Headnotes

to the judgment of the Second Senate of 21 October 2014

– 2 BvE 5/11 –

1. **Under Art. 38 sec. 1 sentence 2 and Art. 20 sec. 2 sentence 2 of the Basic Law (*Grundgesetz* – GG), the German *Bundestag* has a right to ask questions and to receive information from the Federal Government; generally a duty of the Federal Government to give answers corresponds to this right. Oversight of armament exports is not *per se* exempt from all parliamentary oversight on the grounds of the foreign policy significance of this part of governmental action. The allocation of competence under Art. 26 sec. 2 sentence 1 GG alone does not create a sphere of governmental decision-making that is always exempt from parliamentary scrutiny.**

2. **Nevertheless, the *Bundestag* and its individual members do not have an unlimited entitlement to be informed. Their right is limited by the principle of separation of powers, by the welfare of the state, and by third parties' fundamental rights.**

   a. Deliberations and decision-making of the Federal Security Council (*Bundessicherheitsrat*) are a part of the core area of executive autonomy. Thus, the Federal Government is required to inform *Bundestag* members upon request that the Federal Security Council has approved a certain armaments export transaction, i.e. a transaction specified in terms of the armament product, the volume and the recipient country, or that a permit for a transaction as described in the parliamentary inquiry has been denied. There is no constitutional requirement to provide further information.

   b. The Federal Government may deny answers to questions on pending applications for armament exports as well as on advance queries from weapons producers also for reasons of the welfare of the state. The same applies in case an application for permission was denied. Furthermore, these reasons may also justify denial of a response in case applications for permission have already been approved by the Federal Security Council.

c. The interference with military equipment companies' freedom of occupation as a result of a disclosure of information on intended armament export transactions is generally justified to the extent that the Federal Government in its response discloses that the Federal Security Council has authorised a specific armament export transaction and in this context provides information about the type and number of war weapons, about the recipient state, about the German companies involved and about the total volume of the transaction. In general, information going beyond this would disproportionately interfere with the companies' right to freedom of occupation.

d. There is a duty to provide reasons to the extent that the Federal Government intends to deny information about a granted permit or on the basic data of the export transaction to be communicated in this connection.

FEDERAL CONSTITUTIONAL COURT

- 2 BvE 5/11 -

Pronounced
on 21 October 2014
Kunert
Amtsinspektor
as Registrar of the
Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the applications to declare

1. that the respondent violated applicant 1 in his rights under Art. 38 sec. 1 sentence 2 of the Basic Law (*Grundgesetz* – GG) (in conjunction with Art. 20 sec. 2 sentence 2 GG) by not responding or not responding in a sufficient manner

a) to his urgent information request, as posed in question time of the *Bundestag* on 6 July 2011 (Minutes of the Session p. 13807 A), their follow-up question to the urgent information request of Member of Parliament Volker Beck (minutes of the session p. 13802 D) and the two follow-up questions in response to his own urgent information request (Minutes of the Session p. 13807 B, C and p. 13807 D) nor

b) to the written questions of 8 July 2011 (7/84) and 14 July 2011 (7/193) on the delivery of Leopard-2-tanks from Germany to Saudi Arabia,

2. that the respondent violated applicant 2 in her rights under Art. 38. sec. 1 sentence 2 GG (in conjunction with Art. 20 sec. 2 sentence 2 GG) by not responding or not responding in a sufficient manner

a) - during question time of the *Bundestag* on 6 July 2011 -, to the urgent information request of applicant 2 (minutes of the session p. 13810 D), the follow-up question to her own urgent information request (Minutes of the Session p. 13811 A) and her follow-up question to the urgent information request of Member of Parliament Volker Beck (Minutes of the Session p. 13803) on the delivery of Leopard tanks to Saudi Arabia, nor

b) to their requests in writing (7/132) on the delivery of tanks to Algeria,

3. that the respondent violated applicant 3 in her rights under Art. 38 sec. 1 sentence 2 GG (in conjunction with Art. 20 sec. 2 sentence 2 GG) by not responding or not responding in a sufficient manner

a) to the follow-up questions raised by applicant 3 during question time of the *Bundestag* on 6 July 2011 in response to the urgent information request of Member of Parliament Volker Beck (minutes of the session p. 13804 B), Member of Parliament Movassat (Minutes of the Session p. 13841 B) nor

b) to two written questions (7/174 und 715) of 14 July 2011 on the delivery of 200 Leopard tanks to Saudi Arabia,

Applicants: 1. Hans-Christian Ströbele,
Platz der Republik 1, 11011 Berlin,

2. Katja Keul,
Platz der Republik 1, 11011 Berlin,

3. Claudia Roth,
Platz der Republik 1, 11011 Berlin

- authorised representative: Hans-Christian Ströbele,
Platz der Republik 1, 11011 Berlin -

Respondent: Federal Government,
represented by the Federal Chancellor

Dr. Angela Merkel,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin

- authorised representative: Prof. Dr. Stefan Korioth,
Himmelreichstraße 2, 80538 München -

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 15 April 2014:

Judgment:

1. **The respondent violated**

   a) applicant 1 by way of the answers given in response to question 17/119, p. 13802 of the Minutes of Plenary Proceedings of the German *Bundestag* (*Plenarprotokoll* – PlenProt), posed during question time of the *Bundestag* on 6 July 2011, insofar as it concerns the human rights situation in Saudi Arabia, and by way of the answers given in response to written question 7/193 of 14 July 2011, *Bundestag* Document 17/6658, p. 28 (*Bundestagsdrucksache* - BTDrucks) insofar as it concerns the question of whether there is a positive authorisation decision of the Federal Security Council,

   b) applicant 2 by way of the answer given in response to written question 7/132 of July 2011 (BTDrucks 17/6658, p. 24) insofar as it concerns the question of whether there is a positive authorisation decision of the Federal Security Council

   in their rights under Art. 38 sec. 1 sentence 2 and Art. 20 sec. 2 sentence 2 of the Basic Law according to the reasons provided.

2. **The applications are dismissed to the extent set out in B.II.2; as for the rest they are rejected.**

R e a s o n s :

A.

The applicants are Members of the *Bundestag*. They claim that the respondent, the Federal Government (*Bundesregierung*), did not respond or responded insufficiently to several requests on the issue of armament exports. The questions concerned the alleged authorisation of the delivery of 200 tanks of the Leopard 2 type to Saudi Arabia, as well as weapons exports to Saudi Arabia and Algeria, which - according to press reports - had been granted by the respondent. 1

I.

[…] 2-13

II.

[…] 13-57

III.

The applicants seek for the Court to find that the respondent violated them in their rights under Art. 38 sec. 1 sentence 2 GG in conjunction with Art. 20 sec. 2 sentence 2 GG by not responding or not responding sufficiently to their […] requests and follow-up questions during question time of the *Bundestag* on 6 July 2011, as well as by not responding or not responding sufficiently to their […] written questions. 58

[…] 59-85

IV.

The respondent is of the opinion that the applications have no prospects of success. 86

[…] 87-101

V.

[…] 102

VI.

[…] 103

B.

The applications of applicant 1 are partially admissible with regard to the additional question (PlenProt 17/119, p. 13802 D) and the urgent request (PlenProt 17/119, p. 13807 A) and fully admissible with regard to the remaining additional questions (PlenProt 17/119, p. 13807 B, C) and the written question 7/193 of 14 July 2011 (BT-Drucks 17/6658, p. 28). The applications of applicant 2 are fully admissible. The applications of applicant 3 are partially admissible with regard to written question 7/175 of 14 July 2011 (BTDrucks 17/6658, p. 27) and fully admissible with regard to the two additional questions (PlenProt 17/119, p. 13804 A, B und PlenProt 17/119, p. 13814 B) as well as written question 7/174 of 14 July 2011 (BTDrucks 17/6658, p. 26). As for the rest, the applications are inadmissible. 104

I.

