Headnotes

to the Order of 13 October 2016

- 2 BvE 2/15 -

1. § 18(3) of the Parliamentary Committee of Inquiry Act (*Untersuchungsausschussgesetz* – PUAG) does not confer upon just any minority in the committee of inquiry standing to assert a possible violation of rights in *Organstreit* proceedings (dispute between highest federal organs). Only the committee minority reflecting the specific or potential plenary minority in the German *Bundestag* entitled to establish such committees within the meaning of Art. 44(1) first sentence of the Basic Law (*Grundgesetz* – GG) has standing to assert a possible violation of rights.

2. The right of a parliamentary committee of inquiry to collect evidence is subject to limitations; any such limitation, including those set out by ordinary statutory law, must be rooted in constitutional law (cf. BVerfGE 124, 78 <118>). Accordingly, obligations arising under international law cannot immediately limit the parliamentary right to collect evidence, given that these obligations do not have constitutional rank.

3. The Committee of Inquiry's right to receive the requested NSA Selector Lists, which derives, in principle, from its right to collect evidence, has neither been satisfied by the appointment of an expert in a position of trust (*sachverständige Vertrauensperson*), nor by the expert opinion submitted by that person.

4. The Committee of Inquiry's right to collect evidence conflicts with the Federal Government's interest that state functions be exercised in a duty-oriented manner and by the appropriate organ (*funktionsgerechte und organadäquate Aufgabenwahrnehmung*). These functions include the cooperation of intelligence services for the purpose of effectively protecting the state and the Constitution.

5. In the present proceedings:

The Federal Government's secrecy interest outweighs the parliamentary interest in information, given that: the NSA Selector Lists requested under the Committee's decision to collect evidence are not at the Federal Government's free disposal due to commitments made under international law; the Government's assessment that handing over the lists without consent could significantly impair the functioning of German intelligence services and their ability to cooperate is reasonable; the Federal Government – in cooperation with the Committee of Inquiry – has responded to the request to hand over the lists through other procedural means in as precise a manner as possible without actually disclosing secrets.

IN THE NAME OF THE PEOPLE

**In the proceedings
on
the application to declare**

that respondent no. 1 and respondent no. 2 violated the rights of the German *Bundestag* under Art. 44 of the Basic Law (*Grundgesetz* – GG)

by refusing to hand over, in full, to the 1st Committee of Inquiry (*Untersuchungsausschuss*) of the 18th legislative period of the German *Bundestag* all files, documents, data stored electronically or by other means, as well as all any other objects or means of evidence that

1. provide information as to what knowledge the Federal Intelligence Service (*Bundesnachrichtendienst* – BND) had in the past, or has presently, on whether and to what extent the National Security Agency (NSA) of the United States of America within the scope of the joint signal intelligence cooperation "Joint SIGINT Activity" had pursued (or attempted to pursue) intelligence activities with regard to German targets or German interests (i.e. directed at individuals residing in Germany or the European Union; German or European bilateral, multilateral or supranational agencies, or respectively directed at companies, including EADS, Eurocopter, and French authorities, cf. the article headlined "Codewort Eikonal" published by the newspaper *Sueddeutsche Zeitung* on 4 October 2014), and that provide information as to the reaction of German authorities,

   or

2. were used to compile written documents of the Federal Chancellery (*Bundeskanzleramt*) or the BND in relation to the topic detailed above, filed under the following references: MAT A-BK-7, file no. 05/14 strictly confidential (reclassified as 'confidential'), annex 06, file 135, sheet 36, sheet 41, sheet 120,

   and which

were created within the organisational structure of the Federal Chancellery or the BND, or were seized by authorities, during the period of inquiry of the 1st Committee of Inquiry, insofar as the respondents had claimed in this respect that any part concealed or removed from these files, documents, electronic files, other data, or other objects of evidence had contained original source material shared by foreign intelligence services or other foreign agencies, or information concerning foreign intelligence services or other agencies,

Applicant: 1.the parliamentary group *DIE LINKE* of the *Bundestag*,
represented by chairpersons Dr. Sahra Wagenknecht, Member of the *Bundestag*, and Dr. Dietmar Bartsch, Member of the *Bundestag*,
Platz der Republik 1, 11011 Berlin,

2.the parliamentary group BÜNDNIS 90/DIE GRÜNEN of the *Bundestag*,

represented by chairpersons Katrin Göring-Eckardt, Member of the *Bundestag*, and Dr. Anton Hofreiter, Member of the *Bundestag*,
Platz der Republik 1, 11011 Berlin,

3.the qualified minority of the 1st Commission of Inquiry of the 18th legislative period of the German *Bundestag* consisting of Martina Renner, Member of the *Bundestag*, and Dr. Konstantin von Notz, Member of the *Bundestag*,
Platz der Republik 1, 11011 Berlin

– authorised representatives: Rechtsanwälte WEISSLEDER - EWER,
Walkerdamm 4-6, 24103 Kiel –

Respondent: 1.the Federal Government,
represented by Federal Chancellor Dr. Angela Merkel,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin,

2.the Head of the Federal Chancellery,
Federal Minister Peter Altmaier, Member of the *Bundestag*,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin

– authorised representative: Prof. Dr. Joachim Wieland, LL.M.,
Gregor-Mendel-Straße 13, 53115 Bonn -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on 13 October 2016:

1. The application of applicant no. 3 is dismissed [as inadmissible].

2. The application of applicants no. 1 and 2 is rejected.

R e a s o n s :

A.

The Organstreit proceedings (dispute between highest federal organs) concern the question whether the Federal Government, respondent no. 1 and respondent no. 2, may refuse the request of the 1st Committee of Inquiry of the 18th German *Bundestag* (so-called Committee of Inquiry into NSA Activities, *NSA-Untersuchungsausschuss*) to hand over evidence, for reasons of conflicting obligations under international law as well as for the purpose of protecting the functioning of German intelligence services and their ability to cooperate. 1

Applicants no. 1 and 2 are the parliamentary groups DIE LINKE and BÜNDNIS 90/DIE GRÜNEN in the *Bundestag*. Applicant no. 3 comprises those members of the Committee of Inquiry into NSA Activities that are also members of applicants no. 1 and 2. 2

I.

