

FEDERAL CONSTITUTIONAL COURT

– 2 BVR 1390/12 –
– 2 BVR 1421/12 –
– 2 BVR 1438/12 –
– 2 BVR 1439/12 –
– 2 BVR 1440/12 –
– 2 BVR 1824/12 –
– 2 BVE 6/12 –

Delivered
on 18 March 2014
Kunert
Amtsinspektor
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 –

- against 1. the Act approving 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) of 13 September 2012 (Federal Law Gazette, Bundesgesetzblatt – BGBl II p. 978),
2. the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism (Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus) of 13 September 2012 (BGBl II p. 981),
3. the Act on Financial Participation in the European Stability Mechanism (Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz – ESMFinG, ESM Financing Act) of 13 September 2012 (BGBl I p. 1918),

4. the Act approving 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) of 13 September 2012 (BGBl II p. 1006),
5. the Federal Government's omission to work towards ensuring that the amount of the TARGET2 balances must be limited, settled regularly, and reduced,
6. the Federal Government's omission to work towards a change of the legal framework of the European System of Central Banks, in order to ensure that the percentage of the money created by a national central bank does not exceed the share of national capital in the European Central Bank.

– 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 for 1. to 3. and 5.:

Prof. Dr. Karl Albrecht Schachtschneider,
Treiberpfad 28, 13469 Berlin –

- against a) the Act approving 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 13 September 2012 (BGBl II p. 978),
- b) the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism of 13 September 2012 (BGBl II p. 981),
 - c) the Act on Financial Participation in the European Stability Mechanism (ESM Financing Act – ESMFinG) of 13 September 2012 (BGBl I p. 1918),
 - d) the Act approving the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union of 13 September 2012 (BGBl II p. 1006),

- e) the six legal acts (Six-pack) of the European Union on strengthening the budgetary discipline of the members of the euro group, namely
 - aa) 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),
 - bb) 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),
 - cc) 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),
 - dd) 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),
 - ee) 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), and
 - ff) 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),
- f) the application and observation of the Euro Plus Pact for “Stronger Economic Policy Coordination for Competitiveness and Convergence” (cf. Conclusions of the European Council of 24/25 March 2011, EUCO 10/1/11 REV 1, Annex I) in Germany,
- g) the European Central Bank’s expansion of the money supply by flooding the capital market with credits which are granted against insufficient collateral in order to indirectly finance government budgets and banks,
- h) the establishment of the TARGET2 system for settling payment transactions between the national central banks,
- i) the Federal Government’s omission to challenge the acceptance of government bonds as collateral for Central Bank loans provided that those acts serve the financing of states under the procedure of Art. 263 sec. 1 and sec. 2 TFEU before the Court of Justice of the European Union,

- j) the Federal Government's omission to challenge the TARGET2 system under the procedure of Art. 263 sec. 1 and sec. 2 TFEU before the Court of Justice of the European Union.

– 2 BVR 1421/12 –,

III. on the constitutional complaint
of Mr H...,
and of another 11692 complainants,

- authorised representatives: 1. Prof. Dr. Christoph Degenhart,
Burgstraße 27, 04109 Leipzig,
2. Rechtsanwältin Prof. Dr. Herta Däubler-Gmelin,
in Sozietät Schwegler Rechtsanwälte,
Unter den Linden 12, 10117 Berlin,
3. Prof. Dr. Bernhard Kempen,
Rheinblick 1, 53424 Remagen/Oberwinter –

- against a) the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism of 13 September 2012 (BGBl II p. 981), and the Act for Financial Participation in the European Stability Mechanism (ESM Financing Act – ESMFinG) of 13 September 2012 (BGBl I p. 1918),
b) the Act approving the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union of 13 September 2012 (BGBl II p. 1006),
c) the Act approving 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 13 September 2012 (BGBl II p. 978).

– 2 BVR 1438/12 –,

IV. on the constitutional complaint
of Mr van A...,
and of another 75 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 –

- against a) Article 1 of the Act approving the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union of 13 September 2012 (BGBl II p. 1006),
- b) Article 1 of the Act approving 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 13 September 2012 (BGBl II p. 978),
- c) Article 1 of the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism of 13 September 2012 (BGBl II p. 981),
- d) the Act on Financial Participation in the European Stability Mechanism (ESM Financing Act – ESMFinG) of 13 September 2012 (BGBl I p. 1918).

– 2 BVR 1439/12 –,

V. on the constitutional complaint
of Mr S ...,

- authorised representatives: Rechtsanwälte Dr. Arvid Siebert und Katrin Piepho,
in Sozietät Rechtsanwälte kessler&partner,
Martinistraße 57, 28195 Bremen –

- against 1. the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism of 13 September 2012 (BGBl II p. 981),
2. the Act on Financial Participation in the European Stability Mechanism (ESM Financing Act – ESMFinG) of 13 September 2012 (BGBl I p. 1918), in particular § 5 sec. 2 sentence 1 no. 1 to no. 4 ESMFinG, insofar as the tasks that it assigns to the budget committee have not been assigned to the plenary of the German Bundestag,
3. the Act approving 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 13 September 2012 (BGBl II p. 978),
4. the federal legislature's omission to ensure by legislation that there will be no collective or agreed-upon approaches between the European Stability Mechanism and the European Central Bank,

5. the federal legislature's omission to ensure by legislation that, under budgetary law, a transferable expenditure authorisation for the grand total of EUR 190 billion is anchored in the budget for the year 2013 (if it does not exist already), and that the Federal Republic of Germany's share in the European Stability Mechanism's capital stock, which amounts to EUR 190 billion, will be held in cash until a capital call is made,
6. the federal legislature's omission to ensure by additional legislation that the Federal Republic of Germany has to oppose actions of the European Stability Mechanism that, pursuant to the ESMFinG, require consent, until the European Stability Mechanism has instituted an effective risk management, the reasoning of which the German Bundestag can follow at any time, and until it is guaranteed that the European Stability Mechanism's annual financial statements essentially meet the criteria of the German Commercial Code or another international accounting system that is recognised in Germany.

– 2 BVR 1440/12 –,

VI. on the constitutional complaint
of Prof. Dr. von S...,
and of another 17 complainants,

- authorised representative for 1. to 6. and 8. to 18.:

Rechtsanwalt Prof. Dr. Markus C. Kerber,
Hackescher Markt 4, 10178 Berlin –

- against a) the Act approving 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 13 September 2012 (BGBl II p. 978),
- b) the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism of 13 September 2012 (BGBl II p. 981), and the Act for Financial Participation in the European Stability Mechanism (ESM Financing Act – ESMFinG) of 13 September 2012 (BGBl I p. 1918),
- c) the Act approving the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union of 13 September 2012 (BGBl II p. 1006),
- d) 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).

– 2 BVR 1824/12 –,

and

VII. on the application for a ruling in Organstreit proceedings that

1. Article 1 of the Act on the Treaty of 2 March 2012 approving Stability, Coordination and Governance in the Economic and Monetary Union of 13 September 2012 (BGBl II p. 1006),
2. Article 1 of the Act approving 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 13 September 2012 (BGBl II p. 978),
3. Article 1 of the Act approving the Treaty of 2 February 2012 establishing the European Stability Mechanism of 13 September 2012 (BGBl II p. 981),
4. the Act on Financial Participation in the European Stability Mechanism (ESM Financing Act – ESMFinG) of 13 September 2012 (BGBl I p. 1918),

violate Article 20 section 1 and section 2, Article 23 section 1 and section 2 as well as Article 79 section 3 of the Basic Law and violate the applicant's rights under Article 38 section 1 sentence 2 of the Basic Law.

Applicant: Parliamentary group DIE LINKE in the German Bundestag,
represented by its chairman 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. Christian Calliess,
2. Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin,
3. Prof. Dr. Martin Nettesheim,
Horemer 13, 72076 Tübingen –

– 2 BVE 6/12 –

the proceedings I. to VI. were joined by:

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

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

all proceedings, in proceedings VII. on the side of the German Bundestag, were
joined by:

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) –

The Federal

Constitutional Court – Second Senate – with the participation of Justices

President Voßkuhle,
Lübbe-Wolff,
Gerhardt,
Landau,
Huber,
Hermanns,
Müller,
Kessal-Wulf

held on the basis of the oral hearing of 11 and 12 June 2013 as follows:

Judgment:

1. The proceedings are combined for joint decision.
2. The constitutional complaints are dismissed to the extent mentioned under B.II.

The remainder of the constitutional complaints is rejected as unfounded.

3. The application in the *Organstreit* proceedings of applicant VII. is dismissed, to the extent that the applicant request the declaration that 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 13 September 2012 (Bundesgesetzblatt (Federal Law Gazette) II 2012 p. 978) violates rights of applicant VII., because the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union was decided pursuant to the simplified treaty revision procedure, and that the Act on Financial Participation in the European Stability Mechanism of 13 September 2012 (Bundesgesetzblatt I p. 1918) violates rights of applicant VII., because it assigns responsibilities to the German Bundestag’s budget committee which are to be fulfilled by the German Bundestag in plenary session, and because it lets simple majorities suffice for decisions which require a majority large enough to change the Constitution.

The remainder of the application is rejected as unfounded.

R e a s o n s :

A.

The *Organstreit* proceedings [proceedings relating to disputes between constitutional organs] and the constitutional complaints challenge German and European legislation dealing with the establishment of the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, measures of the European Central Bank, and, in this context, certain omissions of the federal legislature and the Federal Government. 1

I.

1. At its meeting of 28/29 October 2010, the European Council agreed to establish a “permanent crisis mechanism to safeguard the financial stability of the euro area as a whole” in order to deal with the financial and sovereign debt crisis (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 its general characteristics. 2

a) On 16/17 December 2010, the European Council in principle agreed on an amendment of the Treaty on the Functioning of the European Union, according to which a new section 3 was to be added to Art. 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 amendment of Art. 136 TFEU (*Bundestag* Document, *Bundestagsdrucksache* – BTDrucks 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 Art. 136 sec. 3 TFEU with the following wording (EUCO 10/11, 3

Conclusions, Annex II, p. 21 et seq.):

(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.

Following the ratification by all Member States of the European Union, this provision entered into force on 1 May 2013 (cf. BGBl II p. 1047). 4

b) Following this, 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. On 21 July 2011, the heads of state and government of the euro currency area agreed to furnish the European Financial Stability Facility and the future European Stability Mechanism (ESM) with further instruments. The corresponding renegotiations of the Treaty were completed on 2 February 2012 by signing the – second – draft of the Treaty establishing the European Stability Mechanism (cf. BTDrucks 17/9045, p. 29). 5

By the Treaty establishing the European Stability Mechanism, the Contracting Parties (ESM Members) create the “European Stability Mechanism” as an international financial institution (Art. 1 TESM). If it is considered 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 (Art. 12 TESM); this may include “precautionary financial assistance” in the form of a precautionary conditioned credit line or an enhanced conditions credit line (Art. 14 TESM), financial assistance granted through loans for the purpose of re-capitalising financial institutions (Art. 15 TESM) or generally to an ESM Member (Art. 16 TESM) and the purchase of government bonds of an ESM Member on the primary or secondary market (Art. 17 and 18 TESM). With regard to the procedure, Art. 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 (cf. Art. 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 (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 eco- 6

conomic conditionality attached to the financial assistance facility. The provisions relevant to the present proceedings are as follows (cf. BGBl II 2012 p. 981 et seq.):

Article 3

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

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. [...]

(4) By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast.

Where the emergency procedure referred to in the first subparagraph is used, a transfer from the reserve fund and/or the paid-in capital to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the financial support granted under that emergency procedure. The Board of Governors may decide to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital.

(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

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; [...]

l) to make adaptations to this Treaty as a direct consequence of the accession of new members, including changes to be made to the distribution of capital among ESM Members and the calculation of such a distribution as a direct consequence of the accession of a new member to the ESM, in accordance with Article 44; and

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

Article 6

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

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

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

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

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 12

Principles

(1) If 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. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

(2) Without prejudice to Article 19, ESM stability support may be granted through the instruments provided for in Articles 14 to 18.

(3) Collective action clauses shall be included, as of 1 January 2013, in all new euro area government securities, with maturity above one year, in a way which ensures that their legal impact is identical.

Article 23

Dividend policy

(1) The Board of Directors may decide, by simple majority, to distribute a dividend to the ESM Members where the amount of paid-in capital and the reserve fund exceed the level required for the ESM to maintain its lending capacity and where proceeds from the investment are not required to avoid a payment shortfall to creditors. [...]

Article 25

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

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

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

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. [...]

Article 37

Interpretation and dispute settlement

(1) Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

(2) The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

(3) If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.

Article 44

Accession

This Treaty shall be open for accession by other Member States of the European Union in accordance with Article 2 upon application for membership that any such Member State of the European Union shall file with the ESM after the adoption by the Council of the European Union of the decision to abrogate its derogation from adopting the euro in accordance with Article 140(2) TFEU. The Board of Governors shall approve the application for accession of the new ESM Member and the detailed technical terms related thereto, as well as the adaptations to be made to this Treaty as a direct consequence of the accession. Following the approval of the application for membership by the Board of Governors, new ESM Members shall accede upon the deposit of the instruments of accession with the Depositary, who shall notify other ESM Members thereof.

The Treaty establishing the European Stability Mechanism does not contain an explicit right of resignation or termination. 7

The Treaty on the ESM entered into force on 27 September 2012 (BGBl II p. 1086); the European Stability Mechanism started its operational work with the first meeting of the ESM's Board of Governors on 8 October 2012. 8

2. As a further measure to end the European financial and sovereign debt crisis, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was signed on 2 March 2012; its wording is (in part) as follows (BGBl II p. 1006 et seq.):

Article 1

(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

(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

(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 mar-

ket 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

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 No-

vember 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

(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

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

(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

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 explicit right of termination or resignation either. It entered into force on 1 January 2013 (cf. BGBl II p. 162). 10

After the German *Bundestag* had passed a decision on 31 January 2013 (BT-Plenarprotokoll 17/219, pp. 27216 and 27217), after the participation of the *Vermittlungsausschuss* (BRDrucks 71/13), and after the *Bundesrat* had approved the Act on the National Implementation of the Fiscal Compact (BTDrucks 17/12058) on 5 July 2013 (BRDrucks 540/13, BR-Plenarprotokoll 912, pp. 369 and 370), which includes, *inter alia*, changes to the *Haushaltsgrundsätze-gesetz* (Budgetary Principles Act) and to the *Stabilitätsratsgesetz* (Act on the Stability Council), the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union entered into force on 19 July 2013 (BGBl I p. 2398). 11

3. 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 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 (BTDrucks 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 Decision 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 Gover- 12

nance 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 Acts were adopted by a two-thirds majority. Art. 1 of each of these Acts 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 (BGBl II p. 981):

Article 2

(1) Increases of the authorised capital stock under Art. 10 sec. 1 of the Treaty may enter into effect only subject to authorisation of the provision of further capital by a federal law.

(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 Art. 5 sec. 6 letter m of the Treaty, the German Director on the Board of Directors of the European Stability Mechanism, may only approve a resolution proposal for the amendment of the financial assistance instruments under Art. 19 of the Treaty or abstain from voting on such a resolution proposal, if this has been authorised in advance by a federal statute.

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

4. On 20 March 2012, the CDU/CSU and FDP parliamentary groups submitted the draft bill of an Act for Financial Participation in the European Stability Mechanism (ESMFinG), which was to regulate the financial overall framework of the German participation in the European Stability Mechanism and the parliamentary rights of participation during the day-to-day operations of the European Stability Mechanism (cf. BT-Drucks 17/9048, p. 4). The draft consisted of four paragraphs; § 3 of the draft with the heading “rights of participation” did not yet contain any text, but only a blank (“(1) [...]”). According to the explanatory statement, the rights of participation were to be designed in the course of the parliamentary proceedings. An amendment suggested by the working group “Budget” of the CDU/CSU and FDP parliamentary groups of 30 April 2012 contained provisions on the participation of parliament (cf. *Haushaltsausschuss des Deutschen Bundestages, Ausschussdrucksache 4410*). In this version, the draft bill was the subject of a public hearing on 7 May 2012 (cf. BTDrucks 17/10172, p. 5) and of the second and third reading in the German *Bundestag* sitting in plenary session (cf. BT-Plenarprotokoll 17/188, pp. 22743 and 22744).

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On 29 June 2012, the German *Bundestag* adopted the Act for Financial Participation in the European Stability Mechanism (ESMFinG) in the version of the budget committee’s recommendation (BTDrucks 17/9048; 17/10126). On the same day, the

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Bundesrat gave its approval to this Act (BR-Plenarprotokoll 898, p. 312). Pursuant to § 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 EUR 21.71712 billion and in the total amount of callable capital with EUR 168.30768 billion. The Federal Ministry of Finance is authorised to give guarantees for the callable capital in the amount of EUR 168.30768 billion. The provisions of the Act for Financial Participation in the European Stability Mechanism read, in part, as follows (BGBl I 2012 p. 1918):

§ 1

Acquisition of the German share of the capital stock of the European Stability Mechanism; changing the consolidated lending volume of the European Stability Mechanism and of the European Financial Stability Facility

(1) In order to meet its obligations from the accession to the European Stability Mechanism, the Federal Republic of Germany participates in the total amount of the capital of the European Stability Mechanism to be paid in, which amounts to EUR 80 billion, with EUR 21.71712 billion, and in the total amount of callable capital of the European Stability Mechanism, which amounts to EUR 620 billion, with EUR 168.30768 billion.

(2) The Federal Ministry of Finance is authorised to provide guarantees for the callable capital in the amount of EUR 168.30768 billion. Payments on the callable capital are to be made with the means of the federal budget

1. pursuant to Art. 9 sec. 2 of the Treaty establishing the European Stability Mechanism, to restore the level of paid-in capital, if the amount of the latter is reduced by the balance of a defaulted payment below the agreed-upon level of EUR 80 billion;

2. pursuant to Art. 9 sec. 3 of the Treaty establishing the European Stability Mechanism, to avoid the European Stability Mechanism being in default of any of its payment obligations;

3. pursuant to Art. 25 sec. 2 of the Treaty establishing the European Stability Mechanism, in the context of a temporarily revised increased capital call;

4. pursuant to Art. 9 sec. 1 of the Treaty establishing the European Stability Mechanism, because of a unanimous decision of the Board of Governors of the European Stability Mechanism.

(3) The Federal Government is authorised to approve, through its representative in the Board of Governors, a decision pursuant to Art. 10 sec. 1 of the Treaty establishing the European Stability Mechanism on changing the consolidated lending volume of the European Stability Mechanism and the European Financial Stability Facility within the meaning of Art. 39 of the Treaty establishing the European Stability Mechanism, if financial means up to the amount of EUR 200 billion, which are necessary for the implementation of emergency measures that have been promised by the European Financial Stability Facility until 30 March 2012 will not be deducted in the calculation of the consolidated lending volume within the meaning of Art. 39 of

the Treaty establishing the European Stability Mechanism.

§ 4

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 of the German *Bundestag*. The overall budgetary responsibility is affected in particular

1. in the decision under Art. 13 sec. 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 Art. 13 sec. 3 sentence 3 of the Treaty establishing the European Stability Mechanism and of consent to a corresponding Memorandum of Understanding under Art. 13 sec. 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 Art. 10 sec. 1 of the Treaty establishing the European Stability Mechanism; Art. 2 sec. 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 has passed a decision in favour of this. Without such a decision of the plenary, 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 Art. 5 sec. 6 letter 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

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 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 budget 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 Art. 9 sec. 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 Art. 9 sec. 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 Art. 14 to 18, of the pricing guidelines under Art. 20 sec. 2, of the guidelines for borrowing operations under Art. 21 sec. 2, of the guidelines for investment policy under Art. 22 sec. 1, of the guidelines for dividend policy under Art. 23 sec. 3 and of the rules for the establishment, administration and use of other funds under Art. 24 sec. 4 of the Treaty establishing the European Stability Mechanism,
4. the detailed terms and conditions for capital changes under Art. 10 sec. 2 of the Treaty establishing the European Stability Mechanism,
5. the acceptance of provisions or interpretations on professional secrecy under Art. 34 of the Treaty establishing the European Stability Mechanism.

In these cases, the Federal Government may through its representative only vote in favour of, or abstain from voting on, a resolution proposal on matters of the European Stability Mechanism when the budget committee has passed a decision in favour of this. The Federal Government may also make an application to this effect in the budget committee. Without such a decision 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 section 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 Art. 5 sec. 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 of the German *Bundestag* may, by a decision passed by a simple majority, at any time assume and exercise by ordinary decision 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

Involvement by way of a special committee

(1) If the purchase of government bonds on the secondary market under Art. 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

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 Art. 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 *Laender* in Matters concerning the European Union are not affected.

5. By judgment of 27 November 2012, the Court of Justice of the European Union decided that there were no concerns against the amendment of Art. 136 sec. 3 TFEU, neither with regard to the chosen simplified revision procedure pursuant to Art. 48 sec. 6 TEU, nor with regard to its compatibility with the other provisions governing the monetary union, particularly Art. 125 TFEU (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECR 2012, p. I-0000, n. 106 et seq.).