1. The applicants' capacity to be party to legal proceedings as Members of the *Bundestag* follows from Art. 93 sec. 1 no. 1 GG. Pursuant to Art. 38 sec. 1 sentence 2 GG, Members of the *Bundestag* are granted a special status under constitutional law, which can be defended vis-à-vis other constitutional organs in *Organstreit* proceedings (disputes between constitutional organs) (Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts* , BVerfGE 108, 251 <270>; 124, 161 <184>; established case-law). 105

2. The applications concern suitable subject matters. According to § 64 sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the subject matter of *Organstreit* proceedings can be either an act or an omission. It is therefore irrelevant whether the answers of the respondent that are objected to constitute an act in the form of a refusal to provide a sufficient response, or an omission in the form of a breach of duty by not responding, or an insufficient response to the respective questions. The refusal to give an answer, the simple non-response and the insufficient response to the questions of the applicants can affect the applicants in their legally protected status under Art. 38 sec. 1 sentence 2 in conjunction with Art. 20 sec. 2 sentence 2 GG. The acts or omissions are therefore also legally relevant (cf. BVerfGE 96, 264 <277>; 103, 81 <86>; 104, 310 <324>). 106

3. […] 107

II.

1. The applicants have legal ability to file an application with regard to the majority of the subject matters of the application. They object to the respondent's reaction to parliamentary inquiries directed at the respondent and, in doing so, invoke rights derived directly from the Basic Law itself. There is also a constitutionally governed relationship between the applicants, on the one hand, and the respondent, on the other hand (cf. e.g. BVerfGE 1, 208 <221>; 84, 290 <297>; 124, 161 <185>). The *Organstreit* proceedings, which were initiated in time, concern the scope of the *Bundestag* members' right to pose questions as derived from Art. 38 sec. 1 sentence 2 in conjunction with Art. 20 sec. 2 sentence 2 GG, and the Federal Government's general obligation to give answers to these questions (cf. BVerfGE 124, 161 <185> with further references). It cannot be ruled out from the outset that the respondent's behaviour the applicants object to violates the applicants' own rights which arise from the constitutionally governed relationship between the parties (cf. BVerfGE 94, 351 <362 and 363>; 112, 363 <365>). It is possible that the respondent, by way of its answers, illegitimately curtailed the applicants' right to information under Art. 38 sec. 1 sentence 2 in conjunction with Art. 20 sec. 2 sentence 2 GG. The applicants have sufficiently demonstrated that their rights may have been violated by the criticised behaviour of the respondent. In particular, a violation of the applicants' rights cannot be ruled out *a priori* on the grounds that the regular publication of Reports on Military Equipment Exports (*Rüstungsexportberichte*) by the Federal Government could satisfy the applicants' right to information. Whether and to what extent these suffice to satisfy the legitimate parliamentary interest in information rather requires detailed consideration (see in this respect paras. 203 et seq.). 108

[…] 109-119

2. With regard to individual questions asked by applicants 1 and 3, the applicants lack the ability to file the application given that a violation of rights can be ruled out from the outset. 120

[…] 121-126

III.

The applicants recognised legal interest in bringing an action with regard to the questions about tank exports to Saudi Arabia continues to exist. In particular, this legal interest is not eliminated by the respondent's announcement to modify its reporting practices and to inform the German *Bundestag* of any permits granted by the Federal Security Council within two weeks because the respondent continues to deny in the present proceedings the disputed obligation to respond to information requests concerning decisions by the Federal Security Council. Moreover, the announced timely information of the German *Bundestag* only concerns granted authorisations and not decisions by the Federal Security Council on advance queries. 127

The applicants have an objective interest in clarifying the scope of the right of Members of the *Bundestag* to ask questions derived from Art. 38 sec. 1 sentence 2 in conjunction with Art. 20 sec. 2 sentence 2 GG and of the Federal Government's duty to give answers (cf. on the clarification interest BVerfGE 121, 135 <152>; 131, 152 <194>; Order of the Second Senate of 6 May 2014 - 2 BvE 3/12 -, juris, para. 6). The fact that meanwhile the legislative period has ended does not affect the recognised legal interest in bringing an action either, since the applicants continue to be Members of the *Bundestag* (cf. BVerfGE 87, 207 <209>). 128

C.

The applications are – to the extent that they are admissible – in part well-founded. 129

I.

1. Under Art. 38 sec. 1 sentence 2 and Art. 20 sec. 2 sentence 2 GG the German *Bundestag* has a right to ask questions and to receive information from the Federal Government. Individual *Bundestag* members and parliamentary groups as associations of *Bundestag* members enjoy this right, subject to the standards set out in the Rules of Procedure of the *Bundestag* ; generally a duty of the Federal Government to give answers corresponds to this right (cf. BVerfGE 124, 161 <188>; established case-law). Hence it follows from Parliament's right to ask questions and its right of interpellation that members of the Federal Government are subject to a constitutional duty to respond to questions. The responses by the Federal Government to written questions and questions asked during question time in the German *Bundestag* are aimed at providing the *Bundestag* and its individual members with the information required for the performance of their duties in a quick and reliable way. By responding to parliamentary questions, the Federal Government sets the pre-conditions for the proper functioning of Parliament (cf. on this issue BVerfGE 13, 123 <125>; 57, 1 <5>; 105, 252 <270>; 105, 279 <306>; 124, 161 <187 et seq.>). 130

The parliamentary government system is also characterised by parliamentary oversight. Parliamentary oversight over the government and administration puts the prin- 131

ciple of separation of powers into effect; for the Basic Law, the separation of powers constitutes a fundamental principle in terms of functions and organisation. The principle of separation of powers does not aim to realise an absolute separation of the functions of state power but rather governs the distribution of political power, the interaction of the three state powers and the resulting mutual control and limitation which leads to a moderation of state power (cf. BVerfGE 3, 225 <247>; 7, 183 <188>; 9, 268 <279>; 22, 106 <111>; 34, 52 <59>; 95, 1 <15>). In particular with regard to the strong status of government – and especially because Parliament lacks the means to interfere in the governmental sphere of immediate executive action and application of the law - the principle of separation of powers commands an interpretation of the Basic Law that allows for effective parliamentary oversight. Without access to government´s knowledge, Parliament cannot exercise its right of oversight. Therefore, the parliamentary interest in being informed carries substantial weight when it comes to uncovering possible violations of rights and similar irregularities within the government and the administration (cf. BVerfGE 67, 100 <130>; 110, 199 <219, 222>; 124, 78 <121>).

At the same time, this oversight is the result of the responsibility of the government towards Parliament, which follows from the principle of democracy. Art. 20 sec. 2 sentence 2 GG sets out the principle of sovereignty of the people. It determines that all state power is derived from the people, who exercise it through elections and other votes, as well as through specific legislative, executive and judicial organs. This requires that the people have an effective influence on the exercise of state power through these organs. Any actions of these organs must be attributable to the people's will and be justified before it (cf. BVerfGE 83, 60 <72>; 93, 37 <66>; 130, 76 <123>). In addition to being ensured by parliamentary elections, laws adopted by Parliament as a standard for the executive, and the fact that the administration is generally bound by instructions of the government, this bond of answerability between the people and power of the state also operates through Parliament's influence on the government's policies. The fact that "all state authority is derived from the people" must be noticeable for the people as well as the state organs and take effect in practice. An adequate substance of democratic legitimacy - a certain legitimacy standard - must be achieved (cf. BVerfGE 83, 60 <72>; 93, 37 <67>; 107, 59 <87>; 130, 76 <124>). Only a Parliament elected by the people can transfer democratic legitimacy to the organs and functionaries of the administration at all levels. In case functionaries and organs are not legitimated by way of direct elections, the democratic legitimation for the exercise of state power requires as a rule that the appointment of functionaries is attributable to the sovereign people and that their acts undergo sufficient factual and substantive legitimation. In personal terms, a sovereign decision is democratically legitimised if the appointment of the respective person can be traced back to the sovereign people in an uninterrupted chain of legitimation. Factual and substantive legitimation is conveyed through the binding nature of statutes and of government mandates and instructions. The latter has a legitimising effect due to the government's responsibilities vis-à-vis the Parliament (BVerfGE 93, 37 <67 and 68>; 132

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

Keeping secrets from Parliament limits parliamentary oversight and may thereby impair or disrupt the necessary democratic legitimation (cf. BVerfGE 130, 76 <128>). 133