[Excerpt from Press Release no. 84/2016 of 15 November 2016]

The US-American NSA and the BND were cooperating for the purpose of signals intelligence. Within this cooperation, the BND searched data diverted from an Internet hub, assessing the data in the light of criteria that had been determined by the NSA – the so-called selectors. After the press had reported in the summer of 2013 that EU representations as well as German holders of fundamental rights had been affected by the joint signals intelligence by the BND and the NSA, the *Bundestag* established the so-called Committee of Inquiry into NSA Activities (*NSA-Untersuchungsausschuss*) in March 2014. The Committee of Inquiry requested from the Federal Government to hand over any evidence that would provide information as to the BND's knowledge of whether and to what extent the NSA within the scope of cooperation had pursued intelligence activities with regard to German targets or German interests. Subsequently, the Federal Government provided pieces of evidence;

however, with regard to the NSA's Selector Lists, the Federal Government came to the conclusion that a submission to the Committee of Inquiry without the approval of the United States of America would amount to a breach of the mutually assured confidentiality and undermine Germany's ability to cooperate at an international level.

With their applications in the *Organstreit* proceedings, the parliamentary group of DIE LINKE in the German *Bundestag* and the parliamentary group of BÜNDNIS 90/ DIE GRÜNEN in the German *Bundestag* and two members of the Committee of Inquiry into NSA Activities who are also members of the aforementioned parliamentary groups request the finding that the Federal Government and the Head of the Federal Chancellery Office violated the *Bundestag*'s right to collect evidence under to Article 44 of the Basic Law (*Grundgesetz* – GG) by refusing to hand over the requested information.

[End of excerpt]

[…] 3-26

II.

The applicants initiated *Organstreit* proceedings before the Federal Constitutional Court with the applicant brief of 16 September 2015. With their application, they seek a finding that respondents no. 1 and 2 violated the rights of the *Bundestag* under Art. 44 GG by refusing to hand over all files, documents, data stored electronically or by other means, and other objects of evidence which provide information on what kind of knowledge the BND had in the past, or has presently, on whether and to what extent the NSA of the United States of America within the scope of cooperation of Joint SIGINT Activity pursued (or attempted to pursue) intelligence activities directed at German targets or German interests, and that provide information as to the reaction of the German authorities. 27

[…] 28-47

III.

[…] 48-63

IV.

For reasons of confidentiality (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 14/9220 p. 5), the Senate refrained pursuant to § 66a first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) from conducting an oral hearing. 64

To the extent that the files submitted by the parties constitute classified documents, their content will not be disclosed in the following considerations. 65

B.

The application filed by applicants no. 1 and 2 is admissible; the application filed by applicant no. 3 is inadmissible. 66

I.

[…] 67

II.

[…] 68-71

III.

1. Applicants no. 1 and 2 have the capacity to be a party to *Organstreit* proceedings, both in their capacity of a parliamentary group as such (a) and in their capacity of a collective of all its members (b). 72

[…] 73-80

2. […] 81-83

IV.

Applicants no. 1 and 2 have standing to assert a possible violation of rights (*Antragsbefugnis*); applicant no. 3 lacks such standing. 84

1. The *Organstreit* application is admissible pursuant to § 64(1) BVerfGG if the applicant asserts that an act or omission on the part of the respondent violated or directly threatened to violate the rights and obligations conferred on the applicant or on the applicant's organ by the Basic Law. 85

[…] 86

The applicants challenge the refusal of respondents no. 1 and 2 to comply with the committee decisions requesting evidence from the respondents. Thus, the *Organstreit* proceedings concern the scope of the right of the *Bundestag* to collect evidence, which derives from Art. 44(1) GG, and the corresponding obligation of the Federal Government to hand over the requested files. […] Even where a committee of inquiry has been established, the right of inquiry enshrined in Art. 44(1) GG remains vested in Parliament in its entirety (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 105, 197 <220>; 113, 113 <121>). 87

Within the limits set by the Constitution, the Parliamentary Committee of Inquiry Act (*Untersuchungsausschussgesetz – PUAG*) and the Rules of Procedure of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestages* – GO-BT), and within its investigation mandate as defined by the parliamentary plenary decision establishing such committee, a committee of inquiry is free to determine its own procedural approach. Art. 44(1) first sentence GG confers upon the committee of inquiry 88

the right to take any evidence it deems necessary for discharging its investigation mandate (cf. BVerfGE 67, 100 <128>). […]

2. Applicants no. 1 and 2 lack standing to assert a possible violation of rights insofar as they claim a violation of their own rights (a). They do, however, have standing to assert a possible violation of rights to the extent that they assert rights of the *Bundestag* in their capacity as individual parliamentary groups and by way of pursuing such application on behalf of the *Bundestag* (*Prozessstandschaft*) (b). 89

a) Pursuant to Art. 44(1) first sentence GG, only a one-quarter minority [in Parliament] is accorded the status of an institutionally entrenched and independent organisational sub-unit of the *Bundestag,* and as such only this minority is vested with its own constitutional rights. […] 90

In this regard, the insertion of § 126a(1) no. 1 first sentence GO-BT does not merit a different result. […] As § 126a GO-BT merely constitutes an internal rule of procedure, it cannot resolve in a definite manner conflicts that arise under constitutional law between the majority and the minority in Parliament; most notably, such rules of procedure cannot confer any minority rights justiciable under constitutional law that would go beyond the guarantees of Art. 44 GG. […] 91

b) […] 92

3. Applicant no. 3 lacks standing to assert a possible violation of rights. 93

a) Given that applicants no. 1 and 2, even when relying on the entirety of their membership, already lack standing to assert a possible violation of own rights in this regard, applicant no. 3 in its capacity as representative of 120 Members of the *Bundestag* only can most certainly not assert a possible violation of such rights under Art. 44(1) first sentence GG in conjunction with § 126a(1) no. 1 first sentence GO-BT. 94

b) Nor is applicant no. 3 entitled, by virtue of accounting for a one-quarter minority within the Committee of Inquiry, to assert rights of the *Bundestag* by way of pursuing an action on behalf of the *Bundestag* in accordance with § 18(3) PUAG. 95

§ 18(3) PUAG does not confer upon just any minority in a committee of inquiry standing to assert a possible violation of rights for such interpretation would completely disregard Art. 44(1) first sentence GG, which permeates the regulatory framework governing committees of inquiry. Therefore, standing to assert a possible violation of rights rests solely with the particular committee minority reflecting the specific or potential *Bundestag* minority entitled to establish such committee, within the meaning of Art. 44(1) first sentence GG, in the first place; only such particular committee minority may pursue an application on behalf of the *Bundestag*. 96

[…] 97-98

V.