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6. On 15 and 24 March 2013, the euro group agreed on the basics of an assistance programme for the Republic of Cyprus. On 13 April 2013, the Ministry of Finance asked the German *Bundestag* for approval pursuant to § 4 sec. 1 no. 1 and no. 2 of the ESM Financing Act (ESMFinG) to granting stability support in the form of a financial assistance facility pursuant to Art. 13 sec. 2 TESM, to agreeing on a financial assistance facility pursuant to Art. 13 sec. 3 sentence 3 TESM, and to an already negotiated memorandum of understanding pursuant to Art. 13 sec. 4 TESM. The reasons given in the request state that “against the backdrop of the political agreement of the euro group of 24/25 March 2013 and the preliminary measures that were taken in the meantime to restructure the Cypriot banking sector”, the Federal Government was of the opinion that “the conditions for granting financial aid to the Republic of Cyprus were met”. The request further stated that the European Commission, in cooperation with the European Central Bank “had confirmed to the euro group that there was a threat to the financial stability of the euro zone” (BTDrucks 17/13060, pp. 3 and 4). The European Commission Communication of 12 April 2013, which was created in consultation with the European Central Bank and presented by the Federal Government as an attachment, states *inter alia* that an insolvency of Cyprus would have “indirect consequences for the euro currency area as a whole and could again cast doubt on the integrity of the euro currency area” (cf. BTDrucks 17/13060, p. 20); the German *Bundestag* approved the proposals of the Federal Government on 18 April 2013 (BT-Plenarprotokoll 17/234 p. 29179 et seq.). Prior to this, the Federal Constitutional Court had rejected an application by complainant VI. for a temporary injunction (cf. BVerfG, order of the First Chamber of the Second Senate of 17 April 2013 – 2 BvQ 17/13 –, NVwZ 2013, p. 858 et seq.).

The Board of Governors of the European Stability Mechanism decided on 24 April 2013 to grant, in principle, to the Republic of Cyprus stability support in the form of a financial assistance facility (Art. 13 sec. 2 TESM). On 8 May 2013, pursuant to Art. 13 sec. 5 TESM, the Board of Directors of the European Stability Mechanism approved the agreement on the features of the financial assistance facility negotiated with Cyprus (“Financial Assistance Facility Agreement between European Stability Mechanism and the Republic of Cyprus and Central Bank of Cyprus” of 8 May 2013).

7. Already on 24/25 March 2011, the “Euro Plus Pact” had been adopted by the European Council (EUCO 10/1/11 REV 1, Annex I). Pursuant to the text of the treaty and its conclusions, it aims to strengthen the economic pillar of the monetary union, to achieve a new quality of economic policy coordination between the Member States of the euro currency area, to improve their competitiveness, and thereby to achieve a higher degree of convergence. The focus is to be placed primarily on the policy areas that fall within the competences of the Member States and which are crucial for increasing competitiveness and avoiding harmful imbalances (cf. in detail BVerfGE 131, 152 et seq.).

8. Furthermore, the European Union has also passed six acts of secondary legislation in November 2011 (the so-called 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) only applies to the Member States whose currency is the euro and sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the Stability and Growth Pact in the euro area (Art. 1). 20
- 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) only applies to the Member States whose currency is the euro and provides a system of sanctions for the effective correction of excessive macroeconomic imbalances in the euro area (Art. 1). 21
- 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) strengthens the preventive surveillance and coordination instruments of the Stability and Growth Pact. 22
- 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) sets out detailed rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union (Art. 1 sec. 1). These provisions concern in particular the option that, in case of excessive imbalances, European Union institutions issue recommendations and thus influence the Member State concerned. 23
- 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) aims to improve the effectiveness of the corrective measures in case of an excessive deficit by providing stricter requirements for the stages of the deficit procedure pursuant to Art. 126 TFEU. 24
- 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) aims to ensure transparency and availability of the necessary data, which are a requirement for compliance with and enforcement of the obligations under the Treaties regarding the avoidance of excessive budgetary deficits, with detailed requirements for, *inter alia*, public accounting systems, the use of numerical fiscal rules, medium-term budgetary forecasts and the implementation of independent analysis and monitoring. 25
9. In the course of the financial and sovereign debt crisis, particularly in the years 2011 and 2012, the Governing Council of the European Central Bank has repeatedly lowered the credit quality requirements of securities eligible as collateral for central 26

bank lending (cf. for instance Decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government ECB/2010/3 <OJ L 117 of 11 May 2010, p. 102>; Decision of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government ECB/2011/4 <OJ L 94 of 8 April 2011, p. 33>; Decision of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government ECB/2011/10 <OJ L 182 of 12 July 2011, p. 31>) and provided, at the same time, via two extensive longer-term refinancing operations, additionally about one trillion euros to commercial banks at favourable interest rates for three years (cf. ECB press release of 8 December 2011, online at www.ecb.europa.eu/press/pr/date/2011/html/pr111208_1.en.html; see also www.ecb.europa.eu/mopo/implementation/html/index.en.html). With the TARGET2 system, the European System of Central Banks operates a cross-border payment system, which most central banks of the Member States of the European Union and more than 4,000 commercial banks use for carrying out their payment transactions.

II.

1. By judgment of 12 September 2012, the Senate rejected the applications of complainants I. to V. and applicant VII. – who, in the temporary injunction proceedings, was applicant VI.– for a temporary injunction against the ratification of the Treaty establishing the European Stability Mechanism as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, and for preventing the Federal President from signing the national Acts approving and accompanying the Treaties stipulating that the Treaty establishing the European Stability Mechanism may only be ratified if, at the same time, it is ensured under international law that Art. 8 sec. 5 sentence 1 TESM limits the amount of all payment obligations of the Federal Republic of Germany under 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, and that Art. 32 sec. 5, Art. 34 and Art. 35 sec. 1 TESM do not stand in the way of the comprehensive information of the *Bundestag* and of the *Bundesrat* (BVerfGE 132, 195 <196 and 197>).

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2. Subsequently the ESM Members agreed on the basis of a draft by the Federal Ministry of Finance on a joint declaration, of which the German *Bundestag* was informed on 21 September 2012 (BTDrucks 17/10767, p. 3). The ESM Members made this declaration on 27 September 2012, the date the ESM Treaty came into force (BGBl II p. 1086). It was sent to the General Secretariat of the Council of the European Union, as the depositary of the Treaty (Art. 46 TESM), by the government of the Republic of Cyprus (cf. BGBl II p. 1086):

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The representatives of the parties to the Treaty establishing the European Stability

Mechanism (ESM) signed on 2 February 2012, meeting in Brussels on 26 September 2012, agree on the following interpretative declaration:

“Article 8(5) of the Treaty Establishing the European Stability Mechanism (“the Treaty”) limits all payment liabilities of the ESM Members under the Treaty in the sense that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member’s representative and due regard to national procedures.

Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.

The above mentioned elements constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty.”

At the same time, the Federal Republic of Germany also issued a unilateral declaration to the General Secretariat, which reads as follows (BGBl II p. 1087):

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The Federal Republic of Germany refers to the declaration made by the parties to the Treaty of 2 February 2012 establishing the European Stability Mechanism and submitted by Cyprus in their name by Note Verbale of 27 September 2012 to the Council Secretariat as depositary, which reads as follows:

The representatives of the parties to the Treaty establishing the European Stability Mechanism (ESM) signed on 2 February 2012, meeting in Brussels on 26 September 2012, agree on the following interpretative declaration:

“Article 8(5) of the Treaty Establishing the European Stability Mechanism (“the Treaty”) limits all payment liabilities of the ESM Members under the Treaty in the sense that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the ESM Treaty, without prior agreement of each Member’s representative and due regard to national procedures.

Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.

The above mentioned elements constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty.”

The Federal Republic of Germany hereby confirms and explicitly repeats this declaration, which it issued jointly with the other parties to the Treaty.

The General Secretariat of the Council of the European Union, as the depositary of the Treaty, formally announced the notification of the unilateral declaration of the Federal Republic of Germany to the ESM Members by verbal note of 4 June 2013.

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3. On 26 September 2012, the Senate rejected the adoption of an enforcement or-

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der which complainant I. had applied for, since it was not discernible that such an order was needed to enforce the requirements contained in the Senate's judgment of 12 September 2012 (BVerfG, order of the Second Senate of 26 September 2012 – 2 BvR 1390/12 –, juris).

4. By order of 17 December 2013, the Senate separated the proceedings in so far as complainants I., II., III., and VI. challenge the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT), the continued purchases of government bonds by the European System of Central Banks on the secondary market, and the Federal Government's and the *Bundestag's* omission of reactions to this, and in so far as applicant VII. requests a declaration that the *Bundestag* has an obligation to take action with regard to the above-mentioned Decision (2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13 and 2 BvE 13/13).

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III.

In essence, complainants I. to VI. submit that the challenged Acts violate their rights under Art. 38 sec. 1 sentence 1 read in conjunction with Art. 79 sec. 3 and Art. 20 sec. 1 and sec. 2 GG. In addition to this, complainant I. claims a violation of Art. 3 sec. 1 GG, and complainants II. claim a violation of Art. 14 sec. 1 and Art. 20 sec. 4 GG. Applicant VII. believes that the decision of the German *Bundestag* regarding the challenged Acts violates Art. 38 sec. 1 sentence 2 GG and Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1 and sec. 2 and Art. 79 sec. 3 GG, and thus challenges a violation of its own rights as well as of the rights of the German *Bundestag*. In addition to the arguments that have already been cited in the Senate's judgment on the applications for a temporary injunction of 12 September 2012 (cf. BVerfGE 132, 195 <216 et seq.>, n. 42 et seq.), the complainants and the applicant give, in essence, the following reasons:

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1. Complainant I. claims that the challenged Acts – each of them on its own as well as through their interaction – violate his fundamental right under Art. 38 sec. 1 sentence 1 GG. Transformations of the Economic and Monetary Union must not result in a situation in which the European Union no longer complies with the requirements of Art. 23 sec. 1 sentence 1 GG, or in an interference with one of the unamendable principles of Art. 79 sec. 3 GG. To the extent that he expressly reiterates his arguments after the Court's judgment of 12 September, he states:

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a) In the outcome, the insertion of the new Art. 136 sec. 3 TFEU eliminates the bail-out prohibition of Art. 125 TFEU and thus disposes of a mechanism which, according to the Federal Constitutional Court's jurisprudence, is vital for ensuring the Member States' parliamentary responsibility in budget-related matters. At least in connection with the ESM Treaty, the provision leads to a fundamental restructuring of the monetary union towards a community of comprehensive joint liability and stability, which is incompatible with Art. 79 sec. 3 GG. The provision is completely indeterminate with regard to the objective, requirements, and limits of the stability mechanism it men-

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tions, and permits unlimited transfer payments.

b) Complainant I. further argues that the ESM Treaty could – in conjunction with the ESM Financing Act – lead to incalculable burdens on the federal budget that are not controlled and accounted for by the *Bundestag*, and is thus incompatible with the *Bundestag*'s overall budgetary responsibility. 36

aa) The overall budgetary responsibility of the *Bundestag* is in particular violated by the fact that the ESM Treaty establishes an obligation under international law for the Contracting Parties to consent to possible capital increases and re-capitalisations, if they are necessary to preserve or restore the functioning of the European Stability Mechanism. If the authorised capital stock of EUR 700 billion were not (or no longer) sufficient to fulfil the tasks of the European Stability Mechanism – because, for instance, a large state like Italy has difficulties in meeting payments, or because the capital stock is used up – a systematic and teleological interpretation of the ESM Treaty would sustain a capital increase or a re-capitalisation, so that the European Stability Mechanism could continue to fulfil the tasks assigned to it by its Contracting Parties, especially, as emphasised in the preamble to the Treaty, the commitment to ensuring the financial stability of the euro area. In such a situation, the *Bundestag* would be bound by international law and, regardless of its formal participation rights, no longer be able to autonomously decide on the capital increase or re-capitalisation. The ESM Treaty is therefore unconstitutional or has at least to be interpreted in conformity with the Constitution in such a way that an obligation of German authorities to agree to an unlimited amount of capital increases and re-capitalisations violates the principle of democracy. 37

bb) Another reason why the integration of the German *Bundestag* in the decision-making process of the European Stability Mechanism does not meet the constitutional requirements is that the ESM Financing Act, which, for the most part, stipulates the participation rights of parliament, is void due to its formal unconstitutionality. The draft bill that was submitted to the *Bundestag*'s procedure and discussed in a first reading (BTDrucks 17/9048) had expressly left open the central issue of parliamentary participation rights. Thus, merely an empty shell of a law had been submitted to the *Bundestag*'s procedure, which does not meet the requirements of Art. 76 GG. Since the ESM Financing Act is thus unconstitutional under a formal point of view, the participation rights it regulates do not exist legally. Without effective regulation of the necessary involvement of parliament, the *Bundestag* was not allowed to approve the ESM Treaty. 38

cc) The fact that capital calls pursuant to Art. 9 sec. 2 and sec. 3 TESM can be made without the *Bundestag*'s approval violates its overall budgetary responsibility at least insofar as the *Bundestag* cannot control and, if necessary, prevent the accrual of the losses that underlie such capital calls. While, by approving individual assistance measures of the European Stability Mechanism, the *Bundestag* assumes the risk of the potentially ensuing losses and the costs for the federal budget, it has no opportunity 39

to influence the loss risks which follow from the operations of the European Stability Mechanism. It can only indirectly influence policy matters via the guidelines which the Board of Directors adopts pursuant to Art. 21 sec. 2 and Art. 22 sec.1 TESM. However, such guidelines cannot, by their nature, exclude the risk of losses; in addition, the *Bundestag* has no means of enforcing a conduct of the ESM institutions that adheres to these guidelines. The Federal Government's blanket assessment that, with a view to the experiences with other international financial institutions, losses are not expected to arise from the operations of the European Stability Mechanism, is a mere assertion that is not backed by any proof. A comparison with the European Financial Stability Facility rather suggests that the European Stability Mechanism, too, will have to grant long-term loans to the participating states, but will have to refinance itself through medium and short-term loans. Should the interest level rise, this would immediately result in significant loss risks.

dd) With regard to the Director and alternate Director to be appointed by Germany under Art. 6 sec. 1 TESM, they are not bound by the decisions of the *Bundestag* in a sufficiently reliable manner, and their accountability to parliament is not sufficiently ensured. While the Federal Government has announced its intention to appoint a State Secretary with the function of member of the Board of Directors, a mere declaration of intent cannot permanently safeguard the necessary accountability to parliament. The members of the Board of Directors may be replaced at any time by other persons who are not bound by decisions of the *Bundestag* and who are not accountable to it either due to the comprehensive regulation of immunity under Art. 35 TESM. Precisely because the Board of Governors of the European Stability Mechanism can delegate most decision-making powers to the Board of Directors, an explicit legal guarantee of parliamentary accountability of the Director and alternate Director – for instance in the ESM Financing Act – is indispensable.

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ee) In order to ensure the overall budgetary responsibility of the *Bundestag*, a permanent legal protection of Germany's veto position in the institutions of the European Stability Mechanism is required, so that decisions with potentially significant consequences for the federal budget cannot be taken against the vote of the German legal representatives. This is not yet adequately ensured because other states can join the euro area and the ESM Treaty any time. Germany does not have a veto position against such an accession. Thus, the ESM Treaty is only in conformity with the Constitution if the quorum necessary for approval of future accessions of new members is increased so that the veto position of the German representatives in the institutions of the European Stability Mechanism will be preserved.

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ff) The participation of parliament is not sufficiently precisely regulated with regard to the issue of shares of the capital stock of the European Stability Mechanism on terms other than at par pursuant to Art. 8 sec. 2 sentence 4 TESM. An interpretation of § 4 sec. 1 ESMFinG in conformity with the Constitution is needed at least to the effect that, without exception, any decision under Art. 8 sec. 2 sentence 4 TESM is subject to parliamentary approval.

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gg) In order to exclude the possibility that Germany's voting rights are suspended pursuant to Art. 4 sec. 8 TESM, effective budgetary safeguards are needed. The guarantee authorisation that has been issued so far for the callable capital is insufficient because the case at hand is not about a guarantee, but about real payment obligations. Furthermore, it is not clear how a supplementary budget can be adopted and promulgated within the short period of seven days pursuant to Art. 9 sec. 3 TESM. Moreover, it is necessary to make provision in a way that reflects the risk in order to ensure that the capital that is to be transferred is actually available at any time and on time. The Federal Government must take sufficient precautions for capital calls through its own active risk management and must not rely on the risk management of the European Stability Mechanism. In an inquiry addressed to the Federal Government by complainant I., asking how a timely and full payment was to be ensured, the Parliamentary State Secretary in the Federal Ministry of Finance explained in a letter dated 11 October 2012 that they did not assume that capital calls would ever be needed; but otherwise they would adjust potential budgetary measures to the respective general framework such as the amount and the date of the capital call. With this approach, the Federal Government indeed does not take precautions for a deposit and misunderstands the explicit requirements in the Senate's judgment of 12 September 2012.

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hh) The shift of decision-making powers from the plenary to the budget committee which the ESM Financing Act stipulates violates the principle of holding meetings in public, a vital element of representative democracy covered by Art. 79 sec. 3 GG. In order to control, understand and potentially influence the decisions of the elected representatives, the voters need an opportunity to follow the process of how opinions are formed in parliament. This is only guaranteed if the process takes place in the plenary. In view of this, a delegation of decision-making powers to the budget committee may only be considered to the extent that administrative decisions which do not affect the overall budgetary responsibility are concerned. At least with regard to § 5 sec. 2 no. 2 and no. 3 ESMFinG, this not the case.

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ii) The provisions on immunity in Art. 35 sec. 1 TESM for the members of the ESM's bodies lead to arbitrary and thus, with regard to Art. 3 sec. 1 GG, unconstitutional unequal treatment. Art. 35 sec. 1 TESM transfers the functional immunity protection for diplomats and legal representatives of international organisations to the ESM system without sufficient justification. Since in particular the members of the Board of Governors are not independent of the governments of the respective Member State, there is no objective reason for them to be exempt from the justice of their sending states. At a minimum, this would require an interpretation in conformity with the Constitution to the effect that the immunity of the German board members would not extend beyond their leaving this body.

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jj) Pursuant to Art. 3 sentence 1 and Art. 12 sec. 1 sentence 1 TESM, supported by Art. 136 sec. 3 TFEU, the European Stability Mechanism may explicitly only award financial assistance if this is "indispensable to safeguard the financial stability of the

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euro area as a whole”, meaning if a bankruptcy of the requesting Member State would have “systemic” effects. The stability assistance to the Republic of Cyprus adopted in April 2013, however, showed that this requirement is consensually interpreted and applied by the ESM Members and Union institutions in such a way that it does not constitute an objective limit for awarding financial assistance and thus is, in effect, obsolete. According to all known indicators, it is absurd to assume that Cyprus is of systemic importance to the euro currency area as a whole; this could also not be demonstrated with the documents of the European Commission and European Central Bank, on which the *Bundestag’s* Act of Assent of 18 April 2013 was based. Rather, the reasoning in these documents, which is not based on any verifiable data, boils down to the argument that, because of possible psychological consequences, the insolvency of a single ESM Member always affects the financial stability of the euro area as a whole. With this, the criterion of indispensability, which was meant to be restrictive, has lost its application and is replaced by a general policy of the European Commission and the European Central Bank, which eludes legal review. In view of this, Art. 12 sec. 1 sentence 1 TESM proves to be a blanket empowerment which establishes a constitutionally impermissible automatic process of performance. In this respect, an interpretation in conformity with the Constitution is required to the effect that the *Bundestag* may only approve a stability support if the requirement of being indispensable to ensure the financial stability of the euro area as a whole is met and proven by specific and verifiable data on the integration of the financial systems.

kk) Pursuant to § 4 sec. 1 no. 1 and no. 2 ESMFinG in conjunction with Art. 13 sec. 2 to sec. 4 TESM, a two-stage approval procedure is envisaged for the approval of financial assistance: In a first step, the decision of principle, and in a second step, the adoption of a specific agreement with the ESM Member concerned and the approval of the negotiated memorandum of understanding (MoU). If, like when deciding on the stability support for Cyprus, one bypassed this two-stage system – agreed-upon in the Treaty – by taking the decision of principle only after negotiating a specific agreement with the Member State concerned and an MoU, and by linking the decision of principle to the approval of the specific assistance facility and the MoU, the *Bundestag* could no longer freely decide on the whether the stability support is granted. The negotiation of an MoU, which usually entails considerable efforts, creates a *fait accompli* with regard to foreign policy and massive, inescapable pressure to approve. The primary question, namely the systemic relevance of an ESM Member, thus completely stands back behind the Member State’s specific financing needs and its debt sustainability. The justification for this approach put forward by the European Stability Mechanism and the Federal Government, namely to save time, would amount to a treaty practice that is incompatible with the wording and purpose of the Treaty. In this respect, and with regard to the actions of German authorities, an interpretation in conformity with the Constitution is needed which counteracts the binding solidification of such treaty practice under international law.

c) Complainant I. further submits that the Treaty on Stability, Coordination and Gov-

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ernance in the Economic and Monetary Union (“fiscal compact” – TSCG) violates his right to participation in the constituent power of the people. Though the TSCG does not affect the content of budgetary autonomy more intensely than the rules already laid down in the Basic Law, the impact of the TSCG goes beyond this. Since this Treaty cannot be terminated under international law, Germany has committed itself with the Treaty to never remove 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.

d) Furthermore, complainant I. alleges that the Federal Government violates his right to participate in the legitimation of state power under Art. 38 sec. 1 sentence 1 GG by failing to work towards a change of the TARGET2 system and of the framework for the creation of money. While the TARGET2 system was originally developed in accordance with primary law as a trans-European payment system, it has displayed significant constructional faults since 2007, and even more so since 2010. The constant growth of the TARGET2 balances shows that the system allows a Member State of the euro currency area to take out “overdraft loans” in unlimited amounts at the expense of other Member States to fund its own imports. This causes a high risk to the federal budget which results solely from the behaviour of other states and which the *Bundestag* has never approved. It is therefore the Federal Government’s duty to take all necessary measures to defend the Constitution and its identity-shaping core. While there is a certain margin of appreciation for this, the complete inaction of the Federal Government is unconstitutional.