2. Nevertheless, the *Bundestag* and its individual members do not have an unlimited entitlement to be informed. 134

a) This entitlement generally does not extend to matters that do not fall within the government's scope of competence, as these lie outside the government's responsibility towards Parliament (BVerfGE 124, 161 <189>). 135

b) The *Bundestag* 's entitlement to be informed and that of its individual members is further limited by the principle of separation of powers (cf. para. 131). In its constitutional design as a precept for distinguishing between legislative, executive and judicial power (Art. 20 sec. 2 sentence 2 GG), this principle at the same time serves an appropriate allocation of sovereign rights to various holders of sovereign power according to their respective roles and ensures that the law binds all state power (BVerfGE 124, 78 <120>). The Basic Law does not require absolute separation, but rather mutual control, restraint and moderation of the powers (BVerfGE 95, 1 <15>). The branches of state power are inter-related, but they must not be divested of their respective characteristics and specific tasks and responsibilities (BVerfGE 9, 268 <279 and 280>; established case-law). Thus, the principle of separation of powers is both the reason for and the limit to Parliament's right to be informed by the government. The further a parliamentary information request reaches into the core area of governmental decision-making, the more substantial it must be if it is to prevail over a possible confidentiality interest of the government (cf. BVerfGE 110, 199 <222>; 124, 78 <122 and 123>). 136

aa) Government's responsibility towards Parliament and the people necessarily requires a core area of executive autonomy, which includes a sphere of government initiative, deliberation and action that is generally not subject to investigations. This comprises, for example, the decision-making process of the government itself, both with regard to deliberations within the cabinet as well as the preparation of cabinet and departmental decisions, which primarily takes place in cross-departmental and intra-departmental coordination processes (BVerfGE 67, 100 <139>; 110, 199 <214, 222>; 124, 78 <120>; 131, 152 <210>). The decision-making process of the Federal Government which precedes a specific governmental positioning is a process that depends on different interests, considerations and developments of a national, foreign policy or internal nature. This stage takes place solely within the Federal Government's sphere, and there is no general constitutional duty to inform the *Bundestag* about it (yet) (cf. BVerfGE 131, 152 <206>). Accordingly, there is generally no duty of the government to satisfy a parliamentary information request if the information could lead to a third party co-governing on decisions that fall within the exclusive competence of the government (BVerfGE 110, 199 <214>; 124, 78 <120 and 121>). Such a risk regularly arises when information is concerned that is obtained during the 137

preparatory stage of governmental decisions when the decision itself has not yet been taken (BVerfGE 110, 199 <214>; 124, 78 <122>). Thus, an element of a political decision as essential as the moment in which the decision is to be taken, could be taken out of the government's hands if Parliament, prior to this moment, had access to information as to the stages of the government's preparation of the decision (cf. BVerfGE 110, 199 <214 and 215>).

Thus, the *Bundestag* 's competence of oversight generally extends only to completed procedures; it does not include the authority to interfere with on-going negotiations and preparations of decisions (BVerfGE 67, 100 <139>; 110, 199 <215>; 124, 78 <121>). However, protection against informational interferences with the sphere of executive decision-making – protection that follows from the principle of separation of powers – is not limited to protection from direct interferences with the government's autonomous exercise of its competence, but extends beyond the moment a decision is taken (BVerfGE 110, 199 <215>). 138

bb) Oversight of armament exports is not *per se* exempt from all parliamentary oversight on the grounds of the foreign policy significance of this part of governmental action. However, in the field of foreign policy the Basic Law, in line with the traditional concept of a state, has granted the government large discretion for the autonomous fulfilment of its tasks. The role of Parliament as a legislative organ is limited in this field due to the need for a balanced division of state functions already (BVerfGE 104, 151 <207>; cf. already BVerfGE 49, 89 <125>; 68, 1 <87>). A broader interpretation of the *Bundestag* 's power of approval and participation would unjustifiably curtail the freedom of action of the Federal Government in matters of foreign and security policy and lead to an inappropriate division of state power (BVerfGE 104, 151 <207>). 139

This does not mean, however, that essential decisions can be taken without participation of the *Bundestag* . The foreign policy powers entrusted with the government are not beyond the scope of parliamentary oversight either. The *Bundestag* maintains its oversight competence in this field when it disapproves of foreign policy decisions taken by the executive (cf. BVerfGE 49, 89 <125>; 68, 1 <89, 109>; 90, 286 <364>; 104, 151 <207>). It can exercise its rights of questioning, debate and passing resolutions, and exercise its oversight and budgeting powers and thereby impact on the government's decisions, or overturn the government by electing a new federal chancellor (BVerfGE 68, 1 <109 and 110>). 140

The same applies to the oversight of armament exports. It is true that Art. 26 sec. 2 sentence 1 GG grants the Federal Government the competence to authorise armament exports. This, however, does not mean that fulfilment of this task is *per se* exempt from parliamentary oversight […]. Rather, a distinction needs to be drawn between parliamentary participation on the one hand and parliamentary oversight on the other hand. Parliamentary participation in the exercise of state functions needs to be explicitly provided for in the Basic Law. The principle of separation of powers may not be undermined by invoking the principle of democracy in granting participatory 141

powers to Parliament. Likewise, the Basic Law's division of competences may not be superimposed by establishing an all-encompassing requirement of a parliamentary decision (cf. BVerfGE 68, 1 <87>). This, however, does not entail a limitation of the government's responsibility towards Parliament. The exercise of parliamentary oversight does not constitute an unconstitutional intrusion into the executive's area of responsibility. Parliamentary oversight is also exercised in cases in which the Basic Law provides for an exclusive competence of the government. In terms of democratic legitimation of state action, parliamentary oversight takes the place of factual and substantive participatory rights of parliament which are lacking in the sphere of exclusive governmental competence. Thus, the allocation of competences in Art. 26 sec. 2 sentence 1 GG in itself does not create a sphere of governmental executive decision-making that lies outside the scope of responsibility towards Parliament.

cc) Deliberations and decision-making of the Federal Security Council are part of the core area of executive autonomy. 142

(1) Even without an express constitutional authorisation to that end, the Federal Government, based on its organisational authority, has the right to establish cabinet committees, which have a preparatory or advisory function for the government, and which they exercise without having their own decision-making powers […]. Insofar as such a committee prepares cabinet decisions, these committee deliberations and conclusions are generally part of the core area of executive autonomy to the same extent as independent preparatory measures of the members of government. 143

According to current state practice, the Federal Security Council does not, however, prepare cabinet decisions, but becomes active in its stead. […] Consequently, decisions of the Federal Security Council on authorisations […] can only be directed at the respective Minister who is responsible for the issue. This Minister gives the company that filed the application the permission by way of a corresponding notification. 144

According to Art. 26 sec. 2 sentence 1 GG, however, weapons designed for warfare may be manufactured, transported or marketed only with the permission of "the Federal Government". The Basic Law distinguishes between powers and competences of the Federal Government and those of individual Federal Ministers (cf. listing in BVerfGE 132, 1 <21>). The Federal Government is a collegiate body, which according to Art. 62 GG consists of the Federal Chancellor and the Federal Ministers. In cases in which provisions of the Basic Law provide for a decision-making competence of the Federal Government it can therefore generally be assumed that this requires a decision by the entire cabinet (BVerfGE 91, 148 <166>; 115, 118 <149>; 132, 1 <21>). As an exception, the term "Federal Government" can refer also to the Federal Ministers of the responsible department if the meaning and purpose of the respective provision demand such an interpretation (BVerfGE 26, 338 <396>). […] 145

[…] 146-147

(2) In the present case there is no need for a decision on whether the Federal Gov- 148

ernment is authorised to establish the Federal Security Council and to transfer to that Council or to individual Federal Ministers the power to decide on applications for armament exports. This is because in the legal relationship between the *Bundestag* and its members, decisions on permissions given under Art. 26 sec. 2 sentence 1 GG are to be attributed to the Federal Government and to be accounted for by the Federal Government directly vis-à-vis Parliament and indirectly vis-à-vis the people, irrespective of whether the decision is taken by the cabinet, a committee instituted by it, or by an individual minister. The Federal Government can neither rid itself of its responsibility for the decisions it made by delegating the authority it is granted by the Basic Law, nor does such delegation - regardless of whether or not it was permissible – result in the decision by the minister and the respective decision-making of the Federal Security Council losing their character as acts of government and place them outside the core area of executive autonomy. A potential violation of a constitutionally derived prohibition to delegate decisions would not alter the fact that – within a system of separation of powers – decision-making in the Federal Security Council is to be attributed to the government – the more so as only members of the government are given the right to vote in this sub-committee of the government. The protection against informational interferences in the sphere of executive decision-preparation, which follows from the principle of separation of powers, would not become dispensable in case of such a violation. In this context it must be taken into consideration that the Federal Government, which set up the Federal Security Council by way of a cabinet decision, could at any time dissolve this body or ‘take over’ particular debates by way of a corresponding decision.