Applicants no. 1 and 2 direct their application against the correct respondents, given 99

that it was the Federal Government and the Head of the Federal Chancellery which refused to hand over the NSA Selector Lists and thus bear responsibility for the act or omission challenged (cf. BVerfGE 140, 115 <140 para. 61> with further references).

[…] 100

VI.

[…] 101-102

VII.

[…] 103

VIII. 104

[…]

C.

The application of applicants 1 and 2 is unfounded. 105

I.

1. Under Art. 44(1) first sentence GG, the *Bundestag* has the right – and on the motion of one quarter of its members the duty – to establish a committee of inquiry with the power to take any evidence necessary. 106

a) The right of inquiry guaranteed under Art. 44 GG is one of the oldest and most pivotal rights of Parliament (cf. BVerfGE 124, 78 <114>). In addition to the right to require the presence of members of the Federal Government under Art. 43(1) GG, and the right to submit questions as well as the right to information, both derived from Art. 38(1) second sentence and Art. 20(2) second sentence GG, the right to inquiry enables the investigation of facts and circumstances that lay the necessary groundwork for decisions taken by Parliament; it also enables Parliament to effectively exercise its oversight function over the Federal Government, which is thereby held accountable to Parliament (cf. BVerfGE 49, 70 <85>; 124, 78 <114>). In this respect, a committee of inquiry, as an investigative means in the context of political controversy (cf. BVerfGE 105, 197 <225 and 226>), is a specific instrument of parliamentary oversight. 107

[…] 108

b) Within the scope of its investigation mandate, the committee of inquiry has the right pursuant to Art. 44(1) first sentence GG to take any evidence it deems necessary (cf. BVerfGE 67, 100 <127 and 128>; 124, 78 <114>). […] 109

The right to request that files be handed over belongs to the core of the right of inquiry. This right to request files from within the Federal Government's sphere of responsibility does not merely derive from the right to request administrative assistance (*Amtshilfe*) under Art. 44(3) GG; it also forms an integral part of the right to parliamen- 110

tary oversight under Art. 44(1) first sentence GG and the right to collect evidence pursuant to Art. 44(2) first sentence GG (cf. BVerfGE 67, 100 <128 and 129, 132>; 124, 78 <116>). In the investigation of political matters, files are of paramount importance as means of evidence. […]

2. The right of a parliamentary committee of inquiry to collect evidence is subject to limitations; any such limitation, including those set out by ordinary statutory law, must be rooted in constitutional law (cf. BVerfGE 124, 78 <118>). 111

a) Accordingly, obligations arising under international law cannot immediately limit the parliamentary right to collect evidence, given that these obligations do not have constitutional rank. In particular, this becomes apparent in the constitutional provisions of Art. 25 GG and Art. 59(2) GG. 112

Art. 25 first sentence GG provides that the general rules of international law shall be an integral part of federal law. This provision renders the general rules of international law directly effective (i.e. without requiring any further legal act of ordinary law) within the German legal order. Pursuant to Art. 25 second sentence GG, the general rules of international law take precedence over the [ordinary] laws. A law that conflicts with a general rule of international law therefore violates the constitutional order within the meaning of Art. 2(1) GG. At the same time, however, Art. 25 GG must be construed – in accordance with the wording of its second sentence – as conferring upon the general rules of international law a rank above (ordinary) statutes but below the Constitution ('in-between' rank, *Zwischenrang*) (cf. BVerfGE 141, 1 <17 para 39 et seq.> with further reference). 113

According to Art. 59(2) first sentence GG, international treaties that regulate the political relations of the Federation or relate to subjects of federal legislation become effective within the domestic legal order only by way of the act of approval required under this provision. Art. 59(2) first sentence GG does not merely determine the methodological approach to the way which provisions of international treaties become effective within the legal order; it also determines the rank within the legal order conferred upon international treaty law that is given legal effect in such manner. It follows from Art. 59(2) first sentence GG that international treaties share the rank of ordinary (federal) statutes under domestic law, unless they fall within the scope of application of a more specific opening clause (*Öffnungsklausel*) – especially Arts. 23 to 25 GG; therefore, international law treaty does not general enjoy a rank above statutory law, let alone the rank of constitutional law (BVerfGE 141, 1 <18 paras. 43 et seq.>). 114

The principle of the Constitution's openness to international law (*Völkerrechtsfreundlichkeit*) does not supersede the varied provisions of the Basic Law governing the rank of the different sources of international law, nor can it set aside the systematic approach set out in these provisions (cf. BVerfGE 141, 1 <26 et seq. para. 65 et seq.> and <30 et seq. paras. 73 et seq.>). 115

b) First of all, the right of a parliamentary committee of inquiry to collect evidence is limited by the investigation mandate as defined by the decision establishing the committee. The investigation mandate as such must remain within the scope of the Parliament's oversight powers, and it must be defined in a sufficiently clear manner (cf. BVerfGE 124, 78 <118 and 119>). 116

c) Moreover, reasons to withhold information from a committee of inquiry may arise under the principle of separation of powers (cf. BVerfGE 124, 78 <120>; regarding the limits of the right to information vested in the *Bundestag* as well as in its individual Members, cf. BVerfGE 137, 185 <233 para. 135>). 117

The principle of separation of powers aims to ensure a division of power in order to moderate the sovereign authority of the state. In its manifestation under the Basic Law as a principle requiring that legislative, executive and judicial power be distinguished (Art. 20(2) second sentence GG), it also contributes to a functional and duty-oriented assignment of sovereign powers to different public authorities, each of which is organised in a manner suited to their respective tasks; in addition, the principle ensures that all authority be bound by [the rule of] law (Art. 20(3) GG) (cf. BVerfGE 124, 78 <120>; 137, 185 <233 para. 135>). In the constitutional system of the Basic Law, separation of powers is neither stipulated nor implemented in terms of an absolute separation. The different branches of government are inter-related and intertwined, yet they may not be deprived of their respective distinctiveness and their specific tasks and competences (cf. BVerfGE 9, 268 <279 280>; established case-law). Therefore, the principle of separation of powers provides both the basis and the limitation of Parliament's right to information vis-à-vis the Federal Government (cf. BVerfGE 110, 199 <219>; 124, 78 <122>; 137, 185 <233 para. 135>). 118

aa) The responsibility of the Federal Government vis-à-vis Parliament and the people necessarily requires a core sphere of autonomous executive decision-making (*Kernbereich exekutiver Eigenverantwortung*), which generally encompasses a sphere relating to initiative, deliberation and action that is not open to investigation. […] 119

As a rule, a duty of the Federal Government to provide information requested by Parliament does not exist where such information could result in a co-governing by third parties of decisions that fall within the exclusive competence of the Federal Government. […] 120

[…] 121

bb) In light of the constitutional framework governing the assignment of public tasks to specific public duties and responsible authorities, the responsibility of the Federal Government vis-à-vis Parliament and the people requires an effective guarantee that state functions be exercised in a duty-oriented manner and by the appropriate organ (*funktionsgerechte und organadäquate Aufgabenwahrnehmung*). 122

(1) The Basic Law imposes a duty on all constitutional organs to avert impairments 123

of the pillars of the free and democratic order (*freiheitliche demokratische Ordnung*) within their sphere of competence, subject to compliance with the requirements set by the rule of law. Most notably, this includes pursuing the fundamental objectives of the state that are security and protection of the population (cf. BVerfGE 115, 320 <358>).