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2. Complainants II. submit that the challenged Acts violate the political freedom of the citizens and the right to democracy entrenched in Art. 38 sec. 1 GG.

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a) They particularly emphasise in their substantiation that Art. 136 sec. 3 TFEU deepens the connectedness of the euro currency area to such a degree that a federal state is created and Germany's statehood and sovereignty are largely terminated. This violates the principle of democracy, the rule of law and the principle of a social state, as well as the guarantee of sovereign statehood, and at the same time violates Art. 146 GG, because it paves the road to a further consolidation of the European Union, while the German people was not given an opportunity to approve this by voting on a new Constitution.

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b) The ESM Treaty alters the foundations of the European Union. The stability principle applying to monetary policy (Art. 88 sentence 2 GG), which is based in the principle of a social state and laid down in the “debt brake” of Art. 109 sec. 3 and Art. 115 sec. 2 GG, is repealed. Germany shares liability for the debts of foreign countries for an unlimited period of time. The budgets of the Federation and the *Laender* are bound by the capital share of the European Stability Mechanism and the callable capital to a considerable extent and for an indefinite period of time; so financial and budgetary sovereignty are permanently limited. The Act of Assent to the ESM Treaty also violates the principle of a social state, which can be challenged pursuant to Art. 38

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sec. 1 in conjunction with Art. 2 sec. 1 GG and Art. 1 sec. 1 GG, because the social benefits and pension payments for Germans have to be cut. It further violates the right to property under Art. 14 sec. 1 GG, because Germany's obligations will lead to inflationary developments. The European Stability Mechanism is turning into a financial institution with the tasks and powers of a bank, but is not subject to any banking supervision. The purchase of government bonds – directly or indirectly – is incompatible with Art. 123 TFEU and the principle of stability of the monetary union and of the Basic Law.

c) The Act of Assent to the TSCG also violates the fundamental right of all citizens to decide on the Constitution of Germany. Art. 4 TSCG obliges Germany to make an annual reduction of debt of EUR 26 billion. This is incompatible with Art. 109 sec. 3, Art. 115 sec. 2, and Art. 143d sec. 1 GG 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. 53

d) Likewise, the acts of secondary legislation contained in the so-called Six-pack and the Euro Plus Pact interfere with the complainants' rights under Art. 38 sec. 1 GG, because they introduce an economic government of the European Union over all Member States of the euro currency area. The Federal Republic of Germany thus becomes a constituent state of the federal Union State and loses at the same time its fiscal, financial and economic sovereignty, and thus its sovereignty as a whole. This is not compatible with the current Basic Law; a new Constitution as required by Art. 146 GG has not been passed. 54

e) Finally, the European System of Central Banks violates the sovereignty of the Member States, and thus also the individuals' right to vote, by expanding the money supply, in particular by granting loans at low interest rates while accepting insufficient collateral, and by the TARGET2 system. If necessary, the Federal Government is obliged to initiate proceedings for annulment against these acts at the Court of Justice of the European Union. 55

3. Complainants III. hold that their rights under Art. 38 sec. 1 sentence 1 GG are violated primarily because structural changes in the organisational set-up of the state were enacted with the challenged Acts without the necessary participation of the people. 56

a) Art. 136 sec. 3 TFEU devalues the bail-out prohibition of Art. 125 TFEU, which is vital for the monetary union. This changes the direction of monetary policy and alters the nature of the European Union towards a transfer and liability community without democratic legitimation. Art. 136 sec. 3 TFEU should not have been decided in the simplified revision procedure pursuant to Art. 48 sec. 6 TEU and is therefore contrary to European Union law. 57

b) By approving the ESM Treaty, the German *Bundestag* divests itself of its budgetary autonomy. The Treaty institutes an automatic liability from which future parlia- 58

ments will not be able to escape. Art. 3 TESM authorises the European Stability Mechanism to perform acts with unpredictable consequences for the budgets of the Member States. Pursuant to Art. 21 TESM, the European Stability Mechanism is allowed to engage without a banking license in all banking transactions and may also, without any involvement of the parliaments, refinance itself at the European Central Bank. The ESM Treaty would remove from the “stability community” the prohibition of direct acquisition of debt instruments of public institutions by the European Central Bank and the prohibition of the assumption of liability, which are essential cornerstones of the Economic and Monetary Union.

As part of the European Stability Mechanism, Germany engages risks that are not acceptable under the provisions of the Basic Law. Issuing shares above par could cause a leveraging of the funds of the European Stability Mechanism. Art. 8 sec. 5 TESM limits the liability of the Member States inadequately. The limitation of the liability risk is counteracted by the provisions on capital calls and the coverage of losses in Art. 9 and Art. 25 TESM; if a Member State becomes insolvent, the members which are still solvent will have to make higher payments in order to set off the default. In view of the likelihood of such payment shortfalls, the legislature has a margin of appreciation; however, even considering this margin of appreciation and leeway for forecasts, the legislature assumes an unjustifiable liability risk with the European Stability Mechanism. The problematic constitutional effects are reinforced by the fact that the ESM Treaty contains no termination clause. Thus, the Treaty is *de facto* impossible to terminate; the *clausula rebus sic stantibus* can only be applied under strict requirements. A unilateral termination by one of the parties to the Treaty does not readily release this party from its obligations under the Treaty; rather, one has to assume that the principle of state responsibility continues to apply.

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c) The decisions on the acts of the European Stability Mechanism are made in a procedure that is not sufficiently democratically legitimised. The responsibility of the German representatives in the ESM bodies towards parliament, which is only indirect and questionable due to duties of loyalty under international law, is also not balanced by the – itself imperfectly structured – participation of the *Bundestag* in decisions of the European Stability Mechanism. The Treaty does not contain any valid reservations under international law in favour of the *Bundestag*. The participation rights regulated in §§ 4 et seq. ESMFinG are insufficient in particular because the specific form of participation depends solely on the Federal Government’s assessment of whether in the individual case the overall budgetary responsibility is concerned. Ultimately, the participation rights of the *Bundestag* can only be imperfectly determined in the accompanying legislation because, given the almost unlimited powers of the European Stability Mechanism, it appears to be impossible from the outset to comprehensively regulate such rights of participation. The provisions on immunity of the ESM Treaty contribute to the fact that the European Stability Mechanism can largely act without democratic monitoring. This is incompatible with Art. 79 sec. 3 GG.

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The fact that the participation rights of the *Bundestag* pursuant to the ESM Financing Act do not meet the requirements of the principle of democracy, and that the *Bundestag* is *de facto* largely limited to mere subsequent enforcement of decisions that were taken intergovernmentally, is also shown by the procedure on granting financial assistance to the Republic of Cyprus. Neither had the substantive requirements of Art. 12 TESM been proven, nor had the two-stage procedure of Art. 13 TESM been observed. Rather, the German *Bundestag* was presented at the same time with the findings of the competent institutions on the requirements of financial assistance, the decision on awarding financial assistance, and the memorandum of understanding. Under the prevailing political conditions, the *Bundestag* was not in a position to insist on compliance with the two-stage procedure. Since this treaty practice can be expected to become established, the *Bundestag* will end up being permanently confined to the role of subsequently enforcing decisions. 61

d) With a view to both procedure and content, the conclusion of the SCG Treaty violates democratic principles of the European Union. The fact that the Treaty allegedly contains no essential changes of the present state of law is irrelevant. The existing commitments under secondary Union law and under the “debt brake” which is already contained in the Basic Law will acquire a new legal quality as a result of being laid down in international law. 62

Moreover, the SCG Treaty also has constitutive effects. The 0.5% criterion in Art. 3 sec. 1 letter b sentence 1 TSCG creates a stricter requirement for the medium-term budget target than under secondary Union law. Furthermore, in the case of material deviations from the medium-term budget objective or from the adjustment path towards it, an automatic correction mechanism is envisaged 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. 63

The SCG Treaty also changes the substantive situation under the Constitution, since there is no automatic correction mechanism under the Basic Law. In addition, the states whose total borrowing exceeds the *Maastricht* criterion of 60% of the gross domestic product will have to undertake cutback measures with the aim of reducing the part over 60% by an average of one-twentieth per year. The actual loss of budgetary sovereignty, however, lies in the fact that the parties that go through an excessive deficit procedure henceforth have to get their “budgetary and economic programs” approved by the European Union. This results in a lasting loss of the *Bundestag*’s legislative discretion. The SKS Treaty is intended to be of a permanent nature and cannot easily be terminated. Democracy, however, means ruling for a limited period of time; whereas the SCG Treaty not only installs permanent mechanisms of supervision and sanction, but also irreversibly determines the economic policy of the contracting parties. 64

4. Complainants IV. believe that the challenged Acts violate their rights under Art. 38 sec. 1 sentence 1 GG in conjunction with Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1 and 65

sec. 2, and Art. 79 sec. 3 GG. They claim that a financial equalisation system is created, with which the threshold to a European federal state is crossed.

a) The Act Amending Art. 136 TFEU violates the Constitution because the underlying decision of the European Council is invalid: The new Art. 136 sec. 3 TFEU could not have been decided in the simplified treaty revision procedure because, in effect, it expands the powers of the European Union; plus, its substance violates the bail-out prohibition of Art. 125 sec. 1 sentence 2 TFEU. Finally, in view of the purpose and scope of the authorisation it contains, it also does not meet the requirements of the constitutional principle of definiteness.

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b) With the ESM Treaty, which is irreversible under international law, the *Bundestag* divests itself permanently of its responsibility for the budget. In connection with the ESM Financing Act, the Treaty establishes incalculable payment obligations towards a financial institution that is not adequately democratically legitimised, monitored, and linked to parliament. The *Bundestag* has no autonomy of decision with respect to individual payments anymore, and can in particular no longer invoke a lack of budget. The ESM Treaty also violates the prohibition of automatic liability, since the scope of payment obligations is not completely foreseeable and cannot be sufficiently answered for by the *Bundestag*. Thus, there is a high probability of obligations to make subsequent contributions pursuant to Art. 25 sec. 2 TESM, since several Member States will most likely not be able to make the payments expected of them. Also, it is not inconceivable that the European Stability Mechanism, which is freely operating on the financial markets, will generate losses through speculation, without the *Bundestag* being in a position to influence this. Moreover, the European Stability Mechanism as a “free-floating” financial organisation on an intergovernmental basis is not sufficiently democratically legitimised. Only the Finance Ministers as members of the Board of Governors possess – albeit weak – democratic legitimation. With regard to acts of the European Stability Mechanism, the German *Bundestag* is assigned the mere subsequent enforcement of decisions that were taken elsewhere. Given this lack of legitimation, the lack of political and technical monitoring instruments aggravates the situation. It is not clear how the Federal Government can satisfy its duties to provide information pursuant to Art. 23 sec. 2 GG, given the duty of professional secrecy (Art. 34 TESM) imposed on the members of the bodies of the European Stability Mechanism.

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c) The rules for the participation of the *Bundestag* under §§ 3 to 7 ESMFinG do not meet the constitutional requirements because the budget committee and not the plenary is involved in many matters important for the overall budgetary responsibility. Moreover, with a view to Art. 23 sec. 1 sentence 3 GG, particularly serious decisions, such as decisions on an increase of capital stock, would require not only a simple but a two-thirds majority in the *Bundestag* and *Bundesrat*.

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d) The SCG Treaty violates the constituent power of the people which is guaranteed by Art. 146 GG. The obligation to never remove the “debt brake” from the Constitu-

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tion, without, however, including it in the eternity clause, violates the constitutional identity of the Basic Law. This commitment under international law in shaping the constitutional foundations of the state constitutes a loss of the so-called *Kompetenz-Kompetenz* (sovereign powers to decide on its own powers). In addition to this, the legislative obligations under the SCG Treaty go far beyond the “debt brake” under constitutional law: A borrowing limit for the state as a whole, including local authorities and social security organisations, an “automatic correction mechanism”, the rights of the “independent institution” pursuant to Art. 3 sec. 2 SCG Treaty, and the lack of transitional periods all lead to significantly stricter requirements than those contained in the “debt brake”, if the international obligations are complied with. In this respect, Art. 79 sec. 1 GG has been ignored as well.

The budgetary autonomy, which is rooted in the principle of democracy, is eroded by Art. 5 SCG Treaty. While this provision does not prescribe that the European Commission must approve budgets, it does require the European Commission to approve budgetary and economic partnership programmes which last for longer than one parliamentary term and are capable of restricting parliament’s decision-making options. This goes beyond the existing requirements and possibilities of sanctions under secondary law. The automatic correction mechanism will also result in requirements of the European Commission eroding the structural principles of the state, which are protected under Art. 79 sec. 3 GG in conjunction with Art. 20 GG.

Finally, the irreversibility of the obligation violates Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 and Art. 79 sec. 3 GG. According to general rules of public international law, the Treaty cannot be terminated unilaterally.

5. To the extent that complainant V. holds on to his request, he contends that the establishment of the European Stability Mechanism endangers the overall budgetary responsibility of the *Bundestag*. In support of this he argues, *inter alia*, that there is a danger of Germany losing voting rights in the bodies of the European Stability Mechanism, since, under certain circumstances, callable capital might not be provided in time. Neither a supplementary budget nor an emergency budget pursuant to Art. 112 GG can avert this danger with sufficient certainty. Furthermore, not only changing or unstable majorities in the *Bundestag*, but also the “debt brake” under Art. 115 GG can stand in the way of a short-term provision of a large amount of capital. In view of the risk of a capital call, the Federal Government and the *Bundestag* need to make a fact-based analysis and base their budgetary planning on it. However, as far as the Federal Government points out that the provision of capital to reliably prevent an exclusion from voting is incompatible with the principle of efficiency and economy, the protection of the constitutional identity takes precedence. In the alternative, it has at least to be ensured that an effective risk management, the reasoning of which the German *Bundestag* can follow at any time, is instituted at the European Stability Mechanism, and that the annual financial statements essentially meet the criteria of the German Commercial Code or another well-respected accounting system.

The assignment of different decision-making powers to the budget committee pursuant to § 5 sec. 2 sentence 1 no. 1 to no. 4 ESMFinG is also incompatible with the complainant's rights under Art. 38 sec. 1 GG. The *Bundestag's* right to self-organisation, which is guaranteed by Art. 40 sec. 1 sentence 2 GG, does not allow for an allocation of tasks via a law requiring consent, if the delegated powers, as in this case, are of at least indirect budgetary relevance. 73

Complainant V. also questions the effectiveness under international law of the interpretative declarations on the scope of the Member States' liability that were made as a result of the judgment of 12 September 2012. He argues that in addition to the interpretative declarations – the legal nature and effect of which are unclear –, an amendment of the Treaty that is ratified by all signatories is required in order to ensure the effectiveness of the limitation of liability. 74

6. Complainants VI. claim a violation of their rights under Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 1 and sec. 2 GG, and under Art. 14 GG. 75

They argue that the challenged Acts violate not only the normative foundations of the European Economic and Monetary Union, but also and in particular the overall budgetary responsibility of the *Bundestag*. In particular the raising of capital of the European Stability Mechanism is insufficiently regulated; realistically, one has to assume a substantial obligation of the financially stronger Member States to make additional contributions. The European Stability Mechanism creates substantial financial risks, which, in case they are called upon, are no longer eligible for refinancing, and which, together with the other obligations entered into under the sovereign debt crisis, render the budgetary autonomy of the *Bundestag* largely ineffective. In the long term, the risks that were taken on with the challenged Acts also further inflation. 76

The decision of the *Bundestag* on the assistance to Cyprus and its preparation by the Federal Government show an example of the limits of fencing in the European Stability Mechanism via constitutional law. With regard to the financial needs and the debt sustainability of the Republic of Cyprus, the Federal Government had, before the *Bundestag*, only referred to questionable, incomprehensibly reasoned and even contradictory estimates by the so-called "Troika" – a panel devoid of any democratic control – and without having checked these assessments itself. The *Bundestag*, who had only received the draft with a total of 26 attachments three days before passing the decision, had thus no chance to exercise its overall budgetary responsibility. In addition, it decided on the granting of stability assistance and the negotiated Memorandum of Understanding in a single session; the conditionality in the individual case called for by the Senate is thus threatened to be undermined in practice. 77

Regulation (EU) No 1176/2011 lacks an authorisation under primary law; moreover, it impermissibly affects the inviolable economic and budgetary competence of the *Bundestag* by establishing a European economic government. 78

7. Applicant VII. believes that the decision of the German *Bundestag* on the chal- 79

lenged Acts violates its rights under Art. 38 sec. 1 sentence 2 GG and Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1 and sec. 2, as well as Art. 79 sec. 3 GG; the German *Bundestag*, the applicant submits, is adversely affected in its right to participate in, and being informed about, matters concerning the European Union, which is enshrined in Art. 23 sec. 2 sentences 1 and 2 GG. Its submission corresponds essentially to the submissions of complainant IV. (cf. above n. 65).

In addition, applicant VII. *inter alia* argues that by adopting the resolution on the amendment of Art. 136 TFEU under the simplified procedure, the right of participation of the *Bundestag* pursuant to Art. 48 sec. 2 sentence 2 GG had been “cancelled”. 80

Given the total amount of the guarantees, the establishment of the European Stability Mechanism practically abolishes the budgetary autonomy of the *Bundestag* for years, perhaps even decades. It should be borne in mind that the “debt brake” of Art. 115 sec. 2 GG prohibits the *Bundestag* from 2016 onwards to cover budget deficits by borrowing. 81

With regard to the acts of the European Stability Mechanism, the *Bundestag* ends up, because of the Treaty’s structures, in the role of mere subsequent enforcement of decisions that have already been made elsewhere. Neither do the participation rights regulated under the ESM Financing Act meet the constitutional requirements. For instance, pursuant to § 5 sec. 3 ESMFinG, the budget committee is merely “involved” but does not have a veto right in case of capital calls pursuant to Art. 9 sec. 2 and sec. 3 shall TESM; however, considering the potential impact on the budgetary sovereignty of the *Bundestag*, in such cases a constitutive decision of the plenary is required. Furthermore, §§ 3 to 7 ESMFinG do not ensure that the *Bundestag* has sufficient influence on individual dispositions and on the way that authorised financial facilities are dealt with. 82

The SCG Treaty violates the institutional rights of applicant VII. under Art. 38 sec. 1 sentence 2 GG because the *Bundestag* – especially because of the automatic correction mechanism if the credit limit is exceeded – was divested of its overall budgetary responsibility with regard to the use of funds. 83

IV.