149 The fact that in addition to government members also third parties […] may participate in meetings of the Federal Security Council does not conflict with the Council enjoying the protection of the core area of autonomous executive decision-making. This does not mean that the body loses its direct link to the decision-making process within the Federal Government, which, pursuant to Art. 26 sec. 2 sentence 1 GG, exclusively decides on the permissions. Insofar as the Senate ruled with regard to the so-called “Presidential Round Table” (*Präsidentenrunde*) that it does not enjoy the same degree of protection of the core area of executive autonomy as the cabinet (BVerfGE 124, 78 <137>), this decision cannot be transferred to the Federal Security Council. […] The institution of the *Präsidentenrunde* is neither a decisional body, nor do its deliberations necessarily or even typically serve the preparation of cabinet decisions (BVerfG, loc. cit.). In particular, they do not in fact take their place.

150 c) A further limit on the *Bundestag* ’s entitlement to information is set by the welfare of the Federation or a *Land* (“welfare of the state”), which could be put at risk if information requiring confidentiality became public (cf. BVerfGE 67, 100 <134 et seq.>; 124, 78 <123> on the right of parliamentary inquiry committees to collect evidence). The question of constitutional limits to the parliamentary right to ask questions and to investigate, needs to be answered in light of its relevance within the overall structure of the Constitution. This also applies to the interpretation and application of the con-

cept of endangerment of the welfare of the state (cf. BVerfGE 124, 78 <123>). In this context it must be considered that the *Bundestag,* in the *Bundestag* Rules on Document Security (*Geheimschutzordnung des Deutschen Bundestages*), has established in detail the conditions for official secrecy […] (cf. BVerfGE 67, 100 <135>; 77, 1 <48>; cf. also BVerfGE 70, 324 <359>). The duty to observe secrecy […] is confirmed in the criminal sanction stipulated in § 353b sec. 2 no. 1 of the Criminal Code (*Strafgesetzbuch* – StGB). These confidentiality provisions reflect the fact that Parliament could neither exercise its legislative or budgetary powers nor its parliamentary oversight vis-à-vis the government without access to secret knowledge of the government (BVerfGE 67, 100 <135>; 70, 324 <359>). Moreover, in a parliamentary government system as provided for in the Basic Law, the welfare of the state is not placed in the hands of the Federal Government alone, but in the hands of both the *Bundestag* and the Federal Government (cf. BVerfGE 67, 100 <136>; 124, 78 <124>). Parliament and its organs cannot be treated as external entities which belong to the circle of those from whom information needs to be kept confidential in the interest of the welfare of the state (BVerfGE 124, 78 <124>). Thus, as a rule, the Federal Government cannot invoke the welfare of the state vis-à-vis the *Bundestag* in cases in which both entities have taken effective measures against the disclosure of official secrets. This is not in conflict with the fact that compliance with provisions on professional secrecy does not necessarily rule out the possibility of secrets being disclosed, as this affects all three state powers alike (BVerfGE 67, 100 <136>).

151 However, the confidentiality provisions of the *Bundestag* do not affect the Federal Government's own responsibility for maintaining professional secrecy that is derived from the governmental powers with which it has been entrusted (BVerfGE 67, 100 <137>; 70, 324 <359>). The Federal Government is therefore not obliged to present to the *Bundestag* classified documents that contain official secrets if the *Bundestag* does not guarantee the confidentiality considered necessary by the Federal Government (cf. BVerfGE 67, 100 <137>). Arrangements to ensure confidentiality and the decision to entrust only a very small parliamentary body with subject matters of a confidential nature may thus be permissible under constitutional law, even if this implies considerable limitations of access to this information for most *Bundestag* members (BVerfGE 70, 324 <360, 364>; 130, 318 <352 and 353, 359>; 131, 230 <235>).

152 On the other hand, it needs to be taken into account that the German *Bundestag* generally exercises its representative function through all of its members (BVerfGE 130, 318 <342>; cf. already BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <218>; also BVerfGE 131, 230 <235>). For that reason, each member of Parliament is called upon to participate in the deliberations and decisions of the *Bundestag* (BVerfGE 130, 318 <342>). If *Bundestag* members are excluded from participating in the parliamentary decision-making process because the authority to decide has been transferred to a decision-making committee, this is only permissible in order to protect other legally interests of constitutional relevance and under strict adherence to the principle of proportionality (BVerfGE 131, 230 <235>). This requires a special reason

that is legitimised by the Constitution and that is of equal importance as the equality of the *Bundestag* members (BVerfGE 131, 230 <235>).

If the German *Bundestag*, in order to protect other legal interests of constitutional relevance, transfers some of its duties to a committee established on the basis of its power to organise itself, or to another sub-committee for such a body to independently perform these duties instead of the plenary, and if the reasons for that as important as the requirement of equal participation of all *Bundestag* members, this limitation of their status and the resulting unequal treatment of *Bundestag* members must not go beyond what is absolutely necessary for that purpose (BVerfGE 130, 318 <353>). Matters of confidentiality protected in the interest of constitutionally protected goods can also generally serve to justify a limitation of status rights of *Bundestag* members as cogent reasons to ensure the welfare of the state (BVerfGE 70, 324 <358 and 359>; 130, 318 <359>; cf. also BVerfGE 131, 230 <235>). […] As in case of military secrets or secrets kept for other reasons of state security, the Rules on Document Security might not provide sufficient protection in cases in which a decision must be taken with regard to measures concerning which not only the content of the deliberation, but also the fact as such that a deliberation and decision-making is taking place must be kept secret in order to ensure that the success of a measure is not ruled out from the outset (BVerfGE 130, 318 <362>). 153

d) Finally, the *Bundestag* members' right to ask questions and the Federal Government's duty to respond can be limited by the fact that they have to observe the fundamental rights pursuant to Art. 1 sec. 3 GG (BVerfGE 67, 100 <142>; 76, 363 <387>; 77, 1 <46>; 124, 78 <125>). If business and trade secrets are disclosed by the state, or if the state demands their disclosure, the scope of protection of Art. 12 sec. 1 GG is affected (cf. BVerfGE 115, 205 <230>; 128, 1 <56>). 154

Pursuant to Art. 19 sec. 3 GG, the fundamental right to freedom of occupation is also applicable to legal persons if they carry out an activity for profit-making purposes that by its nature and kind can be carried out by a legal as well as a natural person (BVerfGE 50, 290 <363>; 115, 205 <229>; established case-law). The freedom right of Art. 12 sec. 1 GG protects the occupational behaviour of individuals or companies in the market. If the business activity is carried out according to the principles of competition, the scope of the protection of freedom is co-determined by the legal provisions that enable and limit competition (BVerfGE 105, 252 <265>; 115, 205 <229>). If a state measure impacting on competition impairs a legal person in view of its occupational activity this constitutes a restriction of their freedom right under Art. 12 sec. 1 GG (BVerfGE 86, 28 <37>; 115, 205 <230>). 155

Through the disclosure of business and trade secrets the exclusive use of the respective knowledge for one's own entrepreneurial purposes can be compromised. […] This may frustrate business strategies. […] (cf. in full BVerfGE 115, 205 <230>). 156

3. It follows from the general constitutional obligation of the Federal Government to meet information requests of the German *Bundestag* that it needs to provide reasons 157

for any denial to provide the requested information (BVerfGE 124, 161 <193>). The *Bundestag* can only carry out its task of parliamentary oversight over governmental action effectively if it can base its assessment and decision as to whether or not it accepts the denial of information or what further steps to take to enforce its request for information, on a reasoning that is as adequate in detail as required by the situation of conflict. For that purpose, the *Bundestag* must be able to review the consideration of the affected interests that have led to the denial of information with regard to their plausibility and transparency (cf. BVerfGE 124, 161 <193>). Consequently, statement of reasons for a denial to provide answers is only dispensable if the necessity to maintain confidentiality is evident (cf. BVerfGE 124, 161 <193>).