The constitutional order, the existence and the security of the Federation and of the *Laender*, and life, limb and freedom of the person are legally protected interests of exceptionally significant constitutional weight. Accordingly, the Federal Constitutional Court has emphasised that the security of the state, as the sovereign authority guaranteeing peace and order, and its duty to ensure – in conformity with respect for human dignity and the inherent value of the individual – the security of the population constitute constitutional values whose rank equals that of other protected constitutional interests of paramount importance. Thus, the state is under a constitutional obligation to protect the life, the physical integrity and the freedom of the person (cf. BVerfGE 49, 24 <56 and 57>; 115, 320 <346 and 347>; 120, 274 <319>; 141, 220 <267 and 268 para. 100>). 124

The state complies with this duty by countering threats stemming from terrorist endeavours, for example. Crimes of a terrorist nature aim at destabilising society, and resort to ruthless instrumentalisation of individuals for the purpose of carrying out indiscriminate attacks against the life and body of others. These crimes are directed against the pillars of the free and democratic order and against society in its entirety. Providing effective means of investigation for the purpose of averting such crimes is a legitimate aim and of great importance for the democratic and free order (cf. BVerfGE 115, 320 <357 and 358>; 133, 277 <333 and 334 para. 133>; 141, 220 <266 para. 96>). 125

In order to maintain the internal and external security of the Federal Republic of Germany, the Basic Law (Art. 45d, Art. 73(1) no. 1 letter b, Art. 87(1) second sentence GG) expressly permits the establishment of agencies for the protection of the Constitution (*Verfassungsschutzbehörden*) and of intelligence services. Intelligence services are a manifestation of the Basic Law's principal endorsement of a "fortified" democracy (*wehrhafte Demokratie*), and of the purposeful assertiveness of the state under the rule of law. Therefore, they are an integral part of the security framework of the Federal Republic of Germany […]. 126

The Federal Government is responsible for determining the overall strategic approach of activities carried out by intelligence services, and thus it is also competent to decide on the international cooperation between intelligence services. This is in line with the principle that state functions be assigned to the appropriate organ (*organadäquate Funktionenzuweisung*). […] Moreover, it is also the responsibility of the executive government to ensure the functional capacity of the intelligence services. 127

(2) To increase the effectiveness of gathering and evaluation of information on matters of foreign and security policy significance, German intelligence services cooper- 128

ate with foreign intelligence services. Adherence to [mutually assured] confidentiality provides the basis for this cooperation. (cf. Federal Administrative Court, *Bundesverwaltungsgericht* – BVerwG, Order of 20 July 2015 – 6 VR 1.15 -, juris, para. 11). This requires entering into obligations under international law which are governed by the Federal Government's power of initiative and leeway to design as part of its foreign and security policy (cf. BVerfGE 90, 286 <358>).

(a) Pursuant to Art. 32 GG the Federation has the competence to exercise sovereign authority in external relations (cf. BVerfGE 2, 347 <378 and 379>). Foreign policy is one of the functions of the Federal Government (cf. already BVerfGE 1, 372 <394>; cf. also BVerfGE 68, 1 <85 and 86>; 90, 286 <357>). 129

Drawing on traditional doctrines of state theory, the Basic Law grants the Federal Government a widely construed discretion for the autonomous exercise of its functions in the field of foreign policy. Thus, reasons of ensuring the duty-oriented exercise of state functions (*Funktionsgerechtigkeit*) alone already limit the role of Parliament in this area (cf. BVerfGE 104, 151 <207>; 131, 152 <195>). 130

It is true that, according to Art. 59(2) first sentence GG, international treaties regulating the political relations of the Federation or relating to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. However, maintaining relations with foreign states, the representation of the state in international organisations, intergovernmental bodies and systems of mutual collective security (Art. 24(2) GG), as well as ensuring the overall state responsibility for the external representation of Germany, generally fall within the sphere of competence of the executive branch of government, most notably the Federal Government. This principal allocation of acts in matters of foreign relations to the executive government's sphere of competence is based on the consideration that, from an institutional and long-term perspective, it is usually only the Federal Government that has sufficient personnel, material and organisational resources to respond to changing foreign policy situations in a swift and appropriate manner; in respect of this, the Federal Government is best-suited to fulfil the state function of dealing with foreign policy matters in a responsible manner (BVerfGE 68, 1 <87>; 131, 152 <195>). 131

Extending, by way of interpretation, the *Bundestag*'s rights of approval and of participation, while disregarding the specific order of the Basic Law governing the distribution and balancing of state powers, would unjustifiably curtail the Federal Government's capacity to act in matters of a foreign and security policy nature; it would also result in a distribution of state powers in a manner that was no longer duty-oriented (cf. BVerfGE 90, 286 <363; 104, 151 <207>; 131, 152 <195 and 196>); to a large extent, such an interpretation would shift political power from the executive government to the *Bundestag* in an area which, from a functional perspective, does not qualify as a matter of the legislature within the meaning of Art. 20(2) second sentence GG (cf. BVerfGE 68, 1 <87>). 132

(b) Against this background, the Federal Government is responsible for negotiating and concluding confidentiality agreements as the basis for international cooperation between intelligence services. 133

The primary aim of such confidentiality agreements is to safeguard the exchange of confidential information with other states, given that the disclosure of classified information harmfully affects national sovereignty. […] In return, the Federal Republic of Germany must have the ability to enter into binding obligations of mutually assured confidentiality with agencies of foreign states (cf. BTDrucks 12/4891 p. 18). 134