The Federal President, the German *Bundestag*, the *Bundesrat*, the Federal Government and all *Laender* governments had the opportunity to submit statements. In the course of the oral hearing, representatives of the European Stability Mechanism, the European Central Bank and the German *Bundesbank* were heard as expert third parties (§ 27a Federal Constitutional Court Act). 84

1. The Federal Government considers the constitutional complaints and the application in the *Organstreit* proceedings to be inadmissible, and in any event unfounded. 85

a) According to the Federal Government, Art. 136 sec. 3 TFEU merely clarifies that the assistance measures of the European Stability Mechanism are measures of eco- 86

conomic policy, for which the Member States are competent. Art. 136 sec. 3 TFEU does not change the orientation of the monetary union. At the time the primary legislation on the Economic and Monetary Union was drafted, one had not anticipated the situation, or had at least not included it to the necessary extent, that the insolvency of a Member State could endanger the financial stability of the euro currency area as a whole and thus endanger the common currency. Furthermore, the financial assistance measures, which are subject to strict conditionality, are designed as a last resort to ensure the financial stability, and are thus compatible with Art. 125 TFEU.

b) The Treaty establishing the European Stability Mechanism meets the requirements set by the Federal Constitutional Court in its judgments of 7 September 2011 and 28 February 2012 for the German participation in international financial assistance mechanisms. The ESM Treaty does not constitute an entry into a transfer union in the sense of a European financial equalisation system; the overall budgetary responsibility of the German *Bundestag* remains intact and the amount of German liability is limited. This is clearly and bindingly expressed in the declarations under international law that were made following the Senate's judgment of 12 September 2012. The waiver of a veto right for Germany in cases of capital calls pursuant to Art. 9 sec. 2 and sec. 3 TESM is necessary because it safeguards the creditworthiness of the European Stability Mechanism. The domestic protection of the callable capital through "guarantee authorisations" pursuant to Art. 115 sec. 1 GG is consistent with state practice. 87

c) The Federal Government further states that the ESM Financing Act is neither formally nor substantively objectionable. 88

aa) Despite the initially existing placeholder for the participation rights of the *Bundestag*, the ESM Financing Act is in conformity with the formal requirements of the Constitution, because the draft was otherwise complete. The later addition of the participation rights remains within the limits of permissible amendments during the legislative procedure. 89

bb) The acts of the European Stability Mechanism are sufficiently democratically legitimised on the basis of the ESM Financing Act. 90

(1) In view of the non-definitive nature of § 4 sec. 1 ESMFinG, which subjects all matters of the European Stability Mechanism that relate to the overall budgetary responsibility of the German *Bundestag* to the consent of the *Bundestag's* plenary, it is not required to have an express provision regarding the *Bundestag's* participation for issuing new shares of capital stock of the European Stability Mechanism above par pursuant to Art. 8 sec. 2 sentence 4 TESMV. If, in case of an increase of capital stock pursuant to Art. 10 sec. 1 sentence 2 TESM, the Board of Governors decides to issue new shares above par, it is necessary to have the agreement of the German representative following the prior approval of the *Bundestag* pursuant to § 4 sec. 1 sentence 2 no. 3 ESMFinG. Moreover, pursuant to Art. 10 sec. 1 sentence 3 TESM, the decision of the Board of Governors itself would only become effective after the con- 91

clusion of the national notification procedure, which in Germany requires authorisation by a federal law (Art. 2 sec. 1 TESM). If, however, at the accession of a new member, which requires the approval of the *Bundestag*, shares of capital stock were issued higher than at par, pursuant to Art. 5 sec. 6 letter k, Art. 44 TESM, the Board of Governors would have to decide on the accession, which would, pursuant to Art. 10 sec. 3 TESM, lead to an automatic increase in the authorised capital stock. The additional participation of the *Bundestag* would be unnecessary because the accession would not expand the existing liability of the “old” ESM Members. The issue of new shares at a sales price above par would be without consequences for Germany, since the shares of the former capital stock remained unchanged in terms of value. Thus, neither of the two cases affects the overall budgetary responsibility of the *Bundestag*, which alone could require an explicit regulation.

(2) Special budgetary measures to avoid the application of Art. 4 sec. 8 TESM on Germany and a withdrawal of voting rights due to a missing or delayed fulfilment of a capital call, as requested by the Senate in the decision of 12 September 2012, are not necessary.

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(a) It is not necessary to have access to the total sum of about EUR 168.3 billion from the outset and permanently in order to ensure the payment of the callable capital. Rather, an amount which seems realistic considering potential losses and payment obligations is sufficient. The terms and conditions of capital calls (“terms and conditions of capital calls for ESM” of 9 October 2012) oblige the European Stability Mechanism to a prudent “risk policy” so as to reduce the risk of capital calls. Moreover, losses of the European Stability Mechanism can only arise if Member States fail to repay the financial assistance they received. Due to different repayment dates, only a partial amount can be affected at any time. It is therefore impossible that a capital call will reach the amount of EUR 168.3 billion. It is not necessary to take precautions for unrealistic scenarios.

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(b) Even in cases of shorter-term capital calls, which do not allow for consideration under the regular budget preparation procedure pursuant to Art. 110 GG, a loss of voting rights does not need to be feared. Either a supplementary budget or the granting of expenditures in excess of budgetary appropriations or for purposes not contemplated by the budget within the meaning of Art. 112 GG and § 37 of the Federal Budget Code (*Bundeshaushaltsordnung* – BHO) would be possible. The unforeseen and unavoidable necessity required for such authorisation pursuant to Art. 112 GG would exist. A capital call is unpredictable in this sense, since during the regular budgetary procedure, it was not known that and in which amount it would arise. Due to the existing legal obligation to service the call, the need is also factually irrefutable. A supplementary budget is also not excluded under the requirements of the right to make emergency appropriations and could be approved at very short notice if all participants are willing to do so. In this context it should also be noted that the constitutional obligation to avoid an exclusion of voting rights applies to all constitutional organs involved. Together they are legally and factually in a position to avoid a loss of voting

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rights.

(c) A capital call cannot be expected at any time. In the context of the European Stability Mechanism's risk management, it is envisaged to provide early information on potential losses and the threat of capital calls. A capital call pursuant to Art. 9 sec. 3 TESM with a period of seven days is only envisaged to avert an immediate default; the paid-in capital cannot be "refilled" under this provision. Even in the unlikely event of the failure of several Member States, no subsequent claim in the full amount of all defaulted obligations is to be expected, but only claims in accordance with specific maturities of the European Stability Mechanism in relation to third parties. 95

(d) Art. 9 sec. 2 TESM confers on the Board of Directors discretion for a capital call ("may"), so that one may wait for a decrease in the paid-in capital. A capital call under Art. 9 sec. 3 TESM is extremely unlikely, since losses from operations of the European Stability Mechanism are primarily payable against the reserve fund and paid-in capital and only in the end against the authorised capital. Furthermore, the European Stability Mechanism is obliged to pursue a prudent "risk policy", the very aim of which is to prevent capital calls pursuant to Art. 9 sec. 2 and sec. 3 TESM. Finally, disputed payment obligations on the basis of Art. 9 sec. 2 TESM, possibly in conjunction with Art. 25 sec. 2 TESM, could be fulfilled with the reservation that they might be reclaimed. 96

(e) Theoretically, one cannot exclude the possibility that a call of extremely high amounts would lead to difficulties in the timely procurement of the necessary capital; however, this would then also apply to all other Member States. It is unthinkable and under the point of view of the international law principle of good faith (Art. 31 VCLT) also inadmissible that such a situation would be exploited by other Member States used in the bodies of the European Stability Mechanism. Overall, one can therefore assume that a loss of voting rights for the Federal Republic of Germany pursuant to Art. 4 sec. 8 TESM is practically impossible. 97

(3) The constitutional complaints are inadmissible to the extent that they challenge the division of tasks between the plenary and the budget committee as envisaged in the ESM Financing Act. Based on Art. 38 sec. 1 GG, the Federal Constitutional Court granted the voters protection against the erosion of the right to vote in the form of a depletion of the *Bundestag*'s responsibilities through the delegation of powers to international or supranational institutions, but it did not grant them the right to take action on behalf of the individual parliamentarians for their rights under Art. 38 sec. 1 sentence 2 GG. 98

These allegations are in any case unfounded. In the judgment of 12 September 2012, the Federal Constitutional Court did not show any fundamental objections to the assignment of less important decisions to the budget committee, especially since § 5 ESMFinG provides the plenary a right to revocation. Pursuant to § 4 sec. 1 sentence 1 ESMFinG, the plenary must act anyway when the overall budgetary responsibility of the *Bundestag* is affected. Thus it is guaranteed that all major decisions are 99

taken by the plenary. Only in the exceptional constellation of a purchase of government bonds that has to be kept confidential, which has already been recognised by the Federal Constitutional Court in the decision of 28 February 2012 in the proceedings 2 BvE 8/11, the plenary's right of access is dispensed with and, pursuant to § 6 ESMFinG, the decision is transferred to a special committee consisting of members of the budget committee.

§ 5 sec. 2 sentence 1 no. 2 ESMFinG, according to which decisions on capital calls pursuant to Art. 9 sec. 1 TESM as well as decisions on the acceptance or material change of the terms and conditions of capital calls pursuant to Art. 9 sec. 4 TESM only require prior approval of the budget committee, but not the plenary, is also unproblematic. The implementing provisions provided for in the ESM Treaty do not constitute regulations with fundamental budgetary importance, because the implementing provisions cannot go beyond the regulations and stipulations of the ESM Treaty. To the extent that the implementation provisions contain, apart from purely technical regulations, also substantive rules, the ESM Financing Act takes this into account through differentiated participation rights: The implementation provisions mentioned in § 5 sec. 2 ESMFinG require approval of the budget committee, whereas the other provisions mentioned in § 5 sec. 3 ESMFinG entail a right to submit a statement and its consideration by the Federal Government, to the extent that the ("simple") budgetary responsibility of parliament is affected. Otherwise, a mere notification is sufficient. Finally, pursuant to § 5 sec. 5 ESMFinG, in case of a special interest or suspected importance for the overall budgetary responsibility, the plenary can assume an issue to itself at any time. Even if implementation provisions can affect the overall budgetary responsibility of the German *Bundestag*, this need not lead to the unconstitutionality of § 5 sec. 2 no. 2 ESMFinG, because an interpretation of § 4 sec. 1 ESMFinG in conformity with the Constitution would be possible and, in that case, also required.

100

(4) The implementation of the decisions of the *Bundestag* in the Board of Directors of the European Stability Mechanism is guaranteed by posting a State Secretary to the Board. This is compatible with the ESM Treaty, which does not call for the independence of the Directors. It is unrealistic to assume that a civil servant bound by the instructions of the Ministry of Finance will act contrary to a vote in the German *Bundestag*.

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(5) The mere possibility that the German share could be reduced by future developments to the degree that Germany would lose its veto power does at least currently not lead to any interference with the principle of democracy. It is inconceivable that in particular the United Kingdom, whose accession could significantly change the ownership structure, would in the foreseeable future be ready to adopt the euro. Moreover, the introduction of the euro in another state, as well as its subsequent admission in the European Stability Mechanism, requires a unanimous decision of the states of the euro zone.

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d) With regard to the SCG Treaty, the Federal Government essentially argues that this obliges the parties to engage in greater budgetary discipline and to prevent excessive debt. It does not restrict the budgetary autonomy in an impermissible way, it essentially complies with the constitutional requirements, and puts into specific terms provisions of Union law which already exist. The Treaty guards against excessive public debt and in this way prevents further future sovereign debt crises; in this way it also supplements the ESM Treaty substantively and functionally. The limitation of government borrowing is compatible with the Basic Law, since it only defines a framework to be filled by the Member States and this framework corresponds to the model of the German “debt brake”. The proposals which Art. 3 sec. 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 Art. 3 sec. 1 letter b sentence 3 TSCG are merely interpretation guides putting the provision in specific terms. The indefinite duration of the Treaty is not a violation of the Constitution. A treaty entered into for an indefinite period of time may be terminated at any time by all contracting parties by mutual agreement. In addition, in the case of fundamental changes of circumstances, a party may withdraw from the treaty on the basis of Art. 62 VCLT. 103

2. The German *Bundestag* considers the constitutional complaints and the application in the *Organstreit* proceedings to be partly inadmissible, and in any case unfounded. 104

a) The Act of Assent to the European Council decision to amend Art. 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, Art. 125 TFEU does not prevent the voluntary granting of assistance. Art. 136 sec. 3 TFEU clarifies this once more and is also sufficiently specific. The provision serves to safeguard 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 for assistance measures for a limited period of time in a situation which is sufficiently clearly defined; in addition, it contains strict conditionality. The objection that convention proceedings should have been conducted is mistaken, because Art. 136 sec. 3 TFEU does not expand the competence of the European Union. 105

b) The German *Bundestag* adds to its submission in the proceedings on a temporary injunction (cf. BVerfGE 132, 195 <227>, n. 73 et seq.) with a view to the European Stability Mechanism: 106

aa) With regard to the accompanying legislation to the European Stability Mechanism, in particular the division of competences between the plenary and the budget committee, the constitutional complaints are inadmissible. There can be no violation of the complainants’ rights under Art. 38 sec. 1 in conjunction with Art. 20 sec. 1 and sec. 2 and Art. 79 sec. 3 GG in this context, which means that they are not entitled to lodge a constitutional complaint. Unlike the transfer of sovereign powers to the Euro- 107

pean Union, the division of responsibilities within the *Bundestag* cannot erode the substantive content of the right to vote under Art. 38 sec. 1 GG. The organisation of parliament's internal allocation of tasks does not exclude from the democratic process the ensuing decision on the merits. At issue is a process that is reversible at any time, which only concerns the internal workings of a constitutional organ, and which therefore cannot be challenged via a constitutional complaint. An individual right of complaint against the allocation of competences in parliament is also incompatible with the German *Bundestag*'s right to self-organisation.

bb) The applications are in any case unfounded.

108

(1) The overall budgetary responsibility of the German *Bundestag* is not affected by the distribution of competences between the plenary and the budget committee regulated in the ESM Financing Act. For the most important decisions of the European Stability Mechanism, in particular for decisions pursuant to Art. 10 TESM (increase of capital stock) and Art. 13 sec. 2 TESM (decision on the award of grants), the involvement of the plenary is provided. The budget committee is only responsible for the less significant, more technical decisions below the threshold under the *Wesentlichkeitsdoktrin* (threshold relevant for the requirement of parliamentary approval). For instance, pursuant to Art. 5 sec. 2 sentence 1 no. 2 ESMFinG, the budget committee has to decide on capital calls under Art. 9 sec. 1 TESM, since this does not create any new obligation, but only fulfils an obligation already created, which the plenary already approved with the Act of Assent to the ESM Treaty and the protection of all changes in capital stock. The same applies to the decision on the regulations and conditions for capital calls pursuant to Art. 9 sec. 4 TESM (§ 5 sec. 2 sentence 1 no. 2 ESMFinG), which are also assigned to the budget committee. These "terms and conditions" only regulate the internal procedures and the method of payment and do not create obligations of the Federal Republic of Germany which go beyond the ones already regulated under the ESM Treaty. Thus, the decision-making powers of the budget committee concern purely operational tasks.

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The constitutionally recognised role of the budget committee in state practice can also be regarded as an argument in favour of the constitutionality of the allocation of competences under the ESM Financing Act. The tasks of the budget committee – at least in so far as it decides on specific blocking notes (*qualifizierte Sperrvermerke*) pursuant to § 22 sentence 3 and § 36 sentence 2 BHO – exceed a purely advisory and preparatory function. This is comparable to the present constellation, because in both cases, an expenditure that has already been approved by the plenary is assigned by the committee, but not changed in its democratically legitimised purpose.

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Finally, as far as internal organisation and procedures are concerned, the margin of appreciation of the German *Bundestag* has to be respected. It is difficult to imagine how the items requiring approval could be made the subject of political debate in the plenary, since they are ultimately aimed at a monitored and efficient achievement of pre-defined political purposes.

111

Even if § 5 sec. 2 sentence 1 ESMFinG were not compatible with the plenary's responsibility for budgetary policy, the law at least permits an interpretation in conformity with the Constitution. In this respect, one could derive a duty of the plenary arising from Art. 5 sec. 5 ESMFinG to revoke matters, or derive the plenary's competence from the general clause of § 4 sec. 1 sentence 1 ESMFinG. The same ultimately applies to § 5 sec. 2 sentence 1 no. 3 ESMFinG. The decision-making powers referred to in this provision are the expression of a functionally appropriate division of workload between the plenary and the budget committee and do clearly not establish new commitments with regard to the European Stability Mechanism. 112

Overall, the involvement of a democratically legitimised organ in internal procedures of the European Stability Mechanism goes – albeit for good reasons – beyond the standards for parliamentary scrutiny of public financial institutions at the national level. In view of this, it is not convincing to develop this involvement of the experienced budget committee into a reservation for the plenary. 113

(2) The possibility of issuing new shares of the capital of the European Stability Mechanism above par under to Art. 8 sec. 2 sentence 4 TESM is unproblematic with regard to the overall budgetary responsibility, since this does not change the institutional position of the Federal Republic of Germany in the European Stability Mechanism. Pursuant to Art. 4 sec. 7 TESM, the voting rights in the Board of Governors and the Board of Directors are based on the number – and not the value – of the shares which have been allocated to each party to the Treaty pursuant to Annex II of the ESM Treaty. Thus, issuing shares above par cannot affect the weight of the votes. Due to its unequivocal wording, Art. 8 sec. 2 sentence 4 TESM does not apply to the issue of shares of the already authorised capital stock of EUR 700 billion. To the extent that this provision is applicable to subsequently authorised capital, both the decision to increase the authorised capital stock (Art. 10 sec. 1 TESM) and the decision on the value of the newly created shares are the responsibility of the plenary. This is neither an ancillary decision, nor has it been preceded by a decision that has already been discussed and pre-structured in the plenary. As a consequence, decisions on the issue price must be made under § 4 sec. 1 sentence 1 ESMFinG, which has intentionally been phrased by the legislature in such an open way as to make room for necessary plenary decisions. The same should apply to the issue of capital shares after accession of other ESM Members, since the decision on the issue price affects the relative value of the German capital shares and thus indirectly the overall budgetary responsibility of the *Bundestag*. 114

(3) The possibility of suspending voting rights pursuant to Art. 4 sec. 8 TESM is also unobjectionable under constitutional law. It is true, though, that the legal implications of a suspension would be considerable, since far-reaching decisions could be taken without the participation of the state concerned. 115

However, Art. 4 sec. 8 TESM of course primarily serves to protect the Member States that meet their obligations under the ESM Treaty. The aim is to protect them 116

from disproportionate burdens. In this respect, Art. 4, sec. 8 TESM protects, as a mechanism of sanctions, among other things especially the overall budgetary responsibility of the *Bundestag*.

Furthermore, it is virtually impossible that Art. 4 sec. 8 TESM will apply to the Federal Republic of Germany. The constitutional and legal framework enables the fulfilment in time of obligations under Art. 8, Art. 9, and Art. 10 TESM and the repayment of financial assistance under Art. 16 or Art. 17 TESM at any time. The measures necessary to raise the paid-in shares pursuant to Art. 8 sec. 2 TESM have already been partly executed or will in any case be carried out. Any further protection under budgetary law is currently not feasible and would also be impracticable. A (precautionary) appropriation in the budget of means that could become the subject of a capital call under Art. 9 TESM is neither intended by Art. 110 GG, nor possible. The uncertainty about when a Member State will get into serious financial problems or when a loss of the European Stability Mechanism that has to be balanced will take place, does not allow for anticipatory budgeting. The budget law allows, however, for responding quickly in case of a capital call, primarily via a supplementary budget pursuant to Art. 110 GG, or – if the deadline for payment is not sufficient for this purpose – on the basis of an authorisation by the Minister of Finance pursuant to Art. 112 GG. The *Bundestag* will be informed according to established practice. In view of this legislation, no special budgetary precautions are necessary to preclude the application of Art. 8 sec. 4 TESM. Moreover, the liquidity management of the Finance Agency of the Federal Republic of Germany (*Finanzagentur GmbH*) is so prudent and efficient that the necessary liquidity for capital contributions is available or could in any case be procured on time.

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Even if a dispute arose between Germany and another Contracting Party or the European Stability Mechanism over whether the requirements of a revocation of voting rights pursuant to Art. 4 sec. 8 TESM exist, the overall budgetary responsibility of the German *Bundestag* would not be at risk. In case of disputes concerning the interpretation or application of the ESM Treaty, a decision of the Board of Directors is to be brought about first (Art. 37 sec. 1 TESM). Because of the veto position of the German Director, it can be avoided that the Board of Directors holds a violation of the Treaty. As part of a dispute settlement in the Board of Governors pursuant to Art. 37 sec. 2 TESM, a political and diplomatic solution is needed with regard to Art. 37 sec. 2 sentence 2 TESM.

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c) The conditions of the SCG Treaty do not constitute a curtailment of budgetary sovereignty, but serve to restrict the German liability risk. The Treaty creates no direct legal effects on the budgets of the Member States; such effects are only indirectly created by way of the sanctions. A Budget Act which violates the SCG Treaty does not cease to be legally valid.

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Due to the federal structure of the Federal Republic of Germany, the Treaty differs in some respects from the “debt brake” in the Basic Law, but these differences do not

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result in a substantially different legislative concept. The state as a whole, that is, the federal and *Laender* governments, local authorities and all other public budgets, are subject to this. Sanctions by the institutions of the European Union may be directed solely to the Federal Government; there is no scope for directly accessing *Laender* or local authorities. The path to debt reduction provided in the Basic Law is defined by Art. 143d sec. 1 GG, while the SCG Treaty leaves it to be put into specific terms by the European Commission. Admittedly, it is not certain that the European Commission will ultimately decide on an identical path to debt reduction to that provided in the Basic Law; however, the Commission has a duty to take into account country-specific risks and in this respect may orient itself towards the legal position of the Member State in question.

The substantive provisions of the SCG Treaty scarcely add to the number of substantive commitments. The Member States assume the obligations of their own accord and are not compelled to participate, not even *de facto*. The Treaty arranges for the autonomous enforcement of voluntary agreements entered into under the Treaty and complies with already existing provisions of Union law. It is true that Art. 7 TSCG with its “reverse” rule on a qualified majority is an innovation, but this has no constitutional relevance to the budgetary sovereignty of the national parliaments; the agreement on a particular voting behaviour does not modify the excessive deficit procedure in substance. Nor is there a transfer of substantive legislative powers to other bodies with sovereign power. Art. 8 TSCG merely grants the Court of Justice the power, with regard to compliance with Art. 3 sec. 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. Admittedly, the Treaty contains no express provision for termination, but this does not exclude the application of the general rules of termination under international law.

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B.

I.