II.

158 According to these standards, the Federal Government is required to inform *Bundestag* members upon request that the Federal Security Council has approved a certain armaments export transaction, i.e. a transaction specified in terms of the armament product, the volume and the recipient country, or that a permit for a transaction as described in the parliamentary inquiry has been denied. There is no constitutional requirement to provide further information.

159 1. The decision-making process within the Federal Government does not already conclude with a positive or negative response given to an advance query (a), it rather concludes only with the final decision of the Federal Security Council on a formal application for permission; consequently, the Federal Government must inform, upon request, the *Bundestag* and its members about a positive response to an application for permission (b). In contrast, there is no duty to respond to questions about the reasons for a decision and the subject matter and chronology of the deliberations in the Federal Security Council (c).

160 a) A positive response to an advance query by a military equipment manufacturing company with regard to the permissibility of an armaments export transaction does not complete the decision-making process within the Federal Government with regard to the proposed export transaction. […]

161 By providing a positive response to an advance query, the Federal Security Council and the Minister responsible for advance queries on armaments indicate that there are currently no objections to the proposed export transaction so that a corresponding formal request containing specific details and sufficient documentation would have prospect of success. Consequently, a response to an advance query only informs of the planned export's eligibility for a permission at the time of the request. It is not an assurance within the meaning of § 38 sec. 1 sentence 1 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVfG), still less a conclusive partial regulation or partial permission […]. An assurance within the meaning of § 38 sec. 1 sentence 1 VwVfG requires that the authority's statement unambiguously shows that the authority intends to commit itself in the future and establish a corresponding entitlement of the favoured party to the granted measure. If there is only "a prospect" for a

measure then this is generally only a non-binding statement of intent on how to proceed further. […]. Responses [...] by the Federal Foreign Office (*Auswärtiges Amt*) to advance queries […] are worded in a way as to […] communicate that the Federal Government holds the prospect of a permit, provided that the circumstances have not changed significantly at the time the specific application is submitted. Such a statement does not unequivocally show a clear intent of the Federal Government to commit itself and to establish, contrary to § 6 sec. 1 of the Act on the Control of Armaments (*Kriegswaffenkontrollgesetz* – KWKG), the company's entitlement to a permission. Accordingly, the Federal Security Council and the involved ministries are not bound by the positive response to an advance query. A subsequent application for permission may be denied even if circumstances have not changed. […]

[…] 162

Against that background, an obligation of the Federal Government to inform the *Bundestag* in general or individual *Bundestag* members with regard to specific questions concerning decisions taken by the Federal Security Council on advance queries concerning intended armament exports would interfere with an inter-departmental decision-making process within the Federal Government's area of responsibility and which is not yet completed. The Federal Security Council, which is not legally bound by a response to an advance query would be subjected to parliamentary influence on its decision on the subsequent application for permission – a decision that depends on different foreign policy interests, considerations and developments. This would *de facto* enable Parliament to co-govern on a decision for which the Federal Government alone is competent. Parliament's task of oversight would be turned into a steering capacity, to which, according to Art. 26 sec. 2 sentence 1 GG, it is not entitled in this area. 163

b) Decision-making within the Federal Government does not end at the moment in which the responsible Federal Ministry issues a positive or negative notice of approval. Rather, the decisive act of decision-making is the Federal Security Council's deliberation of an application for permission, which is concluded with the Council's decision-making. 164

[…] 165-166

[…] Thus, protection of the core area of executive autonomy with regard to the decision taken ends at this moment. The Federal Government is obliged to inform the *Bundestag* members upon their request that the Federal Security Council has reached a decision regarding an armament export transaction. 167

c) However, beyond the statement that a permission has been granted, the Federal Government is not obliged to provide information regarding the decision-making process within the Federal Security Council that preceded the decision. 168

Parliament's rights to be informed of completed procedures are not always ruled out if they concern information from the core area of governmental decision-making, in- 169

cluding the preparatory stages of decision-making within the respective departments and the coordination between these (BVerfGE 110, 199 <219>; 124, 78 <122>). Information from the core area of governmental decision-making may generally also be accessible to Parliament (BVerfGE 124, 78 <122>).

On the other hand, however, unlimited parliamentary entitlement to information from this area – even if it only arose after the particular decision-making process is completed – would impact the government's autonomous function assigned to it by the principle of separation of powers, in particular through its restrictive advance effects (BVerfGE 110, 199 <215>; 124, 78 <121>). Accordingly, information from the phase preceding a government decision is not entitled to the same degree of protection after the respective decision has been made as during the phase in which access to such information would enable third parties to directly influence the decision (cf. BVerfGE 110, 199 <215 and 216>). However, even in case of completed procedures there might be situations in which the government is not obliged to communicate details from the core area of executive autonomy that are to be kept secret (cf. BVerfGE 67, 100 <139>; 110, 199 <216>; 124, 78 <121>). With regard to completed procedures the limits to Parliament's right to information can only be established under consideration of the specific circumstances of each case (cf. BVerfGE 110, 199 <219>; 124, 78 <122>). The requirement to balance conflicting interests corresponds to the dual function of the principle of separation of powers in that it is both the reason and limit for parliamentary oversight (BVerfGE 110, 199 <219>; 124, 78 <122>). On the one hand this dual function reflects the fact that Parliament's oversight of government serves to ensure that governmental tasks are carried out in accordance with principles of democracy and the rule of law. On the other hand, it shows that this oversight can interfere with these tasks and thus requires to be appropriately limited (BVerfGE 110, 199 <219>; 124, 78 <122>). 170

In case of completed procedures, the government's autonomy to decide no longer constitutes a significant functional interest; rather, the free and uninfluenced process of decision-making within government is significant. Against that background, information from the preparatory phase of government decisions that could provide insights into the process of decision-making deserve a greater degree of protection the closer they are to the government's decision (cf. BVerfGE 110, 199 <221>; 124, 78 <122 and 123>). 171

As a consequence, the Federal Government is not obliged to provide information about the contents and course of the deliberations within the Federal Security Council and about the votes of its members. The Council's members are particularly dependent on its deliberations being kept confidential because the decision on an intended armament export requires a detailed assessment of the recipient country, for example with regard to its political and military stability. If the members of the Federal Security Council had to expect that the assessments they made in the course of the deliberations would be made public shortly after the decision was taken, they would be unable to openly state, relying on confidentiality of the deliberations, reasons in favour or 172

against a permission. […] Such restrictive advance effects would significantly interfere with the work of the Federal Security Council. Consequently, disclosing the course of deliberations within the Federal Security Council would constitute a significant interference with the core area of governmental autonomy.

In comparison, Parliament's interest in obtaining information is less significant. The Federal Government is responsible to Parliament for decisions on export permissions taken under Art. 26 sec. 2 sentence 1 GG. While information on specific positions taken by individual Ministers during deliberations may be of general political interest, it is not relevant for Parliament's oversight of government action. 173

2. The Federal Government may deny answers to questions on pending applications for armament exports as well as on advance queries from weapons producers also for reasons of the welfare of the state. The same applies in case an application for permission was denied. Furthermore, these reasons may also justify denial of a response in case applications for permission have already been approved by the Federal Security Council. 174

Disclosing information about whether the Federal Security Council has decided on an advance query may distort relations with the respective recipient country. On the one hand, the intention to acquire war weapons could become public although the respective country wants to keep this intention secret at least at this early stage of contractual relations, e.g. because its disclosure would reveal that country's future defence strategy. On the other hand, if it became known that a permission was denied or an advance query dismissed or deferred could publicly snub the country interested in the acquisition of war weapons, and thereby impair the relations with the Federal Republic. 175

The risk of interfering with foreign policy interests would be significant if there were a duty to disclose also the reasons for denying a permission or an advance query, i.e. reasons such as the risk that weapons intended for export might be used in actions to break the peace or for human rights violations. Moreover, it may be possible in individual cases to draw conclusions on the basis of the stated reasons as to the particular sources of information and regarding which the Federal Government has a legitimate interest in keeping them secret from the country at issue in order to protect its information channels. 176

Moreover, disclosure of sensitive armament export transactions may have an impact on the Federal Government's ability to act in matters of foreign policy that goes further that the relation with the directly concerned buyer country. Decisions on armament exports tend to have a diplomatic dimension. Thus, armament exports to countries that are not members of NATO or of the European Union, and that do not have equal status to NATO member states, will only be authorised if "in individual cases, the Federal Republic's particular foreign or security policy interests warrant that a permission be granted as a matter of exception and in consideration of the interests of the Alliance"[…]. The position of the Federal Government with regard to an intend- 177

ed armaments transaction may therefore also be an indicator of the political relations to a country or reveal a particular security strategy. The premature disclosure of such armament export transactions, just like the disclosure of a negative decision taken in that respect, could make German foreign policy more predictable to other countries and thus narrow the leeway for negotiation and design. The same applies if the reasons for approving or denying a permission become known. Therefore, the Federal Government is not obliged to disclose the reasons for a decision reached by the Federal Security Council. Nor is it required to disclose information about the denial of an application for armament exports.