The practice of intelligence services, however, is such that cooperation agreements may also take the form of so-called memoranda of understanding or memoranda of agreement which, from a legal perspective, have the status of non-binding commitments […]. 135

Art. 59(2) first sentence GG does not affect the competence, which is rooted in the sovereign authority in external relations, to choose the respective means of action deemed most appropriate to engage in relations under international law; this includes the possibility to refrain from creating binding obligations in this regard. It is incumbent upon the Federal Government – in cooperation with existing contracting parties as well as – potentially – newly acquired contracting parties – to decide whether and when to enter into binding obligations under international law, as well as to decide on the content of such obligations. In particular, foregoing the conclusion of an international treaty is a reasonable option where the concerned subjects of international law are still in the early phase of treaty negotiations, where new forms of cooperation are being tested, or where coordination or consideration is sought in relation to other subjects of international law. Moreover, Art. 59(2) first sentence GG does not bar concerted action between contracting parties in the field of foreign policy on the basis of the contractual status quo, even if such action deliberately avoids the creation of binding obligations – for instance, in consideration of ongoing political developments or such developments where the outcome is not yet sufficiently predictable. In this context, it is precisely not intended to create new or further-reaching rights or obligations (cf. BVerfGE 90, 286 <360>). 136

d) The right to collect evidence is furthermore limited by state interests of the Federation or of a German *Land* (welfare of the state, *Staatswohl*) that would be jeopardised in the event that confidential information were disclosed (cf. BVerfGE 67, 100 <134 et seq.>; 124, 78 <123>). 137

When determining the constitutional limits to the parliamentary right of inquiry, its significance for the overall constitutional framework must be taken into account. This also applies to the interpretation and application of the term “threat to the welfare of the state“. Accordingly, with respect to whether witness statements or the handing over of files could pose a threat to the welfare of the state, it must first be considered that the use of information submitted to a committee of inquiry is in turn governed by a specific set of confidentiality regulations, and that the welfare of the state is entrusted 138

not just to the Federal Government alone, but to the joint responsibility of the *Bundestag* and the Federal Government (cf. BVerfGE 124, 78 <123 and 124>). Parliament and its organs may not be subjected to the same treatment as such external parties that are considered groups of persons in relation to which it is necessary to keep information secret in order to protect the welfare of the state. As matter of principle, the welfare of the state can therefore not be invoked in relation to the *Bundestag* if effective safeguards for preventing the disclosure of official secrets have been put in place on both sides. The fact that compliance with such regulations on the confidentiality of official secrets does not provide an absolute assurance against the risk of disclosure does not merit a different result. This risk exists in relation to all three branches of government (BVerfGE 67, 100 <136>; 124, 78 <124>).

The Rules on Confidentiality (*Geheimschutzordnung*) of the *Bundestag*, which form part of its Rules of Procedure, set out detailed stipulations for the protection of official secrets when exercising parliamentary functions. The duty to maintain confidentiality arising under parliamentary regulations is affirmed by penal sanctions set out in § 353b(2) no. 1 of the Criminal Code (*Strafgesetzbuch* – StGB) (cf. BVerfGE 67, 100 <135>; 137, 185 <240 para. 149>). In addition, the Parliamentary Committee of Inquiry Act regulates the protection of state secrets in § 14(1) no. 4, § 15, § 16 and § 18(2) PUAG (cf. BVerfGE 124, 78 <124 and 125>). These provisions on the protection of confidentiality show that Parliament would not be able to exercise its legislative powers, its budget powers or its powers of parliamentary oversight without participating in secret knowledge of the Federal Government (cf. BVerfGE 67, 100 <135>; 137, 185 <240 and 241 para. 149>). 139

Nevertheless, the confidentiality provisions of the Bundestag do not affect the Federal Government's own responsibility for maintaining official secrets that is derived from the governmental powers with which it has been entrusted (BVerfGE 67, 100 <137>; 70, 324 <359>; 137, 185 <241 para. 150>). In particular, the Federal Government is not obliged to hand over to the *Bundestag* classified documents containing official secrets if the Bundestag does not guarantee the confidentiality considered necessary by the Federal Government (cf. BVerfGE 67, 100 <137>; 137, 185 <241 para. 150>). 140

e) In addition, pursuant to Art. 1(3) GG, parliamentary committees of inquiry have the duty to respect fundamental rights. This may also give rise to limitations on the right to collect evidence (BVerfGE 67, 100 <142>; 77, 1 <46>; 124, 78 <125>). 141

f) Finally, the right to collect evidence is limited in the event of abuse of rights. Accordingly, motions to hear evidence may be rejected if they are evidently designed with a view to creating delays (BVerfGE 105, 197 <225>; 124, 78 <128>). 142

3. If the Federal Government invokes its right to refuse the handing over of evidence to a committee of inquiry for reasons rooted in constitutional law, it has a constitutional duty to substantiate the reasons for doing so (cf. BVerfGE 124, 78 <128>). […] 143

Regarding the applicable formal requirements, ordinary law requires the Federal Government under § 18(2) second sentence PUAG to notify the committee of inquiry in writing of its reasons; thus, the written notification of rejection is of central importance. However, the Federal Government is not barred from presenting to the committee of inquiry, by way of supplementary measures, further elaborations on the reasons for its refusal. Depending on the relevant circumstances, the Federal Government may even be obliged to take such measures and to explain to the committee of inquiry about the nature of the withheld information, the necessity of non-disclosure, and its own assessment regarding the required level of confidentiality. To this end, the Federal Government must make itself available to the committee of inquiry for the purposes of discussing its position (cf. BVerfGE 67, 100 <138>). If the committee of inquiry nevertheless has reason to believe that the withheld information is pertinent to its investigation mandate, and thus sustains its request to receive the relevant files, the Federal Government is hence under an obligation to assess the reasoning put forward by the committee of inquiry; where such reasoning fails to change the position taken by the Government, the latter must examine possible courses of action to convince the committee of inquiry that its reasoning was not well-founded (cf. BVerfGE 67, 100 <138>). The specific contextual setting of the written notification of rejection must generally be taken account in the constitutional review of the case; consequently, it is necessary to consider, in an overall assessment, all position statements that accompany the relevant notification. 144

II.