The constitutional complaints are admissible to the extent that the complainants submit that through 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 Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism, the Act on Financial Participation in the European Stability Mechanism, and the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union, and through insufficient budgetary provision for the case of capital calls, incalculable risks are taken and democratic decision processes are shifted to the supranational or intergovernmental level, so that it is no longer possible for the German *Bundestag* to exercise its overall budgetary responsibility. They sufficiently substantiate that the German *Bundestag*'s budgetary autonomy is impaired and that their rights under Art. 38 sec. 1, sentence 1, Art. 20 sec. 1 and sec. 2 in con-

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junction with Art. 79 sec. 3 GG are violated (cf. BVerfGE 132, 195 <234>, n. 91; on the admissibility and requirements for substantiation of this challenge, cf. BVerfGE 129, 124 <167 et seq.>).

II.

With regard to all other aspects, the constitutional complaints are inadmissible. This applies first to the extent that they challenge, with reference to Art. 38 sec. 1 sentence 1 GG, the unconstitutionality of the ESM Financing Act because of a violation of formal requirements for the legislative process, the functional allocation of competences between the plenary, the budget committee and other subsidiary bodies of the *Bundestag*, and the fact that no two-thirds majority is required; second, this applies to the other challenges of fundamental rights violations made against the Acts mentioned under B.I. (1.). Apart from this, the constitutional complaints are inadmissible to the extent that complainants I. and II. challenge acts and omissions in connection with the TARGET2 system (2.) and the refinancing of commercial banks (3.), and complainants II. and VI. challenge the applicability of certain instruments of secondary legislation of the European Union in the Federal Republic of Germany (4.). This also applies to the extent that complainant V. challenges that it is not precluded that the European Stability Mechanism and the European Central Bank coordinate their actions, and that sufficient risk management and corresponding accounting rules are lacking (5.).

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1. The constitutional complaints are inadmissible to the extent that the complainants challenge, with reference to Art. 38 sec. 1 sentence 1 GG, the unconstitutionality of the ESM Financing Act because of a violation of formal requirements for the legislative process (a), the functional allocation of competences between the plenary of the *Bundestag*, its committees and other subsidiary bodies (b), and the fact that no two-thirds majority is required (c), and to the extent that they challenge a violation of other fundamental rights than Art. 38 sec. 1 sentence 1 GG by the Acts mentioned under B.I. (d-g).

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a) The submission of complainant I. that the ESM Financing Act is unconstitutional because it was not correctly submitted to the German *Bundestag* is inadmissible because in this respect, he has not set out in a substantiated manner that a fundamental rights position exists whose violation can be challenged with a constitutional complaint (cf. BVerfGE 132, 195 <235>, n. 94). The substantive content of the right to vote is protected by Art. 38 sec. 1 sentence 1 GG only to the extent that it is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people is permanently restricted in such a way that vital political decisions can no longer be made independently (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 129, 124 <168>). This substantive protection afforded by Art. 38 sec. 1 sentence 1 GG mostly takes effect in situations in which the competences of the *Bundestag* are eroded in such a way, is made legally or *de facto* impossible (cf. BVerfGE 129, 124 <170>). Outside of

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ultra vires situations (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13 et al. –, juris, n. 53), Art. 38 sec. 1 sentence 1 GG grants a “right to democracy” only in cases in which democratic principles are affected which, pursuant to Art. 79 sec. 3 GG, even the constitution-amending legislature cannot change (cf. BVerfGE 123, 267 <340>; 129, 124 <177>; 132, 195 <238>, n. 104).

b) Apart from this, the constitutional complaints are inadmissible to the extent that complainants I., III., IV., and V. argue that their right to vote is violated because certain acts of the European Stability Mechanism require merely the participation of the budget committee, and not to that of the plenary. 126

Parliament’s internal, functional allocation of responsibilities between the plenary of the *Bundestag*, its committees, and other subsidiary bodies cannot be challenged with a constitutional complaint. 127

The allocation of competences within the *Bundestag* is not generally part of the core of Art. 38 sec. 1 sentence 1 GG, which can be challenged by a constitutional complaint. Democratic minimum requirements within the meaning of Art. 79 sec. 3 GG are also satisfied in case of majority decisions by the budget committee. In Art. 45, Art. 45c, Art. 45d and Art. 53a GG, the Basic Law itself provides for committee decisions in which the committee acts in place of the plenary. Moreover, the exceptional character of a constitutional complaint that is based on Art. 38 sec. 1 sentence 1 GG would be ignored, and the difference to *Organstreit* proceedings would be blurred, if the democratic core of the right to vote could be invoked to challenge parliament’s internal allocation of competences. 128

c) The constitutional complaint of complainants IV. is also inadmissible to the extent that they submit that in order to safeguard their overall budgetary responsibility, *Bundestag* and *Bundesrat* must, pursuant to Art. 79 sec. 2 GG, pass decisions on special measures of the European Stability Mechanism, for instance on an increase of capital stock, by qualified majority. The constitutional complaint gives no plausible reasons for the existence of such a right of the people entitled to vote. Art. 79 sec. 2 GG – also in conjunction with Art. 23 sec. 1 sentence 3 GG – is a provision of objective constitutional law which concerns the formation of opinion within the *Bundestag* and the *Bundesrat* (cf. BVerfGE 2, 143 <161>; 90, 286 <341>). Outside of *ultra vires* situations (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13 et al. –, juris, n. 25), the people entitled to vote, and thus also complainants IV., cannot derive rights from this provision, because the extent of the *Bundestag*’s decision-making competences, thus, the substance of the right to vote, does not depend on the type of majority with which the *Bundestag* passes its decisions. Apart from this, no fundamental right to the requirement of a qualified majority can be derived from the *Bundestag*’s overall budgetary responsibility. The overall budgetary responsibility of the German *Bundestag* is generally exercised by debating and passing decisions in the plenary, by the decision on the Budget Act, by statutes with financial effects or by other constitutive decisions of the *Bundestag* (cf. BVerfGE 130, 318 <347>). Pursuant to 129

Art. 42 sec. 2 sentence 1 GG, this requires the majority of the votes cast, unless the Basic Law provides otherwise. There are no indications that the requirements placed on parliamentary legitimation differ according to the amount of obligations or liability commitments. An increase of the capital stock of the European Stability Mechanism would neither be an amendment of the Basic Law (cf. Art. 79 sec. 1 and sec. 2 GG) nor a transfer of sovereign powers to the European Union that would amend the content of the Basic Law (cf. Art. 23 sec. 1 sentences 2 and 3 in conjunction with Art. 79 sec. 2 GG).

d) To the extent that complainants I., II., and VI. submit that Art. 35 sec. 1 TESM violates the general principle of equality before the law of Art. 3 sec. 1 GG because there is no objective justification for the personal immunity from jurisdiction which is granted to the office-holders of the European Stability Mechanism with regard to their official acts, the complainants themselves suffer no adverse effects from this provision. A violation of Art. 3 sec. 1 GG is impossible from the outset (cf. BVerfGE 63, 255 <265 and 266>). In this respect, complainant I. substantively asserts a general right to have the laws enforced (*allgemeiner Gesetzesvollziehungsanspruch*), which can be derived neither from the general principle of equality nor from Art. 19 sec. 4 GG or Art. 2 sec. 1 GG (cf. BVerfGE 132, 195 <235>, n. 95). 130

e) To the extent that complainants II. and VI. claim a violation of their fundamental right under Art. 14 sec. 1 GG with regard to inflationary developments as a result of the Treaty establishing the European Stability Mechanism and the accompanying legislation, they have not sufficiently substantiated their challenge. Monetary value is in a particular way related to, and dependent on, the community (BVerfGE 97, 350 <371>; 129, 124 <174>). As a general rule, it is not the Federal Constitutional Court's responsibility to review, in the context of constitutional complaint proceedings, economic and financial policy measures to determine whether there are negative consequences for monetary stability. Such a review may be considered at most in borderline cases of a clear reduction of monetary value through acts of a public authority (cf. BVerfGE 129, 124 <174>). Facts to justify such a review have not been submitted (§ 23 sec. 1 sentence 2, § 92 BVerfGG; cf. BVerfGE 132, 195 <236>; n. 96). 131

f) Finally, the challenge of complainants II. that their right under Art. 20 sec. 4 GG, which is equivalent to a fundamental right, has been violated, is inadmissible because they are not entitled to make such a challenge. The right to resist any person seeking to abolish the constitutional order is a subsidiary, exceptional right which cannot be asserted in the very proceedings in which a judicial remedy against the alleged abolition of the constitutional order is sought (cf. BVerfGE 89, 155 <180>; 123, 267 <333>; 132, 195 <236>, n. 97). 132

g) To the extent that the constitutional complaint of complainants IV. is inadmissible with regard to the functional allocation of competences within the German Bundestag and with regard to the majority requirements stipulated in the ESM Treaty Act and the ESM Financing Act, the complaint cannot be reinterpreted to constitute an application 133

for *Organstreit* proceedings.

Not only when interpreting unclear applications, the Federal Constitutional Court must understand the actual meaning of the relief sought, and bring it to bear as far as this is procedurally possible (cf. BVerfGE 54, 53 <64>; 68, 1 <64>). As a general rule, it is possible to reinterpret a constitutional complaint to constitute an application in *Organstreit* proceedings. For such a reinterpretation, it is required that the application would be admissible in *Organstreit* proceedings (cf. BVerfGE 13, 54 <94 and 95>). This is not the case here. 134

As members of the German *Bundestag*, the complainants could have submitted in *Organstreit* proceedings that the challenged Acts violate their parliamentary rights of participation under Art. 38 sec. 1 sentence 2 GG (cf. BVerfGE 64, 301 <313>; 108, 251 <266 and 267>; 118, 277 <320>; 130, 318 <340>). In this respect, however, the application is not sufficiently substantiated. The complainants merely invoke their right to be elected under Art. 38 sec. 1 sentence 1 GG. However, Art. 38 sec. 1 sentence 1 GG is not a legal position that can be asserted in *Organstreit* proceedings. One cannot challenge the violation of fundamental rights and equivalent rights under these proceedings (cf. BVerfGE 94, 351 <365>; 99, 19 <29>; 118, 277 <320>). 135

2. Apart from this, the constitutional complaints are inadmissible to the extent that complainants II. challenge “the establishment of the TARGET2 system” (a) and – together with complainant I. – object to various omissions of German constitutional organs in this regard (b). 136

a) Complainants II. challenge the “establishment of the TARGET2 system” because, as they argue, its implementation is not covered by Union law, and because it entails dangers to the overall budgetary responsibility of the *Bundestag*. It remains unclear, however, whether they object to the Guideline of the European Central Bank of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) ECB/2007/2 (OJ L 237 of 8 September 2007, p. 1), amended by the Guideline of the European Central Bank of 7 May 2009 ECB/2009/9 (OJ L 123 of 19 May 2009, p. 94) and by Guideline ECB/2009/21 of 17 September 2009 (OJ L 260 of 3 October 2009, p. 31) (aa), or whether the application is directed against the actual implementation of the system (bb). This, however, need not be decided because the constitutional complaint is inadmissible in both cases. 137

aa) If the constitutional complaint is interpreted as being directed against Guideline ECB/2007/2, it has, at any rate, been filed too late (§ 93 sec. 3 BVerfGG). It is true that the Guideline from 2007 was most recently amended by the Guideline of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (recast) ECB/2012/27 (OJ L 30 of 30 January 2013, pp. 1 et seq.). According to the first recital of the Guideline, the amendments mainly concern information sharing in the System of European Central Banks and the possibility of sanctions against banks. Since it has neither been submitted nor is apparent that the amendment has established a cause of com- 138

plaint for the complainants (cf. BVerfGE 79, 1 <14>; 122, 63 <74 et seq.>; 129, 208 <235>), the adoption of the amendment could not re-set the time-limit for lodging a constitutional complaint, which has expired since the last amendment in October 2010.

bb) To the extent that the constitutional complaint is supposed to challenge the implementation of the TARGET2 Guideline, it is inadmissible as well because complainants II. have not sufficiently substantiated (§ 23 sec. 1 sentence 2, § 92 BVerfGG) that their own rights have been violated (cf. BVerfGE 123, 267 <329> with further references). The TARGET2 system serves as technical settlement of cross-border payment transactions. The German *Bundesbank* describes it as payment system of the central banks of the Eurosystem for the settlement of urgent transfers in real time, in which credit institutions settle their payment transactions for a fixed monthly fee via a single platform. TARGET2 balances arise when cross-border transactions are netted out every day. They constitute claims or liabilities vis-à-vis the European Central Bank. The complainants have not shown how and to what extent the implementation of the TARGET2 system could impair the overall budgetary responsibility of the German *Bundestag*, and thus their rights under Art. 38 sec. 1 sentence 1 GG.

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b) To the extent that complainant I., with regard to the TARGET2 system, objects to the Federal Government's failure to work towards the limitation of the TARGET2 balances with regard to their amount, their settlement at regular intervals and their reduction, and objects to the failure to work towards a change of the legal framework of the System of European Central Banks in the sense that the percentage of the money created by a national central bank may not exceed its share in the capital of the European Central Bank, he has not sufficiently substantiated a possible violation of Art. 38 sec. 1 sentence 1 GG by the inactivity he challenges. In this respect, he merely submits that the TARGET2 system, due to a constructional fault of the monetary union, has evolved into a mechanism which is tantamount to accepting liability for decisions made by foreign states, and which violates the principle of democracy because the existing TARGET2 balances considerably impair the Federal Republic of Germany's decision-making power, for instance with regard to exiting the euro currency area. He does not submit, however, why the formation of balances is tantamount to a liability mechanism within the meaning of the Federal Constitutional Court's case-law, and how and to what amount liability risks arise to the Federal Republic of Germany due to the alleged mechanism.

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This applies *mutatis mutandis* to the extent that complainants II. request a declaration that the Federal Government's failure to bring annulment proceedings pursuant to Art. 263 sec. 1 and sec. 2 TFEU before the Court of Justice of the European Union against the TARGET2 system violates Art. 38 sec. 1 in conjunction with Art. 20 sec. 1 and sec. 2, Art. 79 sec. 3 GG. However, complainants II. also submit that the uncorrected continuation of the TARGET2 system constitutes a legislative instrument that transgresses the limits conferred upon European agencies and institutions (*aus-*

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brechender Rechtsakt), an instrument which is incompatible with the principle of conferral of European Union law, and which therefore lacks democratic legitimation. In this context, however, there are no submissions as to what extent the European System of Central Banks, by allegedly not reducing or compensating, at regular intervals, excessive TARGET balances that result from some central banks' lending operations, acts outside its mandate in legal terms, and not only from a specific economic perspective. For this reason the submission does not give occasion to examine the question to what extent the obligations to act which were developed in the Senate decision of 14 January 2014 (2 BvR 2728/13 et al.) from the responsibility with respect to integration (*Integrationsverantwortung*) could in this context be significant.

3. The constitutional complaint of complainants II. is also inadmissible to the extent that it challenges measures of the European Central Bank in connection with the refinancing of commercial banks. 142

The complainants' submission does not satisfy the minimum requirements of substantiation of a constitutional complaint (§ 23 sec. 1 sentence 2, § 92 BVerfGG). The complainants merely allege in general terms that the European Central Bank accepts unsuitable collaterals. 143

4. Finally, the constitutional complaints of complainants II. and VI. are inadmissible to the extent that they challenge the application of certain secondary legislation of the European Union and of the Euro Plus Pact in the Federal Republic of Germany. 144

a) Complainants II. submit that the legislative instruments of the so-called Six-pack (cf. n. 19 above) transgress the competences conferred upon European agencies and institutions, i.e. that they are *ausbrechende Rechtsakte* within the meaning of the Federal Constitutional Court's case-law, because they establish an economic government of the European Union and thus constitute an important element of a Federation. The complainants further argue that the measures erode at the same time the Germans' right to vote because the voters can no longer determine their economic fate. 145

In this submission, complainants II. do not state that their right to vote pursuant to Art. 38 sec. 1 sentence 1 GG has been violated by an interference with the constitutional identity protected under Art. 79 sec. 3 GG or by a failure of German state organs to react to qualified *ultra vires* acts (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 –). The general allegation that the six acts of secondary legislation of the Six-pack establish an economic government of the European Union neither suffices to substantiate that the right to vote is eroded because the German *Bundestag* loses indispensable powers to decide, nor to substantiate a possible right to a declaration that the European Union acted *ultra vires*. Complainants II. neither address the details of the regulations which they challenge, nor do they deal with the fact that the regulations closely follow Art. 126 TFEU and corresponding state practice. Moreover, beyond the allegation that the European Union establishes an “economic dictator-

ship”, they do not submit anything tangible with regard to consequences that can be expected of the acts that are combined in the Six-pack. In particular, it remains unclear why the implementation of the challenged regulations could prevent the German *Bundestag* from taking independent economic policy decisions.

b) To the extent that complainants VI. challenge 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, they do not sufficiently substantiate a possible violation of Art. 38 sec. 1 sentence 1 GG either. The challenge that its legal basis (Art. 121 sec. 6 TFEU) is incorrectly chosen, which curtails essential rights of the German *Bundestag*, is not sufficient for this. In particular, they did not explain which of the German *Bundestag*'s rights to participation and to being informed are allegedly violated. 147

c) The application of complainants II. for a declaration that their rights have been violated by the Euro Plus Pact is just as unsubstantiated. They regard the Euro Plus Pact as an *ausbrechender Rechtsakt* which contributes, and is intended to contribute, to developing the European Union into a Federation. It cannot be inferred from the submission how the Euro Plus Pact, which provides no sanctions (cf. BVerfGE 131, 152 <224 and 225>), and which apart from this is referred to as “eyewash” by complainants II., might nevertheless take away competences from the German *Bundestag* to an extent that affects Art. 38 sec. 1 sentence 1 GG. By using mostly economic arguments, complainants II. merely substantiate why, in their view, the Euro Plus Pact is another step on the way to a “debt and financial union” that is incompatible with the sovereignty of the German people. 148

5. Apart from this, the constitutional complaint of complainant V. is inadmissible to the extent that he submits that a coordinated action of European Stability Mechanism and European Central Bank is not precluded (cf. on this BVerfG, decision of the Second Senate of 12 September 2012 – 2 BvR 1390/12 et al. –, juris), and that sufficient risk management, and corresponding accounting rules, have not been created for the European Stability Mechanism. It is not discernible how this alone could erode the complainant's right to vote under Art. 38 sec.1 sentence 1 GG. 149

III.

1. The application in *Organstreit* proceedings is only admissible to the extent that applicant VII. asserts that through the challenged Acts, the German Bundestag divests itself of its overall budgetary responsibility; as a parliamentary group of the German *Bundestag*, it is entitled to make such an application (Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1, Art. 110 GG, cf. BVerfGE 123, 267 <338 and 339>; 132, 195 <237>, n. 102). 150

2. To the extent that applicant VII. submits that its right under Art. 38 sec. 1 sentence 2 GG to participate in a Convention pursuant to the regular treaty revision procedure under Art. 48 sec. 2 to 5 TEU was violated in connection with the Act on the 151

European Council Decision of 25 March 2011 to Amend Article 136 of the TFEU, the application is inadmissible because the applicant did not substantiate the violation of the right, as required by § 64 sec. 1 BVerfGG (cf. BVerfGE 132, 195 <237>, n. 101).