178 Early disclosure of a planned armament export transaction and of the position of the Federal Government in the early stages of contract negotiations furthermore carries the risk that a third country, which opposes the transaction, attempts to prevent it through means of political pressure before the transaction is performed. Early disclosure might also lead to foreign competitors approaching the prospective buyer and diverting the transaction to themselves by submitting a lower bid. This can justify the Federal Government's interest in secrecy for the sake of the welfare of the state at least in such cases in which carrying out the transaction is in the foreign policy interest of the Federal Government. Moreover, maintaining a national defence sector is a legitimate goal of a state. From a defence policy perspective, having a national defence industry implies that national armed forces can be equipped by the domestic industry. In contrast to purchasing military equipment on the world market the advantages are, *inter alia*, the influence that the state can exert as the main purchaser […] and the resulting design of national defence equipment tailored to the tactical and operative concepts of the armed forces as well as the possibility of further conceptual development of the armed forces […]. Moreover, a domestic defence industry increases the reliability of supply and prevents dependence on the export policies of other states.

179 These risks to the realisation of an armament export transaction decrease as the permit procedure progresses. They mainly exist in the phase of contract initiation, which can last for months or even years. For this reason the Federal Government is not obliged to inform *Bundestag* members upon request as to whether an advance query on a particular planned export transaction was submitted and which decision was taken to that end. A positive decision by the Federal Security Council granting the permission and which is subsequently issued as a notice of approval by the responsible Ministry constitutes a turning-point. According to the submissions of expert third parties, negotiations of a contract with the recipient country have usually already been finalised when the application for permission to export war weapons is filed – and in most cases the contract has even been concluded already. This significantly reduces the risk that third parties influence the transaction that awaits permission. A positive decision on the permission by the Federal Security Council also rules out exposure of an interested recipient state, which could result if the denial of a transaction became public prematurely, for instance through information provided upon an ad-

vance query.

The effect of a turning point of a positive decision on permission by the Federal Security Council does not preclude the possibility that the Federal Government may in exceptional cases, for the above reasons of the welfare of the state, also refuse to answer whether such a decision was made. There is no need to decide in the present case under which circumstances such a refusal to answer may be justified. In its response, the Federal Government would have to provide specific reasons for its refusal to provide information; this was not the case here. 180

3. The Federal Government's duty to provide answers with regard to the Federal Security Council's dealing with advance queries and applications for permission for planned armament export transactions is further limited by the fact that business and trade secrets of the arms companies involved are entitled to fundamental rights protection. 181

a) Business and trade secrets are all facts, circumstances and procedures in reference to a company that are not publicly available, but only accessible to a limited group of people and regarding which the legal entity has a legitimate interest in keeping them undisclosed. Trade secrets essentially comprise technical know-how in the broadest sense; business secrets concern primarily commercial know-how. Such secrets include, *inter alia* , sales, earnings, business records, customer lists, suppliers, terms, market strategies, documentation on creditworthiness, calculation documents, patent applications and other development and research projects, which may substantially impact on the economic conditions of a business (BVerfGE 115, 205 <230 and 231>; cf. also BVerfGE 128, 1 <56>). In the present case, specific technical data and specifications of the individual war weapons are considered trade secrets. Business secrets comprise in particular: details regarding the contractual agreement, such as periods and place of delivery, pricing and price components, terms of payment and information concerning the participating suppliers. The fact that a company is negotiating the acquisition of a specific type of war weapon with another state in itself constitutes a business secret given than normally the negotiating partners conclude a confidentiality agreement and because competitors could attempt to undermine the contractual negotiations by submitting their own bids. Therefore, the purchasing interest of a state and the initiation of contractual negotiations constitute exclusive knowledge relevant to competition, and disclosing these facts reduces the possibility to successfully practice an occupation by utilising this knowledge. 182

b) Art. 12 sec. 1 GG does not establish an exclusive right of companies to determine their own public image, or to unlimited corporate self-promotion on the market. Hence, market-relevant information obtained by the state does not impair the constitutionally guaranteed sphere of freedom of occupation of the affected companies, provided that the influence on competition-relevant factors is exerted without distorting the market conditions and in accordance with the legal provisions governing the state's dealing with information (BVerfGE 105, 252 <264 et seq., 268>). Nonetheless, 183

disclosure of trade and business secrets of companies producing war weapons by the Federal Government would affect the scope of protection of the right to freedom of occupation (cf. BVerfGE 115, 205 <230>). At least in this respect, this scope of protection is not limited by Art. 26 sec. 2 sentence 1 GG. […] Even if one were to derive from the provision a general disapproval of the manufacturing, transportation or marketing of weapons designed for warfare, these practices are permitted if a permit exists and are therefore protected under the right to freedom of occupation. This protection extends to such trade and business secrets that a company needs to disclose to public authorities in order to obtain a permission - even if the permit is eventually denied. The Basic Law does not disapprove of the preparation and negotiation of a armament export transaction; at most it disapproves of its unauthorised performance.

c) By disclosing trade and business secrets of arms companies when responding to parliamentary inquiries, the Federal Government would interfere with the scope of protection provided by the freedom of occupation. Both the written responses of the Federal Government as well as its oral responses during question time of the *Bundestag* are public. […] Thus, competitors would be able to obtain knowledge of business and trade secrets of the companies concerned (cf. BVerfGE 115, 205 <231>). 184

d) The interference with the freedom of occupation as a result of a disclosure of information on intended armament export transactions is generally justified to the extent that the Federal Government in its response discloses that the Federal Security Council has authorised a specific armament export transaction and in this context provides information about the type and number of war weapons, about the recipient state, about the German companies involved and about the total volume of the transaction. In general, information going beyond this would disproportionately interfere with the companies' right to freedom of occupation. This is particularly the case for information that is so detailed that it is possible to draw conclusions also on confidential information such as the unit price of a certain armament product. 185

aa) Disclosure of company information by the Federal Government in response to information requests by *Bundestag* members concerns a multipolar legal relationship, in which the Federal Government must balance the right of the *Bundestag* and its members to ask questions and receive information on the one hand, and the protection of trade and business secrets ensured by the concerned companies' fundamental right to freedom of occupation under Art. 12 sec. 1 GG on the other hand. In such a constellation, the suitability and necessity of impairments must be assessed in consideration of both conflicting legal interests. In this context, the advantages and disadvantages of realising the different affected legal interests must be balanced in their entirety. If the legislature has provided for a way to solve this conflict under statutory law, its margin of assessment and leeway to design must be taken into account for the balancing of legal interests. If, on the other hand, the legislature leaves this decision to the bodies implementing the law, their acts of interference must be constitutionally reviewed as to whether both theassumptions and balancing rules they relied on as well as the balancing of legal interests in a specific case satisfy the constitution- 186

al requirements. This includes the question of whether these assumptions remain within the margin of discretion granted to these decision-making bodies and achieve practical concordance in the specific dispute (on this matter, cf. BVerfGE 115, 205 <233 and 234>).