According to these standards, the refusal of respondents no. 1 and 2 to hand over the so-called NSA Selector Lists does not violate the *Bundestag*'s right to take evidence under Art. 44 GG. 145

While taking into account the significance of the parliamentary right to take evidence (1), priority must be accorded to the interest of respondent no. 1 in ensuring that state functions be exercised in a duty-oriented manner and by the appropriate organ (2), given that: the NSA Selector Lists requested under the Committee's decision to take evidence are not at the free disposal of respondent no. 1 due to agreements under international law; the assessment, that handing over the lists without consent could significantly interfere with the functioning of German intelligence services and their ability to cooperate, is reasonable; the respondent – in cooperation with the Committee of Inquiry – has responded to the Committee's request through other procedural means in as precise a manner as possible without actually disclosing secrets (3). Moreover, the respondents have satisfied their constitutional duty to substantiate their reasoning (4). 146

1. In principle, the committee of inquiry's right to take evidence extends to the NSA Selector Lists. 147

a) The committee of inquiry has a particular interest in receiving information relating to the handing over of the NSA Selector Lists in order to ensure that the intelligence 148

services and the Federal Government remain democratically accountable. As is the case for other organs of the executive branch, intelligence services too are subject to parliamentary oversight. A specific need for oversight arises in light of the trend that intelligence activities rely more and more on cooperation and are becoming increasingly international in nature […]. The proliferation of international cooperation between intelligence services partially decouples the gathering of intelligence and democratic responsibility, given that the basis of decision-making is partially determined outside the sphere of influence of the receiving state's democratic organs – in this case the Federal Republic of Germany's democratic organs […].

Therefore, the *Bundestag* has the right and the duty to exercise it oversight functions vis-à-vis the Federal Government in the field of intelligence by making use of all available oversight mechanisms, ranging from the right of individual Members of the *Bundestag* to submit questions to the right to establish committees of inquiry. The various oversight mechanisms are neither mutually exclusive nor is any such mechanism more specific than the other (cf. § 1(2) of the Act on the Parliamentary Oversight of Federal Intelligence Activities, *Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes* – PKGrG; BTDrucks 8/1599 p. 6). 149

The United States (US) intelligence services are similarly subjected to parliamentary oversight. In both Houses, Congress has permanent special committees: the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. These two parliamentary oversight bodies are accorded far-reaching oversight powers regarding, *inter alia*, budget appropriation and budget implementation, tactical intelligence information as well as sources and methods of intelligence activity […]. Similar to the situation in Germany, the United States of America allow for the establishment of committees of inquiry or special committees, such as the Review Group on Intelligence and Communications Technologies aimed at reforming the NSA surveillance practices. 150

b) Considering the nature and the scope of the means of intelligence made available to the intelligence services, and due to the resulting intensity of interferences with fundamental rights as well as the covert nature of intelligence activity, and the lack of transparency in the subsequent processing of data from the perspective of affected individuals (cf. BVerfGE 100, 313 <361>), it follows that parliamentary oversight of the intelligence services serves a particular investigative purpose. 151

According to the investigation mandate as defined in the motion for its establishment (cf. BTDrucks 18/843), the Committee of Inquiry is tasked with investigating, *inter alia*, whether foreign agencies – with the support of German agencies – have gathered intelligence on communication processes involving German holders of fundamental rights, on the contents of such processes as well as on other forms of data processing; and whether the data gathered was made subject to data retention, data monitoring or data analysis. 152

According to the Federal Constitutional Court's case-law, collecting personal infor- 153

mation protected by fundamental rights with a view to retaining such data for unspecified or undeterminable purposes is incompatible with the Basic Law (cf. BVerfGE 65, 1 <46>; 100, 313 <360>; 115, 320 <350>; 118, 168 <187>). It is an integral part of the constitutional identity of the Federal Republic of Germany that the exercise of freedoms by individual persons may not be recorded and registered in its entirety [by the state]; it is incumbent upon the Federal Republic of Germany to promote adherence to this identity within the European and within international contexts (cf. BVerfGE 125, 260 <323 and 324> with reference to BVerfGE 123, 267 <353 and 354> on the guarantee of constitutional identity under the Basic Law).

c) The Committee of Inquiry's right to receive the NSA Selector Lists, which derives, in principle, from its right to take evidence, has neither been satisfied by the appointment of an expert in a position of trust (*sachverständige Vertrauensperson*), nor by the expert opinion submitted by that person. The person of trust appointed as expert does not act as an auxiliary organ for the Committee of Inquiry. 154

[…] 155-157

2. The Committee of Inquiry's right to take evidence conflicts with respondent no. 1's interest that state functions be exercised in a duty-oriented manner and by the appropriate organ. 158

Based on the assessment of respondent no. 1, handing over the NSA Selector Lists in violation of a confidentiality assurance under international law, and without the consent of the United States of America, would significantly undermine the intelligence services' functioning as well as their ability to cooperate and thus also impair the Federal Government's capacity to act in matters of a foreign or security policy nature. 159

a) According to both the shared understanding of the cooperating parties regarding the Confidentiality Agreement as well the Memorandum of Agreement (MoA) (aa) and the "Third Party Rule" (bb), the state sharing its intelligence is the "master of such information" and thus retains the power of disposal even after transferring the relevant intelligence. The lack of consent by the United States of America bars handing over the NSA Selector Lists to the Committee of Inquiry (cc). 160

aa) Cooperation between the BND and the NSA is based on the Confidentiality Agreement and the MoA. The Confidentiality Agreement sets out the general principles governing the exchange of classified information, i.e. the applicable technical-administrative provisions. The MoA specifies the organisational and technical conditions, personnel resources and cost liability, as well as the applicable legal framework for the relevant Joint SIGINT Activity project. As is the case in the interpretation of international treaties, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions must be taken into account, in addition to its text, when interpreting the Confidentiality Agreement and the MoA (BVerfGE 90, 286 <362 et seq.>). In accordance with what was agreed and commonly understood during the consultation procedure, the decision on the re- 161

quired level of confidentiality as well as on the purpose of use should rest with the agency that shared the intelligence in the first place.

bb) Irrespective of these bilateral agreements and understandings, cooperation between the intelligence services relies on the “Third Party Rule”. According to this rule, any information exchanged may not be disclosed to third parties or used for any other purpose except with the consent of the party sharing the intelligence in the first place. 162

(1) Law enforcement agencies and courts assume that the “Third Party Rule” is a right that can be invoked for the purpose of refusing to provide information when questioned (*Auskunftsverweigerungsrecht*) (cf. the Final Report of the Joint Commission of the Federation and the *Laender* on Right-Wing Terrorism, *Abschlussbericht der Bund-Laender-Kommission Rechtsterrorismus*, of 20 April 2013, para 712; cf. furthermore BVerwG, Order of 26 November 2003 – 6 VR 4.03 –, juris). There is no need to make a definite determination as to whether this principle of intelligence cooperation is also applicable in relation to parliamentary oversight bodies, let alone in relation to regulatory authorities […]. In the present context, the intention expressed by the agency sharing intelligence is, in any case, the decisive factor; it is upon this agency to determine who it considers to be a “third party”. 163