3. Neither has applicant VII. substantiated the possibility of the violation of a right to the extent that the applicant challenges the functional allocation of competences between budget committee and plenary, which is stipulated in the ESM Financing Act. Allocating decision-making powers to a committee of the German *Bundestag* can violate neither rights of a parliamentary group (a) nor rights of the German *Bundestag* which the parliamentary group could assert through representative action (b). 152

a) Parliamentary groups in the German *Bundestag* are associations of parliamentarians; just as the status of the parliamentarians, their legal position can be derived from Art. 38 sec. 1 GG (cf. BVerfGE 70, 324 <362 and 363>; 112, 118 <135>). Accordingly, the parliamentary groups have a right to equal participation in the formation of political opinion, which derives from Art. 38 sec. 1 GG (cf. BVerfGE 84, 304 <325>; 96, 264 <278>; 112, 118 <133>); the principle of equal treatment of parliamentary groups applies (cf. BVerfGE 93, 195 <204>). Equal participation of the parliamentary groups in the formation of parliamentary opinion is secured, *inter alia*, by the constitutional principle of *Spiegelbildlichkeit* (mirror image). This principle takes effect when the *Bundestag* does not exercise its constitutional role as a representative organ by the participation of all its members (cf. BVerfGE 80, 188 <218>; 130, 318 <342>). According to the principle of *Spiegelbildlichkeit*, every subsidiary body of the *Bundestag* must be a microcosm of the plenary and its composition must mirror the composition of the plenary in its political distribution (cf. BVerfGE 80, 188 <222>; 112, 118 <133>; 130, 318 <354>). 153

aa) With a view to the functional allocation of competences within parliament, the right of a parliamentary group to be treated equally to the other groups is, however, satisfied if, pursuant to § 12 of the Rules of Procedure of the *Bundestag* (*Geschäftsordnung des Deutschen Bundestages* – GOBT), the composition of a committee corresponds to the distribution of the groups represented in the plenary, and if the principle of the mirror image has been adhered to (cf. BVerfGE 112, 118 <133>; 130, 318 <353 and 354>). In this context, no further rights for the groups arise from Art. 38 sec. 1 GG. Allocating decision-making powers to the budget committee as stipulated in the ESM Financing Act does therefore not affect the constitutional rights of complainant VII. 154

bb) Complainant VII. cannot enforce the rights of its members that are affected by this allocation via representative action either. Every delegation of obligations and powers to a subsidiary body of parliament affects the right of the parliamentarians who are not part of this body to equally participate in the legitimation and monitoring of public authority as representatives of the people as a whole (Art. 38 sec. 1 sentence 2 GG). This, however, can only be asserted by the very members of parliament who are affected. Moreover, representative action by the parliamentary group would 155

contradict the principle of the free mandate. Such representative action would allow that exercising the rights of a member of parliament would not depend on the individual member's decision taken in accordance with his or her conscience, but on a majority decision of the political group, or even on a decision by the parliamentary group's leadership (cf. regarding the position of the members of parliament in relation to the parliamentary groups BVerfGE 10, 4 <14>; 114, 121 <150>; Badura, in: Bonner Kommentar, vol. 7, Art. 38 n. 89, 91 <February 2008>; Klein, in: Maunz/Dürig, GG; Art. 38 n. 201 <October 2010>; Magiera, in: Sachs, GG, 6th ed. 2011, Art. 38 n. 49; Trute, in: v. Münch/Kunig, GG, vol. 1, 6th ed. 2012, Art. 38 n. 89, each with further references).

b) Neither does allocating a parliamentary obligation to a committee violate a right of the German *Bundestag* which the applicant could assert on its behalf via representative action, even if the allocation did not satisfy the constitutional requirements (cf. BVerfGE 130, 318 <350 et seq.>) and therefore violated the principle of democracy. The principle of democracy, which is protected by Art. 20 sec. 1 and sec. 2 GG, is not a right of the German *Bundestag*, not even to the extent that Art. 79 sec. 3 GG declares it inviolable (cf. BVerfGE 123, 267 <339>). There is no room for *Organstreit* proceedings in this context because the purpose of this type of proceedings is to interpret the Basic Law if disputes arise about the rights and obligations of constitutional organs. *Organstreit* proceedings serve the mutual delimitation of competences of the constitutional organs, or parts thereof, under constitutional law; they do not serve to review whether an organ's specific acts independent of this are in accordance with the Constitution (cf. BVerfGE 68, 1 <69 et seq.>; 73, 1 <30>; 104, 151 <193 and 194>; 123, 267 <339>).

Finally, the application is inadmissible to the extent that applicant VII. asserts with regard to the ESM Financing Act, that particularly important measures of the European Stability Mechanism, such as increases of the capital stock, require, due to their importance for the overall budgetary responsibility, the approval of two thirds of the Members of *Bundestag* and *Bundesrat* pursuant to Art. 23 sec. 2 in conjunction with sec. 1 sentences 1 and 3 and Art. 79 sec. 2 GG. This allegation contains no claim that the applicant's own rights, or rights of the German *Bundestag* that can be asserted in *Organstreit* proceedings, have been violated. Art. 79 sec. 2 GG – also in conjunction with Art. 23 sec. 1 sentence 3 GG – is a provision of constitutional law that concerns the formation of opinion within the *Bundestag* and the *Bundesrat* and does not entail specific rights for constitutional organs (cf. BVerfGE 2, 143 <161>; 90, 286 <341>). Outside of *ultra vires* situations (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13 et al. –, juris, n. 25), it therefore does not grant applicant VII. any rights of its own, or derived rights, because the extent of the rights of the parliamentary groups and of the *Bundestag* does not depend on the type of majority with which the *Bundestag* takes its decisions.

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C.

To the extent that they are admissible, the constitutional complaints and the *Organstreit* proceedings are unfounded. However, considering its assent to Art. 4 sec. 8 of the Treaty establishing the European Stability Mechanism, the legislature is obliged to make comprehensive arrangements under budgetary law to ensure that the Federal Republic of Germany can fully and in time meet capital calls that are made according to the Treaty establishing the European Stability Mechanism. 158

I.

As a right that is equal to a fundamental right, the right to vote, which is protected by Art. 38 sec. 1 GG, guarantees the self-determination of the citizens and guarantees free and equal participation in the exercise of public power in Germany (cf. BVerfGE 37, 271 <279>; 73, 339 <375>; 123, 267 <340>). Its guarantees include the principles of the requirement of democracy within the meaning of Art. 20 sec. 1 and sec. 2 GG; Art. 79 sec. 3 GG protects these principles as the identity of the Constitution even against interference by the constitution-amending legislature (BVerfGE 132, 195 <238>, n. 104; cf. also BVerfGE 123, 267 <340>; 129, 124 <177>). In view of this, the legislature must take sufficient measures to be able to permanently meet its responsibility with respect to integration (1.). In particular, it may not relinquish its right to decide on the budget (2.). 159

1. The Basic Law not only prohibits the transfer of *Kompetenz-Kompetenz* to the European Union or to institutions created in connection with the European Union (cf. BVerfGE 89, 155 <187 and 188, 192, 199>; cf. also BVerfGE 58, 1 <37>; 104, 151 <210>; 123, 267 <349>; 132, 195 <238>, n. 205). The German constitutional organs may not grant blanket empowerments for the exercise of public authority either (cf. BVerfGE 58, 1 <37>; 89, 155 <183 and 184, 187>; 123, 267 <351>; 132, 195 <238>, n. 105). Dynamic treaty provisions therefore must be interpreted in a manner that respects the *Integrationsverantwortung* and must therefore be made contingent on suitable safeguards for the effective exercise of this responsibility. For borderline cases of what is still constitutionally permissible, the legislature must, where necessary, make effective arrangements in the legislation that accompanies the Act of Assent to ensure that there is enough room for its responsibility with respect to integration (BVerfGE 123, 267 <353>; 132, 195 <239>, n. 105). 160

2. Art. 38 sec. 1 GG is violated in particular if the German *Bundestag* relinquishes its budgetary responsibility with the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget on its own (BVerfGE 129, 124 <177>; 132, 195 <239>, n. 106). Deciding on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (cf. BVerfGE 123, 267 <359>; 132, 195 <239>, n. 106). The German *Bundestag* must therefore make decisions on revenue and expenditure with responsibility to the people. In this context, the right to decide on the budget is a central element for shaping opinions in a democratic society (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 161

129, 124 <177>; 132, 195 <239>, n. 106), which must also be adhered to in a system of intergovernmental governing (a). The budget autonomy of the national parliaments is safeguarded through arrangements in European Union law (b), and is not questioned by the Member States' commitment to a particular fiscal policy (c). There might be a transgression of an ultimate limit of payment obligations and liability commitments that follows directly from the Basic Law's principle of democracy if the budget autonomy is not merely restricted but suspended at least for a considerable period of time (d).

a) 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. By being open to international cooperation 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 Art. 38 sec. 1 GG. However, the principle of democracy requires that 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 (cf. BVerfGE 129, 124 <177>; 130, 318 <344>; 131, 152 <205 and 206>; 132, 195 <239 and 240>, n. 107). If essential budget questions relating to revenue and expenditure were decided without the constitutive approval of the German *Bundestag*, or if supranational legal obligations were created without a corresponding decision of the *Bundestag*, parliament would find itself in a 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 and 179>; 130, 318 <344 and 345>; 132, 195 <240>, n. 107).

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aa) The German *Bundestag* may not transfer its budgetary responsibility to other entities through imprecise budgetary authorisations. The larger the financial amount of the liability commitments or of commitment appropriations, the more effectively structured the German *Bundestag*'s rights to approve and to refuse and its right to monitor must be. In particular, the German *Bundestag* may not submit itself to financially significant mechanisms which – whether through their overall conception or an overall evaluation of the individual measures – can result in incalculable burdens on the budget, be they expenses or losses of revenue, without first having given its constitutive consent. This prohibition of the relinquishment of budgetary responsibility does not impermissibly restrict the budgetary competence of the legislature, but specifically aims to preserve it (cf. BVerfGE 129, 124 <179>; 132, 195 <240>, n. 108).

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bb) A necessary condition for safeguarding political autonomy within the identity core of the Constitution (Art. 20 sec. 1 and sec. 2, Art. 79 sec. 3 GG) is that the legislature makes its decisions on revenue and expenditure independent of Union institutions and of other Member States of the European Union, and that it remains permanently "the master of its decisions" (cf. BVerfGE 129, 124 <179 and 180.>; 132, 195

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<240>, n. 109). Admittedly, it is primarily the duty of the *Bundestag* itself to decide up to which amount financial guarantees are justifiable, while balancing current needs against the risks of medium- and long-term guarantees (cf. BVerfGE 79, 311 <343>; 119, 96 <142 and 143>; 132, 195 <240 and 241>, n. 109). But it follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an inter-governmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag*'s control and influence (BVerfGE 129, 124 <180>; 132, 195 <241>, n. 109).

cc) Moreover, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions 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 that was made in solidarity and results in expenditure. Insofar as supranational agreements are entered into, which due to 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 participating in similar financial safeguarding systems, not only does every individual disposal require the *Bundestag*'s approval; it must also be ensured that there is sufficient parliamentary influence on the way the funds provided are used (BVerfGE 132, 195 <241>, n. 110; cf. also BVerfGE 129, 124 <180 and 181>). The *Integrationsverantwortung* of the German *Bundestag* regarding the transfer of competences to the European Union (cf. BVerfGE 123, 267 <356 et seq.>) finds its counterpart in this reasoning for budget measures of equal weight (BVerfGE 129, 124 <181>; 132, 195 <241>, n. 110).

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dd) The German *Bundestag* cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions with budgetary implications for which it is accountable. The principle of democracy under Art. 20 sec. 1 and sec. 2 GG therefore requires that the German *Bundestag* is able to have access to the information which it needs to assess the relevant background and consequences of its decision (cf. only Art. 43 sec. 1, Art. 44 GG as well as BVerfGE 67, 100 <130>; 77, 1 <48>; 110, 199 <225>; 124, 78 <114>; 131, 152 <202 and 203>; 132, 195 <241 and 242>, n. 111). This principle not only applies in national budget law (cf. for instance Art. 114 GG), but also in matters concerning the European Union (cf. Art. 23 sec. 2 sentence 2 GG; cf. BVerfGE 132, 195 <242>, n. 111).

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b) Since the third stage of the Economic and Monetary Union has started, the German *Bundestag*'s overall budgetary responsibility is safeguarded 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 non-relinquishable budget autonomy as an essential competence of the parliaments of the Member States which enjoy direct democratic legitimation, but require it (cf. in detail BVerfGE 132, 195 <243>, n. 114 et seq.).

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c) Notwithstanding the principle of democracy under Art. 20 sec. 1 and sec. 2 GG, which aims at general legal reversibility, it is not from the outset anti-democratic for the budget-setting legislature to be bound by a particular budget and fiscal policy (cf. BVerfGE 79, 311 <331 et seq.>; 119, 96 <137 et seq.>; 132, 195 <244 and 245>, n. 119 and 120) (aa). This can, in general, also take place by transferring essential budgetary decisions to bodies of a supranational or international organisation, or by the assumption of corresponding obligations under international law (bb). It is primarily for the legislature to decide whether and to what extent this is sensible (cc). 168

aa) By putting into specific terms and objectively tightening the rules for borrowing for federal and *Laender* governments (in particular Art. 109 sec. 3 and sec. 5, Art. 109a, Art. 115 GG (new), Art. 143d sec. 1 GG) the constitution-amending legislature made 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 in the long term (cf. BVerfGE 129, 124 <170>). Even if such a commitment restricts democratic legislative discretion in the present, it guarantees it for the future. Admittedly, even a worrisome long-term development of the level of debt is not a constitutionally relevant impairment of the legislature's power to decide on fiscal policy at its discretion, and dependent on the situation. Nevertheless, this results in a *de facto* constriction of discretion (cf. BVerfGE 119, 96 <147>). To avoid such a constriction is a legitimate aim of the (constitutional) legislature (BVerfGE 132, 195 <245>, n. 120). 169

bb) The commitment of the budget-setting legislature to a particular budget and fiscal policy may generally also be made under European Union or international law. 170

(1) The requirements for sound budget management contained in the Treaty on the Functioning of the European Union (Art. 123 to Art. 126, Art. 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 is not the task of the present decision to examine – applies to secondary European Union legislation (cf. in detail BVerfGE 132, 195 <245 and 246>, n. 122). 171

(2) 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 they do not conflict with the requirements of European Union law (cf. Art. 4 sec. 3 TEU). The Federal Republic of Germany may therefore introduce stricter domestic rules for its budget policy and enter into treaties to this effect (cf. BVerfGE 129, 124 <181 and 182>; 132, 195 <246>, n. 123). 172

cc) In this context, it is primarily for the legislature to weigh whether and to what extent, in order to preserve some discretion for democratic management and decision-making, one should enter into commitments regarding future spending behaviour and therefore – correspondingly – accept a restriction of one's discretion for democratic management and decision-making in the present. In this context, the Federal Constitutional Court may not with its own expertise usurp the place of legislative bodies, 173

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 (cf. BVerfGE 5, 85 <198 and 199>; 44, 125 <142>; 123, 267 <367>) and that an irreversible legal prejudice to future generations is avoided (BVerfGE 132, 195 <246 and 247>, n. 124).

d) So far, the Senate has not had to decide whether and to what extent a limit of the assumption of payment obligations or of liability commitments can be derived directly from the principle of democracy. An ultimate limit following directly from the principle of democracy could only be exceeded if payment obligations and liability commitments took effect in such a way that the budget autonomy was not merely restricted, but suspended for at least a considerable period of time. This could only happen in case of a manifest overstepping of ultimate limits (cf. BVerfGE 129, 124 <182 and 183>; 132, 195 <242>, n. 112).

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When examining whether the amount of payment obligations and liability commitments will result in the *Bundestag* relinquishing its budget autonomy, the legislature has a wide margin of appreciation, in particular with regard to the risk of the payment obligations and liability commitments being called upon, and with regard to the consequences that can be expected for the budget-setting legislature's legislative discretion; the Federal Constitutional Court must generally respect this. The same applies to assessing the future soundness of the federal budget and the Federal Republic of Germany's economic performance capacity (cf. BVerfGE 129, 124 <182 and 183>), including considering the consequences of alternative actions (BVerfGE 132, 195 <242 and 243>, n. 113).

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II.

According to these standards, the constitutional complaints and the *Organstreit* proceedings are unsuccessful. There are no objections under constitutional law 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 (1.). However, the legislature is obliged to ensure comprehensively that the Federal Republic of Germany can fully and in time meet capital calls made pursuant to Art. 9 TESM, if necessary in conjunction with Art. 25 TESM. (2.). To the extent that they have been admissibly challenged in the present proceedings, 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, are ultimately also compatible with the constitutional requirements. (3.). Finally, there are no constitutional objections against the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (4.).

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1. 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

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Mechanism for Member States whose Currency is the Euro does not violate the rights of the complainants and of applicant VII. under Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG. In particular, Art. 136 sec. 3 TFEU does not lead to a loss of the German *Bundestag*'s budget autonomy (a). Art. 136 sec. 3 TFEU is sufficiently precise (b).

a) Art. 136 sec. 3 TFEU violates neither the principle of democracy (aa) nor other constitutional requirements regarding the design of the monetary union (bb). 178

aa) Art. 136 sec. 3 TFEU neither starts a mechanism with financial effect, nor does it transfer budgetary authorisations to other actors. Art. 136 sec. 3 TFEU merely enables the Member States of the euro currency area to establish a stability mechanism to grant financial assistance on the basis of an international agreement; to this effect, Art. 136 sec. 3 TFEU confirms that the Member States remain the masters of the Treaties. How far the specific structure of the European Stability Mechanism itself, which was established on the basis of Art. 136 sec. 3 TFEU, satisfies constitutional requirements does not affect the relevant question whether the German *Bundestag* was entitled to consent to the introduction of Art. 136 sec. 3 TFEU, while preserving the core area protected by Art. 79 sec. 3 GG (cf. in detail BVerfGE 132, 195 <249 and 250>, n. 131 et seq.). 179

bb) Though, compared to the understanding of the Treaties with which Germany had participated in the foundation of the Economic and Monetary Union, the introduction of Art. 136 sec. 3 TFEU and the establishment of the European Stability Mechanism constitute indeed a fundamental reshaping of the existing Economic and Monetary Union, because it detaches its concept, albeit to a limited extent, from the principle of independence of the national budgets which had characterised it before (cf. on this BVerfGE 129, 124 <181 and 182>; 132, 195 <248>, n. 128; cf. however ECJ, Judgment of 27 November 2012, Case C-370/12 – *Pringle* –, n. 73 et seq.), this does not mean that the stability-directed orientation of the Economic and Monetary Union is abandoned. Parts of the monetary union which are essential under constitutional law (cf. BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181 and 182>; 132, 195 <248>, n. 129), such as the independence of the European Central Bank (cf. Art. 130 TFEU), its commitment to the paramount goal of price stability (cf. Art. 127 TFEU), and the prohibition of monetary financing of the budget (Art. 123 TFEU), are unaffected. Art. 136 sec. 3 TFEU does not release the Member States from the obligation of budgetary discipline (cf. Art. 126, Art. 136 sec. 1 TFEU), and apart from this, it has clearly been designed as an exceptional provision (cf. BVerfGE 132, 195 <248 and 249>, n. 129). 180

Considering the competent constitutional organs' margin of appreciation, the Federal Constitutional Court must, in general, respect the decision of the legislature to supplement the monetary union with the option of active stabilisation measures, and the associated prognosis that such acts can guarantee and further develop the stability of the monetary union (cf. BVerfGE 89, 155 <207>; 97, 350 <369>); it must also re- 181

spected that on the basis of this decision, risks to price stability cannot be ruled out (cf. BVerfGE 132, 195 <249>, n. 130).

b) Art. 136 sec. 3 TFEU is also sufficiently precise. The provision does not transfer any sovereign powers. It merely determines the use of the stability mechanism, imposes restrictive conditions on it, and taken by itself – from the perspective of Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG –, it does lead to additional specificity requirements for the provision, so that the legislative bodies' responsibility with respect to integration can be fulfilled (cf. BVerfGE 132, 195 <250 and 251>, n. 134).

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2. The Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism satisfies the requirements of Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG. The provisions of the ESM Treaty are compatible with the German *Bundestag's* overall budgetary responsibility. In particular, the amount of the payment obligations which Germany assumed when the European Stability Mechanism was established does not impair the *Bundestag's* overall budgetary responsibility. Their absolute amount does not exceed the ultimate limits which could, at most, be derived from the principle of democracy (a). To the extent that, according to the wording of the Treaty, a payment obligation whose amount is unlimited appears at least conceivable, the danger of such an interpretation was effectively precluded under international law by the joint declaration of the ESM Members of 27 September 2012, and by the unilateral declaration of the Federal Republic of Germany made on the same day (b). With regard to decisions that affect the German *Bundestag's* overall budgetary responsibility, it is ensured, at any rate at present, that they cannot be taken against the votes of the German representatives in the bodies of the European Stability Mechanism, i.e. that the legitimising relationship between parliament and the European Stability Mechanism is not interrupted (c). The provision on the suspension of voting rights pursuant to Art. 4 sec. 8 TESM is compatible with the *Bundestag's* overall budgetary responsibility. It must, however, be comprehensively ensured under budgetary law that the Federal Republic of Germany can meet capital calls made pursuant to Art. 9 TESM, if necessary in conjunction with Art. 25 sec. 2 TESM, fully and in a timely manner (d). Parliamentary monitoring of the activity of the European Stability Mechanism, which is required under constitutional law, is ensured (e). Taken by itself, the possibility of issuing shares of the European Stability Mechanism on terms other than at par pursuant to Art. 8 sec. 2 sentence 4 TESM does not endanger the overall budgetary responsibility (f), nor does the risk of financial losses arising from the operations of the European Stability Mechanism (g). It is possible to extend Germany's existing payment obligations through a capital increase; this, however, would require the assent of the legislative bodies. There is no obligation under international law to make such a capital increase (h). Finally, the ESM Treaty does not establish an indissoluble commitment of Germany (i).

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a) As has been stated, an upper limit for payment obligations and liability commitments following directly from the principle of democracy could at most be exceeded if

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the *Bundestag*'s budget autonomy were for at least a considerable period of time effectively non-existent (cf. BVerfGE 129, 124 <183>; 132, 195 <242>, n. 112). Here, the legislature has a wide margin of appreciation, in particular with regard to the risk of the payment obligations and liability commitments being called upon, and with regard to the consequences to be expected for its legislative discretion; the Federal Constitutional Court must generally respect this.