bb) § 12a sec. 2 sentence 1 KWKG authorises the Federal Government to pass on the data collected pursuant to section 1 on the basis of a regulation, in a summarized version and without disclosing the recipients and suppliers and for the purposes stated therein, to international organisations, or to inform the German *Bundestag* , or to publish these data. The provision […] serves the implementation of a United Nations resolution establishing a weapons registry at the United Nations Secretariat and calling upon the member states to report imports and exports of certain weapons of war […]. The authorisation to pass on information or publish it for the purposes of informing the German *Bundestag* was based on the consideration that data such as those included in the weapons registry are available to all UN member states should generally also be available to the German *Bundestag* or the general public […]. This provision is not capable of establishing in a constitutionally required manner the necessary balance between the *Bundestag* members' right to ask questions and the protection of trade and business secrets, even under consideration of the legislature's margin of appreciation and leeway to design. This follows from the fact that it authorizes the Federal Government to pass on the information to the German *Bundestag* , rather than committing it to do so. The balancing of these conflicting legal interests is therefore ultimately left to the Federal Government and it may well lead to an outright refusal to provide information. The legislature has thus not provided for a solution that is always capable of ensuring the realisation of the conflicting interests in this multipolar legal relationship (cf. BVerfGE 115, 205 <235>). Due to its clear wording, it is not possible to interpret this provision more extensively. 187

cc) The thus required direct balancing of the *Bundestag* members' right to ask questions under Art. 38 sec. 1 sentence 2 and Art. 20 sec. 2 sentence 2 GG on the one hand, and the protection of trade and business secrets of the respective […] company under Art. 12 sec. 1 GG on the other hand, entails that the Federal Security Council's decision on the permission constitutes the decisive turning-point, irrespective of the […] armament export transaction. 188

Until the final decision on the permission has been made by the Federal Security Council, the interest of the respective arms company in confidentiality of the intended armament export transaction should be held to rank higher than the *Bundestag* members' legitimate interest in being informed. While a transaction is yet still being prepared, the information that a particular recipient state intends to acquire specific armament is of particular competitive relevance. Competitors that become aware of such an interest could attempt to influence the permission procedure through targeted public campaigning. Moreover, they could submit their own bid and thereby attract the business. This would be particularly likely if the Federal Government, beyond the fact that a transaction as such is intended, were to disclose also information on 189

prices.

Once the Federal Security Council has reached a decision on a permission, the company concerned is in need of a lesser degree of protection. At this stage, competitors can barely influence the authorised transaction. […] 191

With regard to information that goes beyond the Federal Security Council's decision on the permission and the basic data of the armament export transaction - i.e. the type and number of war weapons, the recipient country and the total volume - the balancing of the conflicting legal interests is generally in favour of the companies whose trade and business secrets need to be protected from being disclosed to other competitors. Disclosure of information that would allow drawing conclusions with regard to pricing or specifications of the armament product or persons acting on behalf of the companies involved in the transaction would be particularly disproportionate. Also, there is no legitimate interest in this information, because Parliament does not need it in order to exercise its oversight over the government work. 192

e) The question of whether the Federal Government's duty to respond may also be limited by the concerned companies' basic right under Art. 14 sec. 1 GG does not require a decision because the protection of trade and business secrets by Art. 14 sec. 1 GG does not go beyond the protection granted by Art. 12 sec. 1 GG (BVerfGE 115, 205 <248>). 193

4. Contrary to the view of the applicants, the conflict between the *Bundestag* members' right to ask questions on the one hand, and the protection of the core area of executive autonomy, the welfare of the state, and the freedom of occupation of companies exporting war weapons on the other hand, cannot be resolved by confidentiality measures on the part of Parliament. Neither a limitation of the group of addressees of the Federal Government's answers by establishing a parliamentary oversight body (a) nor the application of the *Bundestag'* s Rules on Document Security (b) are suitable for ensuring an appropriate balance between the conflicting legal interests. 194

a) The *Bundestag* could certainly establish a committee for parliamentary oversight of the Federal Security Council, similar to the parliamentarian control committee (cf. § 1 sec. 1 of the Act governing the Parliamentary Control of Intelligence Activity by the Federation) […], the trust body pursuant to § 10a sec. 2 of the Federal Budget Code (*Bundeshaushaltsordnung*) […], or the special board pursuant to § 3 sec. 3 of the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*) […] and then subject this committee to the Rules on Document Security. Limiting the *Bundestag* members' right to ask questions to the members of such a committee would ensure a minimum of confidentiality that could lead to a balancing of the conflicting interests. 195

However, limiting the exercise of the *Bundestag'* s participation rights to parliamentary sub-committees interferes with the rights of those *Bundestag* members that are 196

not represented in the special committee under Art. 38 sec. 1 sentence 2 GG to deliberate on a matter of the *Bundestag* , to speak on it, to exercise the right of Parliament to ask questions and to be informed, and finally to vote on the matter (BVerfGE 130, 318 <357>). In case the status rights of *Bundestag* members are limited in such a way, the principle of proportionality must be observed and an appropriate balancing between the *Bundestag* 's functioning and the status rights of the *Bundestag* members be ensured. Delegation of participation rights in the interest of particular confidentiality must therefore be limited to a few exceptions with a limited scope of applicability and absolutely necessary (BVerfGE 130, 318 <359 and 360>).

Whether the deliberations of the Federal Security Council may constitute such an exception requires no decision in the case at hand. It is not absolutely necessary to delegate the participation rights of the *Bundestag* to a committee in charge of reviewing decisions on permits pursuant to Art. 26 sec. 2 sentence 1 GG. Such delegation would mean that Parliament would receive information going beyond the mere communication that a permit has been granted. […] Receiving such additional information, however, would be accompanied by a considerable limitation of Parliament's oversight and of the status rights of those Members of the *Bundestag* not represented in the committee. Moreover, withdrawing oversight from the parliamentary public sphere would also eliminate oversight by the citizens, which serves to ensure Parliament's effective responsibility *vis-à-vis* the voters (cf. BVerfGE 125, 104 <124>; 130, 318 <344>). The increased amount of information on matters concerning the Federal Security Council cannot justify such limitations. The obligation of the Federal Government to inform the *Bundestag* publicly about positive decisions on permissions taken by the Federal Security Council ensures sufficient parliamentary oversight. A more in-depth oversight achieved by informing a special body about negative decisions and about the reasons for the decisions by the Federal Security Council is by no means proportionate to the impairments of the oversight function, of the legitimation of government action ensured by public oversight and of the status rights of the *Bundestag* members not represented in the special body and who represent the vast majority in the *Bundestag* . 197

b) Informing the *Bundestag* on matters of the Federal Security Council in accordance with the Rules on Document Security […] cannot resolve this conflict of interests either. 198

[…] 199

The Rules on Document Security are generally a suitable instrument to ensure the balance between the government's interest in confidentiality and Parliament's information interest (cf. BVerfGE 67, 100 <135>; 70, 324 <359>; 124, 78 <124 and 125>; see also BVerfGE 130, 318 <362>; 131, 152 <208>). Even a systematic overall assessment of a number of Basic Law provisions – such as Art. 42 sec. 1 sentence 2, Art. 44 sec. 1 sentence 2, Art. 45a sec. 3 and Art. 53a GG – shows that the Constitution provides for the exclusion of the general public as a possibility to safeguard confi- 200

dentiality interests while at the same time involving Parliament. Nonetheless, the application of the Rules on Document Security conflicts with Parliament's public function. The stated exception provisions do not alter the fact that the public nature of sittings pursuant to Art. 42 sec. 1 GG is generally indispensable for the parliamentary deliberation process. Parliament's right to be informed may not, as a result of its duty to protect secrecy, lead to a fundamental shift in the way Parliament operates and functions in important areas and to ignoring this particular public function.