In this regard, the “Third Party Rule” does not constitute an absolute prohibition on disclosing intelligence [received], but rather a prohibition reserving consent (*Verbot mit Zustimmungsvorbehalt*). The originating agency essentially reserves the power of control over the relevant information […]. The consent of the originating agency may thus authorise disclosure of the relevant intelligence. Corresponding to the protection of confidentiality, the receiving state – in this case, the Federal Republic of Germany – is under an obligation to make all reasonable efforts to obtain consent to disclosure (cf. Federal Court of Canada, Charkaoui (Re)*,* 2009 FC 476, [2010] 3 F.C.R. 102, para. 21; […]). 164

(2) In any case, the “Third Party Rule” is a generally recognised rule of conduct for international cooperation in the field of security and intelligence services (cf. Federal Court of Canada, Charkaoui (Re)*,* 2009 FC 476, [2010] 3 F.C.R. 102, Rn. 17 ff.; Ajluni v. FBI, 947 F. Supp. 599 [N.D.N.Y. 1996] with reference to Ajluni v. FBI, No. 94-CV-325, 1996 WL 776996 [N.D.N.Y. July 13, 1996]). Art. 4 letter d and Art. 5 letter b of the Agreement between the European Union (EU) and the North Atlantic Treaty Organization (NATO) on the Security of Information (Official Journal of the EU L no. 80 of 27 March 2003, p. 36 et seq.) expressly states this rule. In § 6(1) PKGrG, the “Third Party Rule” is also reflected in national law: according to this provision, the Federal Government and the German intelligence services generally lack the power of disposal in relation to information which the intelligence services receive from foreign authorities (on the identical wording of the former version of § 2b PKGrG, cf. BT-Drucks 14/539, p. 7). In practice, German services furthermore affirm the “Third Party Rule” when sharing intelligence with foreign services (cf. BTDrucks 17/11296, p. 9). 165

Compliance with the “Third Party Rule” is not enforced by way of legal constraints; 166

rather, it is regarded as the self-evident basis of transfers in the field of security-critical or intelligence cooperation and therefore observed *de facto* due to the mutual interest in confidentiality and institutional reliability […].

cc) According to the position of the United States of America, which respondent no. 1 did not contest in its submissions during or prior to the present proceedings, the Committee of Inquiry should be viewed as a “third party” and the handing over of the NSA Selector Lists was not covered by the intended purpose of the transfer; consequently, handing over of files was contingent upon consent by the United States of America. An interpretation [of the parties’ intentions] to the effect that intelligence services of both the United States of America and the Federal Republic of Germany were understood as being subject to oversight by superordinate authorities as well as special oversight organs sanctioned by Parliament, and that therefore such oversight bodies would generally not be considered “third parties”, is incompatible with the position expressly stated by the United States of America. Respondent no. 1 made efforts to obtain the United States’ consent to the handing over of the NSA Selector Lists to the Committee of Inquiry, but did not obtain such consent. 167

b) The assessment of respondent no. 1 that handing over [the lists] without consent would significantly undermine the functioning of the German intelligence services as well as their ability to cooperate, and thus also impair the capacity to act in matters of a security of foreign policy nature, is not objectionable under constitutional law. 168

aa) Respondent no. 1’s view that handing over the NSA Selector Lists could result in threats to state institutions and functions is based on a factual and legal assessment that amounts to a political appraisal of the relations with foreign intelligence services and cooperating states; given the Federal Government’s margin of appreciation and latitude for prognosis, such assessment is only subject to limited review by the Federal Constitutional Court. 169

The broad scope of discretion in the field of foreign policy is based on the consideration that the nature and characteristics of foreign relations and the relevant course of events cannot be unilaterally determined by the Federal Republic of Germany; rather, numerous circumstances outside its control are at play in this regard. To enable the Federal Republic of Germany to enforce, within the limits set by international and constitutional law, its respective political objectives, the Basic Law grants organs vested with sovereign authority in foreign affairs wide discretion in matters of foreign policy significance; such discretion extends to assessing the expediency of possible courses of action (cf. BVerfGE 55, 349 <365>; cf. also BVerfGE 40, 141 <178 and 179>). 170

bb) Respondent no. 1 has plausibly argued that intelligence services are dependent on cooperation in order to ensure effective protection of the state and the constitution. In terms of their intelligence capacities, the German and the US intelligence services are mutually dependent […]. On the part of Germany, and against the backdrop of international terrorism and threats resulting from cyberattacks, international coopera- 171

tion in general is accorded “paramount importance” (cf. 2015 Report on the Protection of the Constitution, *Verfassungsschutzbericht*, p. 18; 2014 Report on the Protection of the Constitution, p. 16), while the partnership with the United States of America in particular is qualified as “indispensable” (cf. Final Report of the Committee of Inquiry into BND Activities, BTDrucks 16/13400, pp. 58 and 59, 351 and 352).

Such cooperation is impaired in the event that intelligence is disclosed to third parties in violation of assured or expected confidentiality, for example, if the term “third party“ were construed contrary to the standpoint of the originating agency (cf. BVerwG, Order of the 20 July 2015 – 6 VR 1.15 –, juris, para. 11). 172

This position is criticised for placing undue emphasis on the need for protecting confidentiality, and for exaggerating the scope of such need. It is contended that where cooperation with foreign services is considered an integral part of the work of intelligence services, the same holds true for parliamentary oversight […]. It is further argued that cooperation with foreign services does not, under all circumstances, outweigh parliamentary oversight. According to this view, cases of conflict may require that the terms of the cooperation be modified, or the cooperation as such be terminated […]. 173

The foregoing view, however, fails to consider that this can entail a long-term loss of essential knowledge in foreign and security policy matters; without such information, it would no longer be possible to ensure that anti-constitutional or terrorist activities, as well as those posing a threat to security, were investigated to the same extent (cf. Final Report of the Joint Commission of the Federation and the *Laender* on Right-Wing Terrorism of 30 April 2013, para. 712). […] [T]he applicants [have] comprehensibly argued that the United States of America have already taken steps [in response to the current events] and have announced further consequences should the NSA Selector Lists be handed over. Considering such rather specific threats to the Federal Republic of Germany’s external and internal security, the secrecy interests rooted in the welfare of the state are affected as well. 174