In light of this, no impairment of the *Bundestag*'s overall budgetary responsibility can be inferred from the absolute amount of Germany's payment obligations of presently EUR 190.0248 billion, assumed upon the establishment of the European Stability Mechanism. The legislature's assessment that – even taking into account the German participation in the European Financial Stability Facility, the bilateral financial assistance granted to the Hellenic Republic, and the risks resulting from the participation in the European System of Central Banks and in the International Monetary Fund – the payment obligations arising from the participation in the European Stability Mechanism do not lead to an effective failure of budget autonomy is at any rate not evidently erroneous and must therefore be accepted by the Federal Constitutional Court (BVerfGE 132, 195 <264>, n. 167). 185

b) With its accession to the European Stability Mechanism, the Federal Republic of Germany did not assume payment obligations of an unlimited amount, or which are not sufficiently foreseeable. 186

The explicit limitation of the liability of the ESM Members to their respective portions of the authorised capital stock, which is provided for in Art. 8 sec. 5 sentence 1 TESM, at present bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the European Stability Mechanism to EUR 190.0248 billion (cf. BVerfGE 132, 195 <252 et seq.>, n. 138 et seq.). 187

With regard to the provisions on revised increased capital calls (Art. 9 sec. 2 and sec. 3 sentence 1 in conjunction with Art. 25 sec. 2 TESM), it seemed possible at first to interpret the wording of the Treaty in a way from which a violation of the *Bundestag*'s overall budgetary responsibility could have been inferred (cf. on this in detail BVerfGE 132, 195 <253 et seq.>, n. 142 et seq.; see also Constitutional Court of Austria, *Österreichischer Verfassungsgerichtshof – ÖstVfGH*, decision of 16 March 2013 – SV 2/12-18 –, n. 102); such an interpretation was, however, effectively precluded by the joint interpretative declaration of the parties to the Treaty establishing the European Stability Mechanism of 27 September 2012 (BGBl II p. 1086) and the identical unilateral declaration of the Federal Republic of Germany (BGBl II p. 1087) (regarding the necessity of such a preclusion under constitutional law cf. BVerfGE 132, 195 <256 and 256>, n. 147 et seq.). According to these declarations, Art. 8 sec. 5 of the Treaty Establishing the European Stability Mechanism limits all payment liabilities of the ESM Members under the Treaty to the effect that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of 188

the Treaty, without prior agreement of each Member's representative and due regard to national procedures (cf. also ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 82 and 83, 104).

To the extent that complainant V. doubts the effectiveness under international law of the unilateral declaration of the Federal Republic of Germany on the interpretation of the ESM Treaty of 27 September 2012, this is ultimately not relevant because the declaration was made with identical wording by all Members of the European Stability Mechanism. 189

c) Moreover, the *Bundestag's* exercise of its overall budgetary responsibility requires that the legitimising relationship between the European Stability Mechanism and parliament is not interrupted under any circumstances (cf. BVerfGE 132, 195 <264>, n. 166). 190

aa) To the extent that the decisions of the ESM bodies (can) concern the overall budgetary responsibility, which is at any rate conceivable with regard to the decisions mentioned under Art. 5 sec. 6 letters b, f, i, and l TESM, the necessary legitimation is ensured by the fact that these decisions cannot be taken against the vote of the German representative in the bodies of the European Stability Mechanism (cf. BVerfGE 132, 195 <251>, n. 136). Since pursuant to Art. 5 sec. 6 letters b, f, i, and l TESM, the decisions are adopted unanimously (Art. 4 sec. 3 TESM) and the so-called emergency voting procedure pursuant to Art. 4 sec. 4 sentence 2 TESM requires a qualified majority of 85% of the votes cast, a decision against the German representative, who at present has 27.1464% of voting rights (Art. 4 sec. 7 TESM in conjunction with Annex I), is impossible in these cases. This also applies to all other decisions of the ESM bodies should they, in individual cases, concern overall budgetary responsibility: With the exception of the cases under Art. 9 sec. 2 and Art. 23 sec. 1 sentence 1 TESM, the decisions of the ESM bodies require at least a qualified majority of 80% of voting rights (Art. 4 sec. 5 TESM), so that even decisions under Art. 5 sec. 7 letter n TESM, which are not explicitly mentioned in the ESM Treaty, and whose relevance to the overall budgetary responsibility cannot be foreseen, cannot be adopted against the vote of the German representative. At the level of domestic legislation, the *Bundestag's* overall budgetary responsibility can therefore be safeguarded by the respective German representative in the ESM bodies being bound by clear instructions; consequently, it is not impaired by the ESM Treaty (cf. BVerfGE 132, 195 <265, 273>, n. 169, 185). 191

bb) Furthermore, the *Bundestag's* overall budgetary responsibility is not violated by the fact that the Republic of Germany might lose its blocking minority for decisions adopted by a qualified majority (Art. 4 sec. 5 TESM) through the accession of other states to the European Stability Mechanism and the ensuing shift of voting weights in the ESM bodies (cf. Art. 2 sec. 3 TESM). The Federal Republic of Germany's veto position in the ESM bodies, which is established in the Treaties, can be safeguarded even in such a situation. 192

Pursuant to Art. 5 sec. 6 letter l TESM, adaptations to the ESM Treaty are made as a direct consequence of the accession of new Members. In this context, the present majority requirements could be adapted in such a way that Germany's present veto position, which is required under constitutional law, will also be maintained under changed circumstances. Pursuant to Art. 44 TESM, accession to the European Stability Mechanism requires a unanimous decision by the Board of Governors (Art. 44 in conjunction with Art. 5 sec. 6 letter k TESM). This enables, and if necessary, obliges the Federal Government to make its approval of an application for membership contingent on an amendment of Art. 4 sec. 4 sentence 2 and sec. 5 TESM in order to safeguard the *Bundestag's* overall budgetary responsibility. 193

d) The *Bundestag's* responsibility with respect to integration and the constitutional requirement that the *Bundestag* may not relinquish its overall budgetary responsibility (cf. BVerfGE 129, 124 <177 et seq.>; 132, 195 <260>, n. 157 et seq.), become particularly significant with a view to the suspension of voting rights stipulated in Art. 4 sec. 8 TESM (aa). In this context, it is required to ensure under budgetary law the ability to pay in a way that satisfies the requirements under constitutional law (bb). This is ensured at present (cc). 194

aa) If an ESM Member does not fully and in time comply with its obligations under the Treaty, in particular with regard to capital calls as stipulated under Art. 8, Art. 9 and Art. 10 TESM, all voting rights of the defaulting ESM Member are suspended (Art. 4 sec. 8 TESM). 195

(1) As a consequence of the suspension of voting rights under Art. 4 sec. 8 TESM, the Member concerned *ipso iure* loses all voting rights in all collegial bodies of the European Stability Mechanism until payment of all requested capital shares has been made; 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. The requirements that have been agreed under the Treaty which relate to the quorum of the ESM bodies (Art. 4 sec. 2 sentence 2 TESM) and to the majorities required in the respective case (Art. 4 sec. 4 to sec. 6 TESM) are recalculated accordingly pursuant to Art. 4 sec. 8 sentence 2 TESM for so long as the voting rights of one or several Members are suspended. Hence, as long as at least one Member retains voting rights, the suspension of voting rights will, irrespective of the number of voting rights suspended, under no circumstances result in the lack of a quorum or in the impossibility of reaching certain majorities in the bodies. 196

While the voting rights of one or several ESM Members are suspended, all decisions of the European Stability Mechanism – with the exception of decisions regarding changes in the authorised capital stock (cf. Art. 10 sec. 1 sentence 2 and sentence 3 TESM) – can be taken without the participation of the Members concerned. This includes decisions on further capital calls (Art. 9 sec. 1 TESM), on the granting of stability support in individual cases and on its terms and conditions (Art. 13 et seq. 197

TESM), and on a review of the list of financial assistance instruments (Art. 19 TESM).

(2) The Treaty establishing the European Stability Mechanism does not provide for an effective legal remedy against the suspension of voting rights pursuant to Art. 4 sec. 8 sentence 1 TESM, in particular a remedy that suspends the effect of the suspension. To the extent that an objection made by an ESM Member against the suspension of its voting rights would be deemed a “dispute arising between an ESM Member and the ESM” within the meaning of Art. 37 sec. 2 TESM it would be decided on – again, however, with the votes of the Member affected being suspended (Art. 37 sec. 2 sentence 2 TESM) – by the Board of Governors by qualified majority; the decision of the Board of Governors can be contested before the Court of Justice of the European Union (Art. 37 sec. 3 TESM). Based on the wording and purpose of Art. 4 sec. 8 TESM and on the structure of the Treaty, it can be assumed that the suspension of voting rights continues during the entire duration of the proceedings.

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(3) If the voting rights of the Federal Republic of Germany were suspended pursuant to Art. 4 sec. 8 sentence 1 TESM, the German *Bundestag*'s participation in the decisions of the bodies of the European Stability Mechanism, which is required under national law, would fail for so long as the voting rights are suspended. From the German perspective, this would mean that the decisions taken in this period would not be legitimised and monitored by the German *Bundestag*, regardless of which voting rules the Treaty provides regarding the decisions to be made in the specific situation. This would possibly concern decisions which affect the German *Bundestag*'s overall budgetary responsibility and which therefore generally require the participation of the German *Bundestag* (cf. BVerfGE 129, 124 <179 et seq.>; 132, 195 <262>, n. 162). This concerns for instance decisions on the issue of shares on terms other than at par (Art. 8 sec. 2 sentence 4 TESM), on further capital calls (Art. 9 sec. 1 and sec. 2 TESM), on the granting of stability support including the detailing of the conditionality attached to it in the Memorandum of Understanding under Art. 13 sec. 3 TESM, on the choice of the instruments and the detailing of the financial terms and conditions in accordance with Art. 12 to Art. 18 TESM, and on changes to the list of the financial assistance instruments which the European Stability Mechanism can use (Art. 19 TESM).

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bb) In order to avoid a suspension of voting rights, the *Bundestag* must not only include the Federal Republic of Germany's share in the initial capital, which is set out in Art. 8 sec. 2 sentence 2 TESM, in the budget, but it must also comprehensively ensure to the extent necessary that in the event of calls pursuant to Art. 9 TESM, if necessary in conjunction with Art. 25 sec. 2 TESM, it will be possible at any time to pay in Germany's further shares in the authorised capital stock pursuant to Art. 8 sec. 1 TESM fully and in a timely manner (BVerfGE 132, 195 <263>, n. 164). It is not relevant in this context whether a call for payment made by the European Stability Mechanism is justified. The only decisive issues are whether the Federal Republic of Germany can indeed make a payment called for in the amount and period of time required, and whether it is entitled under constitutional law to do so. The first issue is

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above all a question of liquidity. On this, the German *Bundestag* declared through its authorised representatives that the liquidity management of the *Finanzagentur GmbH* (Finance Agency of the Federal Republic of Germany) was sufficiently “prudent and efficient” to ensure timely payment; this factual assessment must be accepted by the Federal Constitutional Court. The second issue is a question regarding the compatibility of timely and complete payment with the budgetary provisions of the Basic Law.

(1) Pursuant to Art. 110 sec. 1 GG, all expected expenditures and revenues of the Federation shall be included in the budget. The budget, which pursuant to Art. 110 sec. 2 sentence 1 GG is set forth in the Budget Act, is an economic plan and at the same time a sovereign act in the form of a statute (BVerfGE 45, 1 <32>; 70, 324 <355 et seq.>; 79, 311 <328 and 329>; 129, 124 <178>). It fulfils a function of democratic legitimisation and monitoring with regard to all revenues and expenditures of the state, and at the same time serves to inform the public. In view of this, the right to decide on the budget is one of the most important rights of parliament and an essential instrument of parliamentary control of the government (cf. BVerfGE 49, 89 <125>; 55, 274 <303>; 70, 324 <356>; 110, 199 <225>). The specific requirement under Art. 110 sec. 2 sentence 1 GG to enact a statute obliges parliament to account to itself and to the public for revenues and expenditures of the state. Not least for this reason, the parliamentary debate on the budget, including the extent of public debt, is regarded as a general political debate (BVerfGE 123, 267 <361>; 129, 124 <178>). If in the course of the respective fiscal year; the existing budget allocations prove to be too low, or if factual needs arise which the Budget Act did not consider, the Federal Government is under the constitutional obligation to submit a bill to amend the Budget Act (supplementary budget) as stipulated in Art. 110 sec. 3 GG to ensure the completeness of the budget (cf. BVerfGE 45, 1 <34>; implicitly also BVerfGE 119, 96 <122 et seq.>).

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Since the budget must be set out in a law before the beginning of the respective fiscal year (Art. 110 sec. 2 sentence 1 GG), it necessarily has a prognostic element (cf. BVerfGE 30, 250 <263>; 113, 167 <234>; 119, 96 <130>), so that there will always be deviations from the budget in its execution. This is in the nature of things. However, deliberately incorrect or “fabricated” budget allocations, which lack a realistic, and therefore “valid”, prognosis of the expected revenues or expenditures even though obvious possibilities of obtaining better information exist, are not compatible with the principle of *Haushaltswahrheit* (budget accuracy) (cf. BVerfGE 119, 96 <130>).

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(2) In the case of expenditures “in excess of budgetary appropriations or for purposes not contemplated by the budget”, Art. 112 GG allows a deviation from the requirement that the budget is enacted by parliament, if there is an “unforeseen and unavoidable” necessity for this. If the requirements under Art. 112 GG are satisfied, the Federal Minister of Finance can in individual cases authorise expenditures which the budget does not provide at all (expenditures for purposes not contemplated by the budget) or not to a sufficient amount (expenditures in excess of budgetary appropriations). This is a subsidiary emergency power of the executive branch for the case that

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parliamentary approval would come too late (cf. Kube, in: Maunz/Dürig, GG, Art. 112 n. 3 <December 2007>; Heintzen, in: v. Münch/Kunig, GG, Vol. 2, 6th ed. 2012, Art. 112 n. 1).

cc) At present, budgetary law sufficiently ensures that the Federal Republic of Germany will be able to comply with all calls for payment by the European Stability Mechanism that are relevant for the application of Art. 4 sec. 8 TESM – up to its portion of the authorised capital stock (Art. 8 sec. 5 sentence 1 TESM) – so timely and comprehensively that a suspension of its voting rights is virtually impossible. 204

(1) Since the Treaty establishing the European Stability Mechanism entered into force, the expenditures for the first four (out of a total of five) instalments of the German share in the paid-in capital of the European Stability Mechanism were included in the respective budget (cf. Act on the Adoption of a Supplementary Budget to the Federal Budget for the Financial Year 2012, *Gesetz über die Feststellung eines Nachtrags zum Bundeshaushaltsplan für das Haushaltsjahr 2012*, Supplementary Budget Act 2012 of 13 September 2012, BGBl. I p. 1902; Act on the Adoption of the Federal Budget for the Financial Year 2013, *Gesetz über die Feststellung des Bundeshaushaltsplans für das Haushaltsjahr 2013*, Budget Act 2013 of 20 December 2012, BGBl. I p. 2757). According to the Statement of the Federal Government, another expenditure is provided for in the budget for the year 2014. 205

(2) Beyond this share in the paid-in capital, § 1 sec. 2 sentence 1 ESMFinG authorises the Federal Ministry of Finance – relying on Art. 115 sec. 1 GG (cf. BTDrucks 17/9048 p. 6) –, to provide “guarantees” for the callable capital of the European Stability Mechanism to the amount of EUR 168.30768 billion. This, however, does not entail a safeguarding under budget law (cf. also § 1 sec. 2 sentence 2 ESMFinG). 206

(3) Neither the right to make emergency appropriations under Art. 112 GG (a) nor the preparation of a supplementary budget (b) can ensure in every case that the German payment obligations are complied with fully and in a timely manner. 207

(a) Recourse to the right of the Federal Minister of Finance to make emergency appropriations pursuant to Art. 112 sentence 2 GG (cf. also § 37 sec. 1 sentence 2 BHO) requires that the expenditure to be appropriated, or its urgency, have indeed not been foreseen by the constitutional organs participating in the preparation of the budget. In this context, it has to be taken into account that the legal basis and the maximum amount of the payment obligations arising from Art. 9 TESM are certain. Apart from this, the Senate stated in its judgment of 12 September 2012 – explicitly making reference to Art. 110 sec. 1 GG, § 22 of the Budgetary Principles Act (*Haushaltsgrundsätze-gesetz* – HGrG) and § 16 of the Federal Budget Code (*Bundeshaushaltsordnung* – BHO) – that it is necessary to ensure in the budget that the payment obligations can be met (cf. BVerfGE 132, 195 <263>, n. 164). In addition, because of the pre-eminent position of parliament under constitutional law with regard to the adoption of the Budget Act, the supplementary budget has precedence over the right to make emergency appropriations pursuant to Art. 112 GG, a right which 208

excludes parliament from any, even subsequent, participation (cf. BVerfGE 45, 1 <32, 34 et seq.>).

(b) Even the possibility of preparing a supplementary budget does not in all cases ensure that capital calls by the European Stability Mechanism are complied with fully and in a timely manner while adhering to the budgetary provisions of the Basic Law. If the possibility of a capital call pursuant to Art. 9 TESM can be seen to emerge, it is generally necessary to allocate funds for this in the budget. In spite of the simplified procedure for the adoption of a supplementary budget (cf. Art. 110 sec. 3 half-sentence 2 GG), the legislative procedure is time-consuming and depends on the balance of forces in *Bundestag* and *Bundesrat*. Pursuant to Art. 110 sec. 3 half-sentence 2 GG, the *Bundesrat* is entitled to comment within three weeks, a time-limit which it need not, but can, make full use of. In contrast, the period of time to be observed for payment in case of capital calls is “appropriate” at best (Art. 9 sec. 1 and sec. 2 TESM; according to the terms and conditions for capital calls adopted by the Board of Directors on 9 October 2012, implementing Art. 9 sec. 4 TESM, the periods of time for payment should not exceed four months in the cases under Art. 9 sec. 1 TESM and four months in the cases under Art. 9 sec. 2 TESM) and is only seven days in the most urgent case (Art. 9 sec. 3 sentence 4 TESM). It is not completely impossible that under favourable conditions, i.e. if all constitutional organs involved interact cooperatively and waive the applicable time-limits, a supplementary budget can be adopted within seven days; from this, however, it does not follow that this will succeed in every case. This applies notwithstanding the constitutional obligation of all organs participating in the preparation of the budget to ensure under budgetary law that capital calls can be met at all times (cf. BVerfGE 132, 195 <263>, n. 164).

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(4) For foreseeable payment obligations pursuant to Art. 8 sec. 4 sentence 2 TESM in conjunction with Art. 9 TESM, allocations must be made in the budget. This follows from the principles of completeness and accuracy of the budget. In what amount the budget-setting legislature considers possible capital calls by an allocation in the federal budget depends on the respective circumstances and requires a “valid” prognosis about their probability, point in time, and amount.

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Uncertainties with regard to the assessment of future capital calls do not preclude a prognosis by the budget-setting legislature. Not only is the maximum amount of payment obligations certain (Art. 8 sec. 4 TESM); the probability and the point in time of the emergence of financing problems with individual Members can be assessed on the basis of various parameters, for instance the debt ratio and the term and maturity of the government bonds of an ESM Member (this was also held by the Supreme Court of Estonia <Riigikohus>, judgment of 12 July 2012 – 3-4-1-6-12 –, sec. no. 197). The same applies to the risks arising from the operations of the European Stability Mechanism, from its borrowing operations (Art. 21 TESM), and its investment policy (Art. 22 TESM).

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(5) The current prognosis of the legislature that the Federal Republic of Germany’s

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obligations in connection with the financing of the European Stability Mechanism are limited to the paid-in capital within the meaning of Art. 8 sec. 2 sentence 2 TESM (cf. BTDrucks 17/9045, p. 2), is not objectionable under constitutional law.

e) Art. 32 sec. 5, Art. 34 and Art. 35 sec. 1 TESM, which stipulate the inviolability of all official papers and documents of the European Stability Mechanism and the professional secrecy and immunity of the members of its bodies and its staff, ultimately do not violate Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG and the German *Bundestag*'s right under Art. 23 sec. 2 sentence 2 GG, which can only be asserted in the *Organstreit* proceedings of applicant VII., to be informed comprehensively and at the earliest possible date (cf. BVerfGE 131, 152 <202 et seq.>). They are to be interpreted in such a way that they do not stand in the way of sufficient parliamentary control of the European Stability Mechanism by the German *Bundestag* (cf. on this BVerfGE 132, 195 <257 et seq.>, n. 150 et seq.).

