political commitment that is founded itself upon the free democratic basic order will reinforce that order. This applies also, and in particular, if it occurs within a political party in which different forces and segments are struggling with each other for influence. 141

In accordance with all the above, the gain of marginal additional information, as presumed by the Federal Administrative Court, for establishing a comprehensive picture of the party (cf. BVerwGE 137, 275 <311, para. 88>) must be considered secondary relative to the severity of the interference with the complainant's independent mandate under Art. 38 sec. 1 sentence 2 GG. 142

Furthermore, the Federal Administrative Court fails to recognise that the instruments used by the Federal Office for the Protection of the Constitution are disproportionate with regard to the complainant's behaviour in the parliamentary sphere, which is specifically protected by Art. 46 sec. 1 GG. It is true that the Federal Administrative Court found that the Federal Office for the Protection of the Constitution "excluded from observation the core area" of the complainant's "parliamentary activity, namely his voting conduct and his speeches and debates in Parliament and its committees" (cf. BVerwGE 137, 275 <313, para. 92>). But it also states that, among other activi- 143

ties, a collection and analysis of public parliamentary documents had taken place (cf. BVerwGE 137, 275 <312, para. 91>, and the finding in this regard by the OVG NRW in the judgment of 13 February 2009 – 16 A 845/08 –, juris, para. 135). Thus, the required balancing of interests did not take place.

III.

This Court may leave aside the question of whether the challenged decision of the Federal Administrative Court furthermore violates the fundamental and other rights equivalent thereto that the complainant claims were violated, particularly the right to the free development of one's personality under Article 2 sec. 1 GG in conjunction with the prohibition on arbitrary treatment (Article 3 sec. 1 GG) and the principle of the rule of law (Article 20 sec. 3, Article 28 sec. 1 GG), the right to informational self-determination under Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG, and the right to equal opportunities when standing for election, or whether these rights are not applicable in the case at hand because these rights and the member of Parliament's rights under Art. 38 sec. 1 sentence 2 GG are mutually exclusive (cf. on this point, most recently, BVerfGE 99, 19 <29>; 118, 277 <320>). The violation of Art. 38 sec. 1 sentence 2 GG all by itself already justifies reversing the challenged decision (cf. BVerfGE 128, 226 <268>). 144

D.

The applications in the *Organstreit* proceedings under Art. 93 sec. 1 no. 1 GG in conjunction with § 13 no. 5 and §§ 63 et seq. BVerfGG are inadmissible and may be dismissed by an order under § 24 sentence 1 BVerfGG. 145

The decision is to be based on the applications in the original version of the application brief of 20 June 2007, which was received by the Federal Constitutional Court on that same day. The briefs supplementing applications 2 and 3 submitted in the filing of 14 December 2012 were not filed within the time period pursuant to § 64 sec. 3 BVerfGG (I.). In the version of the application brief that is therefore relevant, the applications are inadmissible, either because there is no relevant act or omission at issue or because the particular applicants concerned have not standing to file an application (II.). The alternative applications no. 3 filed in the brief of 14 December 2012 are likewise inadmissible because they did not comply with the time period under § 64 sec. 3 BVerfGG (III.). 146

[…] 147-184

E.

The decision on reimbursement of expenses for the constitutional complaints proceedings is based on § 34a sec. 2 and sec. 3 BVerfGG. 185

Vosskuhle Lübbe-Wolff Gerhardt

Landau Huber Hermanns

Müller Kessal-Wulf

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