[…] 175

3. The Federal Government’s interest in maintaining its capacity to act in matters of a foreign and security policy nature outweighs the Committee of Inquiry’s right to be given the NSA Selector Lists. 176

a) With regard to the balancing of the conflicting interests, it needs to be taken into account that the request to receive the NSA Selector Lists concerns a multilateral legal relationship. This is due to the fact that the Committee of Inquiry’s request also affects the United States of America’s fundamental concerns and secrecy interests. In light of the principle of the Constitution’s openness to international law (cf. BVerfGE 111, 307 <317 and 318>; 112, 1 <26>; 123, 267 <344, 347>) and openness to the international community of states (*internationale Offenheit*) (cf. BVerfGE 92, 26 <48>), the Basic Law does not content itself with defining the domestic order of the German 177

state but also determines the essential features of the state's relationship to the community of states. In this respect, the Basic Law assumes that delimitation and cooperation between states and legal systems is necessary (cf. BVerfGE 100, 313 <362>). These intergovernmental relations restrict applicant no. 1's margin of assessment and its latitude of action; due to international treaties and agreements it lacks exclusive power of disposal over the NSA Selector Lists. In this regard, the exercise of sovereign authority in foreign affairs differs from that exercised in purely domestic affairs.

b) Moreover, in the case at hand there is no risk of creating a vacuum that is exempt from any oversight, which would accordingly result a complete exclusion of Parliament from any kind of information. It was not the case that the circumstances of the intelligence cooperation between NSA and BND in the course of the project of the Joint SIGINT Activity were withheld from the Committee of Inquiry entirely. Rather, the respondents, in cooperating with the Committee of Inquiry, responded to the relevant request through other procedural means and in as precise a manner as possible without actually disclosing secrets. 178

The respondents provided the Committee of Inquiry with information on the focus areas of the cooperation between BND and NSA, the contents and the composition of the selectors, the filtering of selectors on the part of the BND as well as on the number of rejected selectors. They submitted, *inter alia*, a written testimony of the BND on its findings relating to the NSA Selector Lists. 179

Furthermore, respondent no. 1 proposed to the Committee of Inquiry that an expert in a position of trust be appointed and tasked with analysing the NSA Selector Lists who would then report back on the findings to the Committee of Inquiry. The Committee found this proposal to be reasonable (Committee document, *Ausschussdrucksache* 385, clause 1) and hence appointed the responsible person of trust as expert. The Committee of Inquiry compiled a questionnaire (Committee document 385, clause 5) and in consultation with the expert agreed on criteria, key issues and questions for the report. Even in the non-classified version, the report submitted by the expert in a position of trust provides a basis for assessing the nature and the scope of the intelligence services' cooperation and for reviewing violations of German interests and of German law. The report comprises statistical analyses and was drafted in as specific a manner as possible. The analysis of the Selector Lists comprises a description of selector types, the technical structure of selectors and their permutations, as well as the number of rejected selectors in conjunction with abstract designations of the relevant targets, such as German embassies abroad, government institutions and state agencies in EU Member States, institutions of the EU, members of European governments as well as their respective staff, and members of [their] parliaments. As regards the specific designation, i.e. the mentioning by name of the natural and legal persons as well as institutions or governmental facilities that are affected as targets of intelligence activities, it can be held that having knowledge of such facts is more a matter of general and political interest. However, as far as the Committee of Inquiry's 180

performance of its duties and thus parliamentary oversight over governmental activities is concerned, having knowledge of such contents is not pivotal to an extent that it could actually claim priority over interests relating to the welfare of the state and over the government's functioning.

4. Respondents no. 1 and 2 have sufficiently substantiated their position as required under constitutional law. They have provided substantiated reasons, orally and in writing, as to the existence of confidentiality requirements on which the refusal to hand over the lists was based. 181

a) It is true that simply referring to conflicting obligations under international law does not, by itself, directly provide a basis for refusing to hand over the lists to the Committee of Inquiry (cf. para. 112). Within the domestic order, neither international treaty law nor international customary law is accorded the rank of constitutional law. In consequence, international law cannot be directly invoked for the purpose of refusing the Committee of Inquiry's request. It must be taken into account, however, that the respondents additionally based the refusal to hand over the lists on the consequences for the intelligence services' functioning and their ability to cooperate, as well as for the security situation of the Federal Republic of Germany, that would arise if the relevant obligations under international law were violated. The respondents view a handing over of the NSA Selector Lists as a threat to the autonomous and duty-oriented exercise of their constitutional functions. 182

When viewed in isolation, the reasoning provided in the written notification of rejection of 17 June 2015 that a disclosure without the consent of the US Government would violate the applicable Confidentiality Agreement at first does not prove to be sufficiently specific; this is owed to the fact that it neither restates nor references the applicable provisions. Similarly, the written notification fails to specify the contractual parties' common understanding of these provisions, and thus their interpretation, in a comprehensible manner. 183

However, when also taking into consideration the way in which respondent no. 1 and respondent no. 2 provided information prior to the written notification of rejection, it emerges that the need for obtaining the consent of the United States of America was explained in detail to the Committee of Inquiry. The Confidentiality Agreement and the MoA were made available to the Committee of Inquiry; the questions that arose in relation to the interpretation and application of these instruments were discussed, several times and in detail, in the course of the Committee's sessions. 184

In their submissions to the Committee of Inquiry, the respondents have also set out that they had made efforts to obtain the United States of America's consent, elaborating also on the nature of these efforts. In addition, the respondents have continuously provided updates to the Committee of Inquiry on the course and outcome of the consultation procedure. Therefore, the respondents have ensured a sufficient level of transparency as well as the involvement of the Committee of Inquiry in the relevant procedure. 185

The respondents have plausibly argued before the Committee of Inquiry that violating the reservation of consent significantly impacts the intelligence cooperation – as evidenced by recent events, in the sense that the mutual exchange of knowledge is either restricted or terminated completely. Moreover, on the basis of the reactions and statements of the United States of America during the consultation procedure as well as the consequences announced by the United States of America, the respondents comprehensibly argued that impairment of intelligence relations, and thus of their capacity to act in matters of a foreign or security policy nature, is to be expected were the lists to be handed over; it was argued in a comprehensive manner that, ultimately, this could threaten the external and internal security of the Federal Republic of Germany. 186

b) […] 187-189

D.

[…] 190

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski

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