To the extent that the possibility of a different interpretation existed (cf. BVerfGE 132, 195 <259>, n. 154 and 155), such an interpretation has at any rate effectively been precluded under international law by the joint interpretative declaration of the ESM Members of 27 September 2012 (BGBl II p. 1086), and by the identical unilateral declaration of the Federal Republic of Germany (BGBl II p. 1087) (cf. also ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 95). The interpretative declarations clarify that Art. 32 sec. 5, Art. 34 and Art. 35 sec. 1 TESM do not stand in the way of the comprehensive information of the *Bundestag*.

f) The possibility provided for in Art. 8 sec. 2 sentence 4 TESM of issuing shares of the European Stability Mechanism's authorised capital stock on terms other than at par also does not stand in the way of the limitation of the amount of payment obligations (cf. BVerfGE 132, 195 <253, 265>, n. 141, 169). The *Bundestag*'s overall budgetary responsibility can be affected by decisions pursuant to Art. 8 sec. 2 sentence 4 TESM if the issue of shares in the capital stock higher than at par entails additional payment obligations. The *Bundestag*'s overall budgetary responsibility, however, is at any rate ensured because a decision pursuant to Art. 8 sec. 2 sentence 4 TESM cannot be taken against the vote of the German representative in the responsible ESM body.

g) The abstract possibility that the European Stability Mechanism might generate financial losses also does not impair the *Bundestag*'s overall budgetary responsibility. With regard to the question whether and if so, to what extent, losses can be expected to arise from the operations of the European Stability Mechanism, the legislature has, as with every participation in an international financial institution, a margin of appreciation which the Federal Constitutional Court must generally respect (cf. BVerfGE 129, 124 <182 and 183>). It is not apparent that with its assent to the ESM Treaty, the legislature could have transgressed this margin of appreciation.

aa) The Treaty is based on the assumption that the operations of the European Stability Mechanism can entail losses because in Art. 9 sec. 2 TESM, it authorises the

ESM to make capital calls in such a case, if necessary in in conjunction with Art. 25 sec. 2 TESM. One must, however, take into account that not only the German overall involvement in the ESM Treaty (Art. 8 sec. 1, Annexes I and II) was approved by the *Bundestag* (§ 1 sec. 1 and sec. 2 ESMFinG), but that every single stability support measure taken pursuant to Art. 13 sec. 2 TESM, as well as the signing of the respective Memorandum of Understanding pursuant to Art. 13 sec. 4 TESM, require a decision by mutual agreement of the Board of Governors and are thus indirectly made contingent on the approval of the German *Bundestag* (cf. § 4 sec. 1 ESMFinG). Since the *Bundestag* can in this way 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, it can decisively influence the probability and the amount of possible later capital calls pursuant to Art. 9 sec. 2 TESM (cf. BVerfGE 132, 195 <265 and 266>, n. 170).

bb) Admittedly, there are no comparable possibilities for the *Bundestag* of exerting influence with regard to possible losses resulting from the other activities of the European Stability Mechanism, especially with regard to its borrowing operations pursuant to Art. 21 TESM. It can, however, exert sufficient influence on the activities of the European Stability Mechanism via the detailed guidelines for borrowing operations (Art. 21 sec. 2 TESM) and for investment policy (Art. 22 sec. 1 TESM), which oblige the European Stability Mechanism to pursue a sound financial and risk management (cf. BVerfGE 132, 195 <266>, n. 171). 218

h) An extension of the payment obligations beyond the currently applicable amount of EUR 190.0248 billion is only possible via a capital increase pursuant to Art. 10 sec. 1 TESM, if necessary in conjunction with a decision pursuant to Art. 8 sec. 2 sentence 4 TESM. This, however, always requires a unanimous decision of the Board of Governors (Art. 5 sec. 6 letters b and d TESM) or of the Board of Directors, if these decisions are delegated under Art. 5 sec. 6 letter m TESM (Art. 6 sec. 5 sentence 2 in conjunction with Art. 5 sec. 6 letters b and d TESM). Thus, it is sufficiently ensured that the *Bundestag's* overall budgetary responsibility is safeguarded. 219

Contrary to the view held by complainant I., it cannot be inferred from the ESM Treaty that the Federal Republic of Germany is obliged under international law to consent to a capital increase under Art. 10 TESM to preserve or restore the functioning of the European Stability Mechanism. Pursuant to Art. 10 sec. 1 sentence 1 TESM, the Board of Governors shall review regularly the adequacy of the authorised capital stock of the ESM. It may decide to further increase the authorised capital stock (Art. 10 sec. 1 sentence 2 TESM) of currently EUR 700 000 million (Art. 8 sec. 1 sentence 1 TESM). There are no indications to suggest the assumption that a legal obligation for the Member States to consent to a capital increase follows from Art. 10 TESM that goes beyond its wording; on the contrary, there is every indication that the wording is authoritative. Moreover, pursuant to Art. 5 sec. 6 letter d TESM, the decision on the capital increase must be taken unanimously, and pursuant to Art. 10 sec. 1 sentence 3 TESM, it requires a national notification procedure. Thus, the deci- 220

sion on a capital increase is not supposed to follow solely from the objective necessity of a capital increase in order to maintain the European Stability Mechanism's ability to function, but is supposed to be taken on the basis of new (political) decisions in the Member States. A substantive obligation to consent would eliminate this mechanism (this view is also held by the Supreme Court of Estonia <Riigikohus>, judgment of 12 July 2012 – 3-4-1-6-12 –, sec. no. 105 and 106, 144).

Moreover, according to the declaration of the Federal Republic of Germany of 27 September 2012 and the identical joint declaration of the Member States (BGBl II pp. 1086 and 1087), the liability of the ESM Members is not supposed to be unlimited, not even for the purpose of stabilising the euro currency area; on the contrary, it is supposed to be limited at present to the portion of the authorised capital stock corresponding to each ESM Member (cf. also Art. 8 sec. 5 sentence 1 TESM; cf. on this BVerfGE 132, 195 <252>, n. 140; ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 83). This does not preclude a later capital increase. The declaration, however, expresses the unambiguous will of the Contracting Parties, which precludes invoking implicit obligations to the contrary, to decide autonomously, if necessary, about the payment of higher contributions than the ones set out in Annex II of the ESM Treaty.

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i) Finally, the fact that termination is not expressly provided for in the ESM Treaty does not violate the overall budgetary responsibility. The limitation of liability pursuant to Art. 8 sec. 5 TESM in conjunction with Annex II sufficiently ensures that the ESM Treaty does not establish an automatic and irreversible procedure regarding payment obligations or liability commitments; therefore, it is not required to provide a special right of termination in the Treaty (cf. BVerfGE 132, 195 <268>, n. 175). Apart from this, it is possible for Members to resign even though there is no express regulation.

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3. The provisions of the Act on the Treaty Establishing the European Stability Mechanism and the ESM Financing Act, at least if they are interpreted in conformity with the Constitution, meet the requirements under Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG regarding the way the German *Bundestag's* rights to participate and opportunities to exert influence need to be designed in order to ensure democratic governance of the European Stability Mechanism and in order to ensure its overall budgetary responsibility (BVerfGE 132, 195 <269>, n. 176 et seq.).

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The accompanying legislation has the function of modelling and putting into specific terms in national law the constitutionally required rights of the legislative bodies to participate in the work of the European Stability Mechanism (cf. BVerfGE 123, 267 <433>). This legislation must ensure that the *Bundestag* –through the Federal Government – has a determining influence on the actions of the European Stability Mechanism (cf. BVerfGE 123, 267 <356, 433 et seq.>) and is thus in a position to exercise its overall budgetary responsibility and its responsibility with respect to integration (cf. BVerfGE 129, 124 <177 et seq., 186>; 132, 195 <270>, n. 178). With regard to the consultation rights of the *Bundestag*, the requirements placed on ensuring democrat-

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ic governance of the European Stability Mechanism and on safeguarding the overall budgetary responsibility of the *Bundestag* are fully satisfied, at any rate if the ESM Financing Act is interpreted in conformity with the Constitution (a), with regard to the *Bundestag*'s rights to be informed (b), and with regard to the personal legitimation of the German representatives in the bodies of the European Stability Mechanism (c) (cf. in detail BVerfGE 132, 195 <269 et seq.>, n. 177 et seq.).

a) For the decisions of the European Stability Mechanism which play a role for the overall budgetary responsibility, the legislature has created a connection to parliament by laying down in Art. 2 TESM, in § 4 sec. 2 sentences 1 and 2 and in § 5 sec. 2 sentences 2 and 3 ESMFinG 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* when voting in these bodies. The fact that some of the decisions are subject to the vote of the plenary (cf. § 4 sec. 1 sentence 1 ESMFinG) and others merely to that of the budget committee (cf. § 5 sec. 2 sentence 1 ESMFinG) does not affect the basic question of the participation of the German *Bundestag*, which is the one to be decided here (BVerfGE 132, 195 <270>, n. 179).

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aa) The possibility of a development of further instruments (cf. Art. 19 TESM), provided for in the ESM Treaty, does not make it possible at this stage to determine in detail and legislate all cases in which a participation of parliament will be advisable. The participation rights must keep pace with the development of the Treaty – whether by statutory amendment, or by interpretation – so that the effective exercise of parliamentary budgetary responsibility and the *Integrationsverantwortung* is guaranteed in every eventuality (cf. BVerfGE 132, 195 <272>, n. 183). In view of this, the legislature has made a change of the financial assistance instruments under Art. 19 TESM contingent on the requirement of authorisation under federal legislation (Art. 2 sec. 2 ESMVertrG). Should it become apparent during the execution of the ESM Treaty that further essential participation requirements are not expressly provided for, § 4 sec. 1 ESMFinG, which names only three areas of decision of the European Stability Mechanism as examples (“in particular”) in which the plenary is to decide, offers sufficient scope for a treatment which is in conformity with the Constitution. The same applies to the catch-all provision of § 5 sec. 3 ESMFinG, which obliges the Federal Government to involve the *Bundestag* budget committee and to take account of its opinion in all cases in which the *Bundestag*'s budget responsibility is not affected and which are not provided for elsewhere (BVerfGE 132, 195 <271>, n. 180).

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bb) With regard to the possibility of issuing shares of the capital stock of the European Stability Mechanism on terms other than at par (Art. 8 sec. 2 sentence 4 TESM) which, taken by itself, is not objectionable under constitutional law (cf. above n. 215), the *Bundestag* is not expressly involved; the provisions of the ESM Financing Act, however, permit to proceed here in conformity with the Constitution in a manner that is compatible with Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG (cf. already BVerfGE 132, 195 <274>, n. 188).

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While the legislature expressly declared in § 4 sec. 1 sentence 2 no. 1 and no. 2 and sec. 2 ESMFinG that prior approval by the *Bundestag* is required for decisions in the European Stability Mechanism to grant stability support (Art. 13 sec. 2 TESM), for the acceptance of a financial assistance facility agreement (Art. 13 sec. 3 sentence 3 TESM), and for consent to a corresponding memorandum of understanding (Art. 13 sec. 4 TESM), no such provision has been made for the matter regulated in Art. 8 sec. 2 sentence 4 TESM and for the corresponding competence of the Board of Governors (Art. 5 sec. 6 letter b TESM). However, by taking recourse to the general provision of § 4 sec. 1 sentence 1 in conjunction with sec. 2 ESMFinG, pursuant to which decisions “in matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German *Bundestag*” require prior approval of the German *Bundestag*, the necessary participation of the *Bundestag* can be ensured with sufficient certainty (cf. BVerfGE 132, 195 <274>, n. 188). 228

Such an interpretation of § 4 sec. 1 sentence 1 in conjunction with sec. 2 ESMFinG in conformity with the Constitution is covered by the wording of the Act and safeguards the basic objective of the legislature (cf. BVerfGE 49, 148 <157>; 54, 277 <300>; 86, 288 <320>). On the basis of such an interpretation, it is ensured that the *Bundestag* can in fact effectively exercise its overall budgetary responsibility (cf. BVerfGE 129, 124 <184 and 185>), and that in a given situation, the decision on whether and, if so, in what manner the *Bundestag* will be involved in decisions of the ESM bodies under Art. 8 sec. 2 sentence 4 TESM will not be left to the discretion of the executive branch alone. 229

In so far as it is submitted that the participation of the German representative in decisions on the issue of shares higher than at par pursuant to Art. 8 sec. 2 sentence 4 TESM requires a special statutory authorisation, no constitutional reasons are apparent for this. Such a requirement is neither expressly provided in the Basic Law, as is, for instance, the case with Art. 110 sec. 2 sentence 1 GG, nor does it follow from the overall budgetary responsibility of the *Bundestag*. What is decisive for the latter is that the *Bundestag* is involved, and not that the involvement takes the shape of a law. The right to decide on the budget and the overall budgetary responsibility of the German *Bundestag* are exercised by debating and passing decisions in the plenary (cf. BVerfGE 70, 324 <356>; 129, 124 <178 and 179>), by the decision on the Budget Act, by statutes with financial effect or by a constitutive decision of the plenary of another kind (cf. BVerfGE 90, 286 <383 et seq.>; 130, 318 <347>). From the fact that Art. 2 sec. 1 TESM Act expressly requires a federal-law authorisation for increases of the authorised capital stock, it does not follow that the same must apply to decisions pursuant to Art. 8 sec. 2 sentence 4 TESM. 230

b) The rights to information of the German *Bundestag* contained in the ESM Financing Act satisfy the requirements of Art. 23 sec. 2 sentence 2 GG, which is the standard of review in the *Organstreit* proceedings of applicant VII. (cf. BVerfGE 132, 195 <271>, n. 181). The provisions of the ESM Treaty, in particular Art. 34 TESM, do not stand in the way of an information of the *Bundestag* in accordance with the require- 231

ments of Art. 23 sec. 2 sentence 2 GG (cf. above n. 223).

The work of the European Stability Mechanism is a matter concerning the European Union within the meaning of Art. 23 sec. 2 GG, and just like its establishment and set-up, it goes along with rights of participation and information of the *Bundestag* (cf. BVerfGE 131, 152 <215 et seq.>). § 7 sec. 1 to sec. 3 ESMFinG reproduces the relevant constitutional requirements under Art. 23 sec. 2 sentence 2 GG regarding the Federal Government's duties of information and thus guarantees the parliamentary right of information. In addition, § 7 sec. 10 ESMFinG leaves the more extensive rights under the Act on Cooperation between the Federal Government and the German *Bundestag* in Matters Concerning the European Union unaffected (cf. BVerfGE 132, 195 <271>, n. 182). 232

c) Under the aspect of democratic legitimation of the activity of the European Stability Mechanism, which Art. 20 sec. 1 and sec. 2 GG requires, there are no reasons to criticise the structuring of Germany's representation in the bodies of the European Stability Mechanism either. 233

aa) Art. 20 sec. 2 sentence 2 GG guarantees in conjunction with Art. 79 sec. 3 GG that the exercise of state duties and the exercise of state powers can be traced back to the people of the state (cf. BVerfGE 77, 1 <40>; 83, 60 <71 and 72>; 89, 155 <182>; 93, 37 <66>; 107, 59 <87>; 130, 76 <123>) and are accounted for vis-à-vis the people (cf. BVerfGE 83, 60 <72>). Every official act by which decisions are taken requires legitimation. This also applies to the exercise of participatory powers (cf. BVerfGE 47, 253 <273>; 83, 60 <73>) and of membership rights in international organisations and the European Union. Here, democratic legitimation requires that the people can effectively influence a state's sovereign actions (cf. BVerfGE 83, 60 <71 and 72>; 89, 155 <182>; 93, 37 <67>; 107, 59 <87>; 119, 331 <366>; 130, 76 <123>). 234

In personal terms, an office-holder is democratically legitimised if the office-holder's appointment can be traced back to the people in an uninterrupted chain of legitimation (cf. BVerfGE 52, 95 <130>; 68, 1 <88>; 77, 1 <40>; 83, 60 <72 and 73>; 130, 76 <124>). In substantive terms, the exercise of public authority is legitimised in particular by parliamentary requirements placed on administration, parliament's influence on government policy, and the administration being generally bound by instructions of the government (cf. BVerfGE 83, 60 <72>; 93, 37 <67>; 107, 59 <87 and 88>; 130, 76 <123>). The more intensively a given measure affects fundamental rights (cf. BVerfGE 93, 37 <73>; 130, 76 <124>) or the more vital its significance for the general public, the higher its level of democratic legitimation must be. What is decisive in this context is not the form of legitimation, but the effectiveness of the democratic governance of the decision-making processes (cf. BVerfGE 93, 37 <67>). Here, the interaction of the different foundations of legitimation is decisive (cf. BVerfGE 93, 37 <66 and 67>; 130, 76 <124>). Reduced legitimation via one track of legitimation can be compensated through increased legitimation via other tracks (cf. BVerfGE 83, 60 <72>; 93, 37 235

<66 and 67>; 107, 59 <87 and 88>; 130, 76 <124>).

With regard to the work of the executive branch in the areas of foreign affairs and European integration, it must be taken into account that parliamentary requirements can only to a limited extent ensure substantive legitimation. Dealings with other states, representation in international organisations, international institutions and systems of mutual collective security (Art. 24 sec. 2 GG), and guaranteeing the responsibility of the country in the context of Germany's external representation, are generally the responsibility of the Federal Government (cf. BVerfGE 131, 152 <195>). The latitude which the Federal Government needs to perform its functions would conflict with strict parliamentary determination (cf. BVerfGE 49, 89 <124 et seq.>). The requirements placed on substantive democratic legitimation, which are less stringent in this respect, can be compensated by the respective office holder acting on behalf and on the instructions of the government, and thus enabling the government to assume responsibility vis-à-vis the parliament and the people (cf. BVerfGE 9, 268 <281 and 282>; 93, 37 <67>; 130, 76 <124>).

bb) According to these standards, there are no objections to the German representation in the bodies of the European Stability Mechanism.

To the extent that the participation of the German representatives in the ESM bodies affects the overall budgetary responsibility of the *Bundestag*, specific parliamentary instructions to the Federal Government are required to safeguard the *Bundestag*'s decisive influence. Consequently, the ESM Financing Act clearly assumes that the German representatives are bound by the decisions of the *Bundestag* and are accountable to it (BVerfGE 132, 195 <272>, n. 183).

The Constitution does not lay down in detail in what way the legislature ensures that the substantive decisions of the German *Bundestag* are correctly implemented in the ESM bodies.

(1) The German member of the Board of Governors is the Federal Minister of Finance (Art. 5 sec. 1 sentence 3 TESM). Being appointed to the Federal Government by the Federal Chancellor, who is elected by parliament, the Minister of Finance is personally democratically legitimised and at least indirectly dependent on the confidence of the *Bundestag* (Art. 64 sec. 1, Art. 67 sec. 1 GG) and accountable to it (cf. Art. 114 sec. 1 GG).

(2) The delegation of a State Secretary to the Board of Directors of the European Stability Mechanism and the appointment of a ministry official as the State Secretary's representatives are not objectionable. In personal terms, they are democratically legitimated through an uninterrupted chain of individual acts of appointment. In substantive terms, they are legitimised, with regard to the exercise of their function, by the European Stability Mechanism's requirements as stipulated in the Treaty, and by being bound by the decisions of the German *Bundestag*, which the ESM Financing Act stipulates. Due to their positions in the administrative structure within the meaning

of Art. 33 sec. 4 GG, the State Secretary as well as the official representing the State Secretary sufficiently ensure that the way they exercise the sovereign powers connected with their functions under the European Stability Mechanism is subject to the special safeguards which are institutionally guaranteed for the permanent civil service, namely the duty to perform their tasks in a qualified, loyal and law-abiding way (cf. BVerfGE 119, 247 <260 and 261>; 130, 76 <111 and 112>), and that possible requirements of the German *Bundestag* are implemented according to the instructions given.

cc) The ESM Treaty does not conflict with the fact that the German representatives in the bodies of the ESM are bound by instructions, which the ESM Treaty presupposes and which is also required under constitutional law. The ESM Treaty assumes that the members of its bodies are responsible to their parliaments, which is based in particular on the interpretation of the provisions on professional secrecy (Art. 34 TESM) and personal immunity (Art. 35 TESM) under the joint declaration of the ESM Members and the identical declaration of Germany of 27 September 2012 (BGBl II pp. 1086 and 1087), which is binding under international law. This already follows from the fact that the Ministers of Finance of the ESM Members are represented on the Board of Governors (Art. 5 sec. 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 (Art. 6 sec. 1 sentence 2, Art. 43 TESM). The provision makes it possible to enforce a commitment to instructions from the national government and to ensure the influence of parliament in this way (cf. BVerfGE 132, 195 <272>, n. 184).

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4. Finally, the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (SCG Treaty – TSCG) does not violate Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG. Its essential content conforms to requirements of constitutional law (cf. in particular Art. 109, Art. 109a, Art. 115 and Art. 143 GG) and of European Union law (cf. in particular Art. 126 TFEU) (cf. in particular BVerfGE 132, 195 <278 et seq.>, n. 197 et seq.; also ÖstVfGH, decision of 3 October 2013 – SV 1/2013-15 –, n. 47).

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The Treaty grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German *Bundestag* and does not force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed (cf. on this in detail BVerfGE 132, 195 <278>, n. 196). It is true that pursuant to Art. 3 sec. 2 sentence 2 TSCG, in establishing the correction mechanism, the Contracting Parties rely on principles which are to be proposed by the European Commission and which concern in particular the nature, size and time-frame of the corrective action to be taken (including under exceptional circumstances), and the role and independence of the institutions responsible at the national level for monitoring compliance with the deficit and indebtedness criteria. This, however, does not grant the European Commission authority to impose specific substantive requirements for the structuring of the budgets (cf. also Conseil con-

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stitutionnel, Décision n°2012-653 DC of 9 August 2012, cons. 25). This follows in particular from the fact that the correction mechanism to be established pursuant to Art. 3 sec. 2 sentence 3 TSCG for the reduction of public deficit is subject to the reservation that the parliamentary prerogatives shall be respected. Nor can the Court of Justice of the European Union review the application of the correction mechanisms (cf. BVerfGE 132, 195 <284 and 285>, n. 211 et seq.).

Due to the evaluation provision under Art. 16 TSCG and the general rules of international law concerning the possibilities of terminating a treaty, the lack of an explicit right of termination in the Treaty is at any rate not objectionable under constitutional law (cf. in detail BVerfGE 132, 195 <285 et seq.>, n. 214 et seq.).

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Voßkuhle

Lübbe-Wolff

Gerhardt

Landau

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Müller

Kessal-Wulf

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