Bundestag members cannot convey information obtained subject to the Rules on Document Security to the public opinion-forming process. If Parliament is informed and the Rules on Document Security apply to this information, the requirement of answerability between Government and Parliament is formally complied with. However, the next step of accountability towards the people is interrupted. The election process ensures the people's oversight of the use of power by the political majority (BVerfGE 5, 85 <199>). Without being adequately informed the voters can neither acknowledge nor evaluate government actions nor Parliament's reaction to the obtained information. Both are, however, essential for democratic legitimation in form of the act of voting. 201

Moreover, the application of the Rules on Document Security weakens the oversight linking the relationship between Government and Parliament. Publicity is essential in the exercise of parliamentary oversight. While information requested for the preparation of legislation provides Parliament with the required factual knowledge and thus fulfils its purpose even if it is non-public, this is different as far as information provided for the purposes of political or legal oversight is concerned. In political reality, the right to ask questions for oversight purposes is primarily a means employed by the opposition and which generally requires publicity to be effective. Without publicity, oversight no longer has a sanctioning effect in practice. 202

5. The duty of the Federal Government to respond to parliamentary queries concerning positive permit decisions by the Federal Security Council is not fulfilled simply by the annual publication of the Reports on Military Equipment Exports. 203

The form of a report differs systematically from the question- and answer structure of the right of interpellation. In the case of the Reports on Military Equipment Exports both the presentation and content of the information as well as its timing are not determined by *Bundestag* members but by the Federal Government. Already for this reason a general report is not tantamount to the parliamentary right to ask questions. 204

Furthermore, the Reports on Military Equipment Exports of the Federal Government are not sufficiently specific to satisfy the legitimate parliamentary information interest. The reports do not distinguish between individual permit decisions but provide a summary of transactions that received a permission in the reporting year. The description of the respective products is general. […] 205

[…] 206

6. The Federal Government may refuse to respond to parliamentary queries on matters relating to the Federal Security Council to the extent that the respective query is aimed at obtaining information that goes beyond the information about a positive permit decision and the basic parameters of the respective export transaction. There is no need for a separate statement of reasons for refusing an answer. Rather, emphasizing in general the need to keep deliberations of the Federal Security Council secret is sufficient. 207

There is a decade-long and commonly known practice of the Federal Government to refuse answering such requests by invoking confidentiality of the Federal Security Council's deliberations, even if in individual cases specific details were released due to special circumstances. In light of this longstanding practice it cannot be required that the Federal Government states in each response to an information request its general opinion on the relationship between Parliament's right to information on the one hand, and the protection of the autonomous executive decision-making, matters of the welfare of the state and the protection fundamental rights of third parties on the other hand. Such a constant and repetitive statement would only be formalistic and not suitable to furthering the insights of the *Bundestag* members asking the question. A Member of Parliament who wants to question the reasons for the denied response is therefore required to make these reasons the particular subject matter of an information request in their own right. 208

There is, however, a duty to provide reasons to the extent that the Federal Government intends to deny information about a granted permit or on the basic data of the export transaction to be communicated in this connection. 209

III.

The respondent partially misjudged the limits of its duty to provide answers in the context of the questions in dispute and thereby violated the applicants rights under Art. 38 sec. 1 sentence 2 and Art. 20 sec. 2 sentence 2 GG. 210

1. The respondent did not comply at all with its duty to provide answers with regard to the follow-up question of applicant 1. during question time of the *Bundestag* of 6 July 2011, PlenProt 17/119, p. 13802 D, insofar as it refers to the human rights situation in Saudi Arabia, and did not comply in parts with this duty with regard to the written question 7/193 of 14 July 2011 (BTDrucks 17/6658, p. 28). As for the rest, the applications – insofar as they are admissible – are unfounded. 211

a) The additional question of applicant 1. posed during question time of the German *Bundestag* of 6 July 2011 (PlenProt 17/119, p. 13802 D) in part referred to whether the Federal Government had knowledge of violations of human rights or civil rights in Saudi Arabia. 212

The Parliamentary State Secretary of the Minister for Economic Affairs and Technology finally refused to answer this question by invoking the lack of competence of the Federal Minister for Economic Affairs; by this, the respondent curtailed the right to 213

ask questions of applicant 1. in a constitutionally impermissible manner. The right of *Bundestag* members to ask questions exists in relation to the Federal Government, which has a duty to provide answers. Hence, an answer cannot be denied by invoking the principle of departmental responsibility. The respondent did not invoke other grounds of secrecy; there are none that are evident.

b) The respondent in part wrongfully refused to respond to the written question asked by applicant 1. on 14 July 2011 (question 7/193, BTDrucks 17/6658, p. 28). The respondent would have been required to tell applicant 1. whether the Federal Security Council had approved the delivery of 200 tanks of the Leopard model to Saudi Arabia. 214

The respondent was under no obligation to provide information going beyond the requirements set out above. If at the time the question was answered there had been no positive decision by the Federal Security Council, the respondent would not have been under an obligation to inform applicant 1. whether there had been an application for a permit or a respective advance query at all. The fact that the press had reported on an alleged permission for such a delivery does not lead to a different conclusion. If a decision-making process within government falls within the core area of executive autonomy, it does not become less worthy of ensuring confidentiality simply because third parties report on it. Otherwise, the government could be forced into disclosing information requiring confidentiality through targeted speculation. Nor would the respondent have been obliged to inform about a negative decision; rather, the respondent would have had to state only that there is no positive decision on a permit. Had there been a positive decision by the Federal Security Council, the respondent would not have been obliged to answer the question insofar as it concerns pricing, terms of delivery or possible conditions on the deployment in Saudi Arabia or other countries. It would not have been obliged to provide reasons for the decision either. 215

c) The respondent legitimately refused to provide an answer (PlenProt 17/119, p. 13807 A) to the urgent information request 2 of applicant 1. (BTDrucks 17/6438, p. 1) insofar as it related to “agents, supporters within the Federal Government and beneficiaries of this weapons transaction”. 216

[…] 217

[…] 218

d) The respondent was also allowed to refuse giving an answer to the additional question of applicant 1. concerning the precise purchasing price of the 200 Leopard battle tanks (PlenProt 17/119, p. 13807 B, C). This concerns a business secret of the company selling these tanks. […] 219

[…] 220

2. The respondent did not comply with its duty to answer the written question 7/132 of applicant 2. of July 2011 (BTDrucks 17/6658 p. 24) insofar as the question refers to 221

whether there is a positive permit decision by the Federal Security Council. As for the rest, the applications of applicant 2. are unfounded.

[…] 222-226

3. To the extent that the applications of applicant 3. are admissible, they are unsuccessful, given that the respondent was permitted to deny a response to the respective questions. 227

a) The additional question (PlenProt 17/119, p. 13804 A, B) of whether an approval of the armament export transaction by Israel and the USA had been obtained prior to the alleged decision by the Federal Security Council concerns the core area of executive autonomy. The Federal Government is not obliged to disclose information about the contents and course of deliberations within the Federal Security Council (para. 172). This also applies to talks conducted by the Council with other states to prepare a decision. If third party states had to expect that their assessments provided confidentially to the Federal Government become public soon after the decision was taken, the Federal Republic would run the risk of not being entrusted with such information any longer. Consequently, an answer can also be denied for the sake of the welfare of the state. 228

b) The additional question (PlenProt 17/119, p. 13814 B, referred to in the application as “p. 13841 B”) of applicant 3. whether the persecution of homosexuals by a country would conflict with granting a permission to export tanks to this state, concerns a balancing process within the Federal Security Council which is protected as part of the core area of executive autonomy. 229

c) The same applies with regard to the written question of 14 July 2011 (question 7/174; BTDrucks 17/6658, p. 26), in which applicant 3. specifically asks for information on the reasons for the alleged authorisation of the delivery of 200 Leopard battle tanks to Saudi Arabia. 230

d) With regard to the remaining written question of 14 July 2011 (question 7/175; BTDrucks 17/6658, p. 27) reference is made to the statements concerning the corresponding question of applicant 1. (cf. para. 216 et seq.). In this case, the respondent was also permitted to deny a response. 231

D.

[…] 232

Voßkuhle	Justice Lübbe-Wolff is retired from her office and therefore unable to provide a signature. Voßkuhle	Justice Gerhardt is retired from his office and therefore unable to provide a signature. Voßkuhle
Landau	Huber	Hermanns
Müller		Kessal-Wulf

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 21. Oktober 2014 - 2 BvE 5/11

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 21. Oktober 2014 - 2 BvE 5/11 - Rn. (1 - 232), http://www.bverfg.de/e/es20141021_2bve000511en.html

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